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THE TRANSFER OF PROPERTY ACT

Vol. 2

MANOHAR & CHITALEY

AIR Commentaries

The
TRANSFER OF PROPERTY ACT

(IV of 1882)

WITH

EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

6th (2001) Edition

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PREFACE TO SIXTH EDITION

The Transfer of Property Act, 1882 covers almost the whole ground occupied by law relating to transfer inter vivos of interests in property. With speedy urbanisation; spurt in construction activities and rising prices of agricultural lands and residential sites, and the complexities of transactions relating to immovable properties, it is essential for those dealing in the matter to understand and comprehend properly the fundamentals relating to property rights.

A large number of decisions, rendered both by the Supreme Court and the High Courts for about 16 years since previous Edition are incorporated in this Edition. Special care is taken to include latest case law in the Commentary. The statute law is also updated by incorporating the Central and State amendments. The proposition given in the Commentary are abundantly supported by Footnotes so as to comprehensively illustrate the ratios underlying those decisions.

Topical Index is given in Third Volume so as to facilitate easy and quick search of the required subject.

We hope to receive liberal patronage from the Bar and the Bench, as usual.

We record our appreciation to Shri D. V. Thakre, Retd. Asstt. Editor, AIR Pvt. Ltd., for rendering help in revising and bringing out this Edition.

D/- 13-08-2001

V. R. Manohar

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Abbreviations
Relating to Indian Law Reports

A.C.C. ... Accident & Compensation Cases.
A.C.J. ... Accident Claims Journal.
A.H.C.R. ... Agra High Court Reports.
A.I.H.C. ... All India High Court Cases (Published by AIR)
A.I.R. ... 1914 All., Bom., etc. ... All India Reporter. Allahabad. Bombay etc.. sections of the respective years.
A.I.R. (N.O.C.) ... All India Reporter (Notes of Cases) (All., Andh. Pra.) etc.
A.I.R. (N.S.C.) ... All India Reporter (Notes of Supreme Court Cases).
A.I.R. (N.U.C.) (All) (Andh) ... All India Reporter (Notes of Unreported Cases) (Allahabad, Andh. Pra. etc.)
A.I.R S.C.W. ... All-India Reporter Supreme Court Weekly (Published by AIR)
A.D. (SC) ... Apex Decisions (Supreme Court).
A.D. (Delhi) ... Apex Decisions (Delhi)
A.I.T.C. ... All India Tribunal Cases.
A.M.L.J. ... Ajmer-Merwara Law Journal.
A.T.C. ... Administrative Tribunal Cases.
A.T.R. ... Administrative Tribunal Reporter.
A.T.L.T. ... Administrative Tribunals Law Times.
All or I.L.R. All ... Indian Law Reports, Allahabad Series.
All. A.C. (Cri) ... Allahabad Appeal Cases (Criminal).
All. C.J. ... Allahabad Civil Journal.
All. Cr. C. ... Allahabad Criminal Cases.
All. Cri. L.J. ... Allahabad Criminal Law Journal.
All. Cr. R. ... Allahabad Criminal Reports.
All. Cri. R. ... Allahabad Criminal Rulings.
All. L.J. ... Allahabad Law Journal, (Published by A.I.R.)
All. L.J. (N.O.C.) ... Allahabad Law Journal (Notes of Cases), (Published by A.I.R.)
All. L.R. ... Allahabad Law Reports.
All. L.T. ... Allahabad Law Times.
All. Ren. Cas ... Allahabad Rent Cases.
All. Cri. L.R. ... All India Criminal Law Reporter.
All. Serv. Rep. ... All India Services Reports.
All. Tax J. ... Allahabad Tax Judgments.
All. W.C. ... Allahabad Weekly Cases.
All. W.N. ... Allahabad Weekly Notes.
All. W.R. ... Allahabad Weekly Reporter.
All. Mah. L.R. ... All Maharashtra Law Reporter.
I.L.R. Andhra (Andh Pra.) ... Indian Law Reports, Andhra (Andhra Pradesh) Series.
Andh. L.D. ... Andhra Legal Decisions.
A.P.L.J. ... Andhra Pradesh Law Journal.
A.P.L.J. (Cri.) ... Andhra Pradesh Law Journal (Criminal).
Andh. L.T. ... Andhra Law Times.
Andh. W.R. ... Andhra Weekly Reporter.
Aps. Labour Cases ... Aps. Labour Cases.
A.T.R. or ArbiTLR ... Arbitration and Trade Mark Law Reporter.
Arbi. L.R. ... Arbitration Law Reporter.
Arbi. L.R. ... Arbitration Law Reporter with Trade Mark Cases.
I.L.R. Assam ... India Law Reports, Assam Series.
Assam L.R. ... Assam Law Reports.
Bank. C. ... Banking Cases.
Bank C.L.R. ... Banking Commercial Law Reporter.
Bank. J. ... Banker's Journal.
Bank. L.J. ... Baking Law Judgment.
Bank. L.R. ... Banking Law Reporter.
Beng. L.R. ... Bengal Law Reports.
B.B.C.J. ... Bihar Bar Council Journal.
Bihar Cri. C. ... Bihar Criminal Cases.
B.L.J. or Bihar L.J. ... Bihar Law Judgments.
B.L.J.R. or Bihar L.J.R. ... Bihar Law Journal Reports.
B.L.T. (Rep.) or Bihar L.T. (Rep) ... Bihar Law Times (Reports).
B.R. ... Bihar Reports.
B.R.L.J. ... Bihar Revenue and Labour Journal.
Bom. or I.L.R. Bom ... Indian Law Reports, Bombay Series.
Bom. C.J. ... Bombay Civil Journal
Bom. C.R. ... Bombay Cases Reporter.
B.H.C.R. or Bom. H.C.R. ... Bombay High Court Reports.
Bom. L.R. ... Bombay Law Reporter.
Bom. P.J. ... Bombay Printed Judgments.
Bom. R.C. ... Bombay Rent Cases.
Bur. L.J. ... Burma Law Journal.
Bur. L.R. ... Burma Law Reports.
Bur. L.T. ... Burma Law Times.
Cal. or I.L.R. Cal ... Indian Law Reports Calcutta Series.
Cal. Cri. L.R. ... Calcutta Criminal Law Reports.
Cal. H.N. or Cal. H.C.N. ... Calcutta High Court Notes.
Cal. L.J. ... Calcutta Law Journal.
Cal. L.R. ... Calcutta Law Reports.
Cal. L.T. ... Calcutta Law Times.
Cal. Tax. C. ... Calcutta Tax Cases.
Cal. W.N. ... Calcutta Weekly Notes.
Cal. W.N. (D.R.) ... Calcutta Weekly Notes (Dacca Reports).
Cencus (Now E.C.R.) ... Excise & Customs Reporter.
C.P.L.R. ... Central Provinces Law Reports.
Chand. Cri. C. ... Chandigarh Criminal Cases.
Chand. L.R. ... Chandigarh Law Reporter.
Chand L.R. (Cri.) ... Chandigarh Law Reports (Criminal).

Civ. App. J (SC) ... Civil Appeals Judgments (Supreme Court).
Civil. C.C. ... Civil Court Cases
Civil L.J. ... Civil Law Journal.
Civil L. Jud ... Civil Law Judgments.
Com. Cas ... Company Cases.
Com L.J. ... Company Law Journal.
Com. N.R. ... Company News and Reporter.
Co-op. L.J. ... Co-operative Law Journal.
Co-op. L.R. ... Co-operative Law Reporter.
Co-op. T.D. ... Co-operative Tribunal Decisions.
Co-op. T.J. ... Co-operative Tribunal Journal.
Crimes ... Crimes.
Cri. App. Rep. (S.C.) ... Criminal Appeals Reporter (Supreme Court).
Cri. C.J. ... Criminal Court Judgment
Cri. L.C. ... Criminal Law Cases.
Cr. or Cri. L.J. ... Criminal Law Journal (Published by A.I.R.).
Cri. L.J. (N.O.C.) ... Criminal Law Journal (Notes of Cases) (All., Andh. Pra., etc.) (Published by A.I.R.)
Cri. L.R. (S.C., Guj. & Mah.) ... Criminal Law Reporter (Supreme Court, Gujarat and Maharashtra).
Cri. L.R. (S.C., M.P.) ... Criminal Law Reports (Supreme Court, Madhya Pradesh).
Cri. L.R. (Raj.) ... Criminal Law Reports (Rajasthan).
Cri. L.T. ... Criminal Law Times (Punj.).
Cur. C.C. ... Current Civil Cases.
Cur. C.L.J. ... Current Civil Law Judgments.
Cur. Cri. J. ... Current Criminal Judgments.
Cur. Cri. R. ... Current Criminal Reports.
Cur. I.S. (I.J.) ... Current Indian Statutes (Important Judgments).
Cur. L.R. ... Current Labour Reports.
Cur. L.J. (CCR) ... Current Law Journal (Civil, Criminal & Revenue).
Cur. L.J. (Tax.) ... Current Law Journal (Taxation).
Cur. S.N.R. ... Current Sales Tax News and Reports.
Cur. Serv. J. ... Current Service Journal.
C.T.C. ... Current Tamil Nadu Cases.
Cur. Tax. Rep. ... Current Tax Reporter.
I.L.R. Cut ... Indian Law Reports, Cuttack Series.
Cut. L.R. (Cri.) ... Cuttack Law Reports (Criminal).
Cut. L.T. ... Cuttack Law Times.
Cut. W.R. ... Cuttack Weekly Reports.
D.E.C. ... Doabia's Election Cases.
Delhi or I.L.R. Delhi ... Indian Law Reports Delhi Series
D.L. ... Delhi Lawyer.
D.L.T. ... Delhi Law Times.
D.M.C. ... Divorce and Matrimonial Cases.
D.R.J. ... Delhi Rent Judgments
D. Rep. J. ... Delhi Reported Judgments
E.P. or East Punj ... East Punjab.
I.L.R. E.P. or East Punj ... Indian Law Reports, East Punjab Series.
East Cri. C. ... Eastern Criminal Cases.
East L.R. ... Eastern Law Reporter.
Ed. Cas. ... Education Cases.
E.S.C. ... Education and Service Cases.
E.L.Rs. ... Election Law Reports (Delhi).
E.L.J. (L.S.) ... Epitomised Legal Judgments (Labour & Service).
Ex. C.C. ... Excise and Customs Cases.
Ex. C.R. ... Excise and Customs Reporter.
Ex. F.R. ... Excise and Food Adulteration Reports.
Ex. L.T. ... Excise and Law Times.
F.A.C. ... Prevention of Food Adulteration Cases.
F.A.J. ... Prevention of Food Adulteration Journal.
F.C.R. ... Federal Court Reports.
F.J.R. ... Factories Journal Reports.
F.L.J. ... Federal Law Journal.
Fac. L.R. ... Factories and Labour Reports.
Gau. L.R. ... Gauhati Law Reporter.
Goa. L.T. ... Goa Law Times.
G.O.C. (SC.) ... Gist of Cases (Supreme Court)
I.L.R. Guj ... Indian Law Reports, Gujarat Series.
Guj. Cri. R. ... Gujarat Criminal Reporter.
Guj. H.C.R. ... Gujarat High Court Reporter
Guj. L.H. ... Gujarat Law Herald.
Guj. L.R. ... Gujarat Law Reporter.
Har. Rent R. ... Haryana Rent Reporter
H.P. or I.L.R. Him. Pra. ... India Law Reports, Himachal Pradesh Series.
Hindu L.R. ... Hindu Law Reporter
Hyd. or I.L.R. Hyd. ... Indian Law Reports, Hyderabad Series.
H.R. ... Hyde's Reports.
I.T.A.T.R. ... Income-tax Appellate Tribunal Reporter.
I.T.C. ... Income-tax Tribunal Cases.
I.T.J. ... Income-tax Journal.
I.T.R. ... Income-tax Reports.
I.T.D. or I.T.T.D. ... Income-tax Tribunal Decisions.
Ind. App. ... Law Reports, Indian Appeals.
Ind. Cas. ... Indian Cases.
I.C.C. ... Indian Civil Cases.
I.J.R. ... Indian Judgment Reporter.
I.J.R. ... Indian Judicial Reports See Reports.
Ind. Tax. Cas. ... Indian Tax Cases.
I.C.R. ... Industrial Court Reporter.
Ind. J. ... Indian Jurist.
Ind. R. ... Indian Rulings.
Int. L.R. ... International Law Reporter.
Jab. L.J. ... Jabalpur Law Journal.

J. & K.L.R. ... Jammu & Kashmir Law Reports.
J.L.R. or Jaipur L.R. ... Jaipur Law Reports.
J.S.C.T.L. ... Journal of Shipping, Customs and Transport Laws.
J.T. ... Judgment Today.
Karachi or I.L.R. Karachi ... Indian Law Reports, Karachi Series.
Kant or I.L.R. Kant ... Indian Law Reports, Karnataka Series
Kant. L.C. ... Karnataka Law Chronicle.
Kant. L.J. ... Karnataka Law Journal.
Kant. Serv. L.J. ... Karnataka Service Law Journal
Kash. L.J. ... Kashmir Law Journal.
Kerala or I.L.R. Ker. ... Indian Law Reports, Kerala Series.
Ker. H.C.N. ... Kerala High Court Notes.
Ker. L.J. ... Kerala Law Journal
Ker. L.J. (Tax) ... Kerala Law Journal (Tax Cases).
Ker. L.R. ... Kerala Law Reports.
Ker. L.T. ... Kerala Law Times.
Lab. A.C. ... Labour Appeal Cases.
Lab. I.C. ... Labour and Industrial Cases (Published by A.I.R.).
Lab. I.C. (N.O.C.) (All.) (Bom.) ... Labour and Industrial Cases (Notes of Cases) Allahabad, Bombay, etc. (Published by A.I.R.).
Lab. L.J. ... Labour Law Journal
Lab. L.N. ... Labour Law Notes.
Lab. L.R. ... Labour Law Reporter.
Lah. or I.L.R. Lahore ... Indian Law Reports, Lahore
Lahore L.J. ... Lahore Law Journal.
Lah. L.T. ... Lahore Law Times.
L.A.C.C. ... Land Acquisition & Compensation Cases.
Land L.R. ... (All India) Land Laws Reporter.
L.J.R. ... Latest Judicial Reports.
L.R. ... Law Reporter (All).
Law. Rep. ... Law Reports (Mys.).
L.S. (A.P.) ... Law Summary (Andhra Pradesh).
Lawyers ... Lawyers.
L.R.S. (Punjab) ... Punjab Legal Reports & Statutes.
Legal Surv. ... Legal Surveyor.
Low. Bur. R. ... Lower Burma Rulings.
Luck or I.L.R. Luck ... Indian Law Reports, Lucknow Series.
Luck. L.J. ... Lucknow Law Journal.
Luck. L.T. ... Lucknow Law Times.
Madh B. or M.B. ... Madhya Bharat
I.L.R. Madh. B. ... Indian Law Reports, Madhya Bharat Series
Madh. B.L.J. ... Madhya Bharat Law Journal.
Madh. B.L.R. ... Madhya Bharat Law Reporter.
I.L.R. M.P. ... Indian Law Reports, Madhya Pradesh.
M.P.C. ... Madhya Pradesh Cases.
M.P.L.J. ... Madhya Pradesh Law Journal.
M.P.L.T. ... Madhya Pradesh Law Times.
M.P.R.C.J. ... Madhya Pradesh Rent Control Journal.
M.P.W.R. ... Madhya Pradesh Weekly Reporter.
Mad. or I.L.R. Mad. ... Indian Law Reports, Madras Series.
Mad. H.C.R. ... Madras High Court Reports.
Mad. L.J. ... Madras Law Journal.
Mad. L.J. (Cri.) ... Madras Law Journal (Criminal).
Mad. L. Tim. ... Madras Law Times.
Mad. L.W. ... Madras Law Weekly
Mad. L.W. (Cri.) ... Madras Law Weekly (Criminal).
Mad. W.N. ... Madras Weekly Notes.
Mah. Cri. R. ... Maharashtra Criminal Reporter.
Mah. L.J. ... Maharashtra Law Journal.
Mah. L.R. ... (Brahan) Maharashtra Law Reporter.
Marr. L.J. ... Marriage Law Journal.
Marwar L.R. ... Marwar Law Reporter.
Mat. L.R. ... Matrimonial Law Reporter.
Mer. L.R. ... Mercantile Law Reporter.
Moo. Ind. App. ... Moore's Indian Appeals.
Moo. P.C.C. ... Moore's Privy Council Cases.
Mun. C.C. ... Municipalities and Corporation Cases
Mun. L.J. ... Municipal Law Journal.
Mys. I.L.R. ... Indian Law Reports, Mysore Series.
Mys. C.C.R. ... Mysore Chief Court Reporter.
Mys. H.C.R. ... Mysore High Court Reports.
Mys. L.J. ... Mysore Law Journal.
Mys. L.R. ... Mysore Law Reports.
Nag. I.L.R. ... Indian Law Reports, Nagpur Series.
Nag. L.J. ... Nagpur Law Journal.
Nag. L.R. ... Nagpur Law Reports.
N.W.P.H.C.R. ... North West Provinces High Court Reports.
O.C.R. or Orissa Cri. R. ... Orissa Criminal Reports
Orissa J.D. ... Orissa Judicial Decisions.
Orissa L.R. ... Orissa Law Reviews
Oudh Cas. ... Oudh. Cases.
Oudh L.J. ... Oudh. Law Journal.
Oudh L.R. ... Oudh. Law Reports.
Oudh S.C. ... Oudh. Select Cases.
Oudh. W.N. ... Oudh. Weekly Notes.
I.L.R. Patiala. ... Indian Law Reports, Patiala Series.
Pat. or. I.L.R. Pat. ... Indian Law Reports, Patna Series.
Pat. H.C.C. ... Patna High Court Cases.
Pat. L.J. ... Patna Law Journal.
Pat. L.J.R. ... Patna Law Journal Reports.
Pat. L.R. ... Patna Law Reporter.

Pat. L. Tim. ... Patna Law Times.
Pat. L.W. ... Patna Law Weekly.
Pat. W.N. ... Patna Weekly Notes.
Pepsu L.R. ... Pepsu Law Reports.
I.L.R. Punj. ... Indian Law Reports. Punjab Series.
Punj. L.J. ... Punjab Law Journal.
Pun. L.J. (Cri.) ... Punjab Law Journal (Criminal).
Pun. L.R. ... Punjab Law Reporter.
Pun. L.R. (D) ... Punjab Law Reporter (Delhi).
Pun. L.R.S. ... Punjab Legal Reports and Statutes.
Pun. Re. ... Punjab Records.
Pun. W.R. ... Punjab Weekly Reporter
I.L.R. Raj. ... Indian Law Reports, Rajasthan Series.
Raj. Cri. C. ... Rajasthan Criminal Cases.
Rajasthan L.R. ... Rajasthan Law Reporter
Raj. L.W. ... Rajasthan Law Weekly
Rajdhani L.R. ... Rajdhani Law Reporter.
Rang. or I.L.R. Rang. ... Indian Law Reports. Rangoon Series.
Rang. L.R. ... Rangoon Law Reports.
Rat. or Rt. Un. Cr. C. ... Ratanlal's Unreported Criminal Cases.
Rec. Civ. R. ... Recent Civil Reports.
Rec. Cri. R. ... Recent Criminal Reports.
Rec. Rev. R. ... Recent Revenue Reports.
Recent Law (R) ... Recent Laws Reports
Ren. Cas. ... Rent Cases.
Ren. C.J. ... Rent Control Journal.
Re. C.R. ... Rent Control Reports.
Rent. L.R. ... Rent Law Reporter.
Reports ... Reports
R.D. ... Revenue Decisions.
Rev. L.R. ... Revenue Law Reporter.
Rev. Rul. ... Revenue Rulings.
S.T.A. ... Sales Tax Advices.
S.T. Aff. ... Sales Tax Affairs.
S.T.C. ... Sales Tax Cases.
S.T.D. ... Sales Tax Tribunal Decisions.
S.T.I. ... Sales Tax Interpretations.
S.T.L. ... Sales Tax Literature.
S.T.R. ... Sales Tax Rulings.
Sar. ... Saraswati's Privy Council Judgments
Sau. L.R. ... Saurashtra Law Reporter.
S. Civ. Dec. ... Selected Civil Decisions
S.C.T. ... Service Cases Today.
Ser. L.C. ... Services Law Cases.
Serv. L.J. ... Service Law Journal.
Serv. L.R. ... Services Law Reporter.
S.L.W.R. ... Service Law Weekly Reporter.
Shome L.R. ... Shome's Law Reports.
Sikkim L.J. ... Sikkim Law Journal.
Sim. L.C. ... Simla Law Cases.
Sim. L.J. ... Simla Law Journal.
Sind. L.R. ... Sind Law Reporter.
S.P.J. ... Speed Post Judgments.
Srinagar L.J. ... Srinagar Law Journal
Supreme. ... Supreme.
Scale. ... Supreme Court Almanac.
Scale S.P. ... Supreme Court Almanac Short Points.
S.C.A. ... Supreme Court Appeals.
S.C.C. ... Supreme Court Cases.
S.C.C. (Cri.) ... Supreme Court Cases (Criminal)
S.C.C. (L & S) ... Supreme Court Cases (Labour & Services).
S.C.C. (Suppl.) ... Supreme Court Cases (Supplement).
S.C.C. (Tax.) ... Supreme Court Cases (Taxation)
S.C.Cr. R. ... Supreme Court Criminal Rulings
S.C.D. ... Supreme Court Decisions.
S.C.F.B.R.C. ... Supreme Court and Full Bench Rent Cases.
S.C.J. ... Supreme Court Journal
S.C.N. or S.C. Notes ... Supreme Court Notes.
S.C.R. ... Supreme Court Reports
S.C.S.T.J. ... Supreme Court Sales Tax Judgments
S.C.W.R. ... Supreme Court Weekly Reporter.
Suther. ... Sutherland's Privy Council Judgments.
Suth. W.R. ... Sutherland's Weekly Reporter.
T.N.L.J. ... Tamil Nadu Law Notes Journal
T.N.L.J. (Cri.) ... Tamil Nadu Law Notes Journal (Criminal)
Tax. ... Taxation.
Tax. Affairs. ... Tax Affairs
Tax. Ref. ... The Tax Referencer
Tax. B.R. ... Tax Bar Reporter.
Tax. Dec. (SC) ... Tax Decisions (Supreme Court)
Tax. L.D. ... Tax Law Decisions
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Tax. L.Rev. ... Tax Law Review.
Taxmann ... Taxmann
Tax. Rep. ... Tax Reporter.
Tax. Tri. J. ... (All India) Tax Tribunal Judgments
T.A.C. ... (All India) Transport and Accidents Cases.
I.L.R. Trav-Co. or T.C. ... Indian Law Reports. Travancore-Cochin Series
T.C.L.R. or Trav-Co. L.R. ... Travancore-Cochin Law Reports.
T.L.J. or Trav. L.J. ... Travancore Law Journal.
U.C.R. (Bom.) ... Unreported Cases (Reporter) (Bombay).
Uch. N.P. ... Uchcha Nyayalaya Nirnaya Patrika.

Um. N.P. ... Uchchatam Nyayalaya Nirnaya Patrika
U.P.L.R. ... United Provinces Law Reports.
U.J. (S.C.) ... Unreported Judgments (Supreme Court).
Upp. Bur. Rul. ... Upper Burma Rulings.
U.P.Cri.C. ... Uttar Pradesh Criminal Cases.
U.P.Cri. L.C. ... Uttar Pradesh Criminal Law Cases.
U.P. Cri. L.R. ... Uttar Pradesh Criminal Law Reports.
U.P. Cri. R. ... Uttar Pradesh Criminal Rulings.
U.P.L.B.E.C. ... Uttar Pradesh Local Bodies and Educational Cases.
U.P.L.R. ... Uttar Pradesh Law Reports.
U.P.L.T. ... Uttar Pradesh Law Tribune. (Published by A.I.R.).
U.P.L.T. (N.O.C.) .. Uttar Pradesh Law Tribune (Notes of Cases) (Published by A.I.R.).
U.P.R.C.C. ... Uttar Pradesh Rent Control Cases.
U.P.R.J. .. U.P. Rent Journal.
U.P.S.C. ... Uttar Pradesh Services Cases.
U.P.S.T.J. ... Uttar Pradesh Sales Tax Journal.
U.P.T.C. ... Uttar Pradesh Tax Cases.
V.K.N. ... Vikraya Kar Nirnaya.
Vind. Pra. or V.P. ... Vindhya Pradesh.
Weir. ... Weir's Criminal Rulings.
W.L.N. ... Weekly Law Notes.
W.L.N. (U.C.) ... Weekly Law Notes (Unreported Cases).
W.L.C. ... Western Law Cases.
Writ L.R. ... Writ Law Reporter.

Relating to Foreign Journals

All. E.R. ... All England Law Reports.
Malayan. L.J. ... Malayan Law Journal.
Pak. L.D. ... Pakistan Legal Decisions.
Pak. L.R. (Lahore) ... Pakistan Law Reports (Lahore).
W.L.R. ... Weekly Law Reports (English).

OTHER ABBREVIATIONS

A. or * ... Superior A or * place above the word or words in a square bracket indicates that the word or words is or are the last in the series of general adaptations directed to be made by one or more of the Adaptation Orders published in the Gazette of India from 1937 to 1957.
A.C. ... Appellate Jurisdiction, Civil.
A.Cr. ... Appellate Jurisdiction, Criminal.
A.L.O. .. Adaptation of Laws Order.
App. .. Appendix or Appeal.
Appr. .. Approved.
Art. or A. .. Article.
B.R. .. Board of Revenue.
C.A. ... Court of Appeal.
C.A.T. .. Central Administrative Tribunals.
Civ. ... Civil.
Cl. ... Clause.
Cons. ... Considered.
Cr. ... Criminal.
Diss. ... Dissented.
Dist. ... Distinguished.
D.B. ... Division Bench.
E. ... Entry.
Expl. ... Explained.
F.A. ... First Appeal.
F.B. ... Full Bench.
F.C. ... Federal Court.
F.N. ... Foot Note.
Foll. .. Followed.
G.I. ... Government of India.
I.O. ... The India (Adaptation of Existing Indian Laws) Orders, 1947.
Illus. ... Illustrations.
J.C.R. ... Joint Committee Report.
Jour. ... Journal.
L. ... List.
L.P. ... Letters Patent.
N. ... Note.
No. ... Number.
O. ... Order.
O.C. .. Original Jurisdiction, Civil.
O.Cr. ... Original Jurisdiction, Criminal.
Over. ... Overruled.
P. ... Page.
Pr. or P. ... Para.
Pt. ... Point.
P.C. ... Privy Council.
Pre. ... Preamble.
R. ... Rule.
Ref. .. Referred or Reference.
Rel. on ... Relied on.
R.S.C. ... Rules of Supreme Court.
Rev. ... Revenue.
Revers. .. Reversed.
S. ... Section.
S.A. ... Second Appeal.
S.B. ... Special Bench.
S.C. .. Supreme Court.
S.C.R. .. Select Committee Report.
S.O.R. ... Statement of Objects and Reasons.
S.N. ... Short Notes of Cases.
U.P.B.R. ... United Provinces Board of Revenue.
w.r.e.f. ... With retrospective effect from.

IN FOOT-NOTES,—

**Indicates that citation of a different case begins.

THE
TRANSFER OF PROPERTY ACT
(IV OF 1882)

VOLUME 2

52. TRANSFER OF PROPERTY PENDING SUIT RELATING THERETO.— During the [A][pendency] in any Court having authority [B][[C] within the limits of India excluding the State of Jammu and Kashmir] or established beyond such limits] by [D][the Central Government [E][* * *]], of [F][any] suit or proceeding [G][which is not collusive and] in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose

[G]**[Explanation.**— For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.]

[A] Substituted for the words "active prosecution" by the Transfer of Property (Amendment) Act 1929 (XX of 1929), S. 14

[B] Substituted for the words "in the Provinces or established beyond the limits of the Provinces" by ALO, 1950 [26-4-1950].

[C] Substituted for the words "within the limits of Part A States and Part C States" by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Schedule [1-4-1951]

[D] Substituted for the words "the Governor General in Council" by AO 1937 [1-4-1937]

[E] Substituted for the words "or the Crown Representative" were omitted by AO (No. 2) 1948 [23-3-1948].

[F] Substituted for the words "a contentious" by Act XX of 1929, S. 14

[G] Inserted ibid

STATE AMENDMENTS

Gujarat

In its application to the State of Gujarat, the amendments made in section 52 are the same as those of Maharashtra.

Maharashtra

In its application to the pre Reorganisation State of Bombay—

(1) the Transfer of Property and the Indian Registration (Bombay Amendment) Act, 1939 (Bom XIV of 1939) shall apply to notices in respect of suits or proceedings which relate to immovable properties situate wholly or partly in the [Greater Bombay], with effect from such date as may be directed by the State Government in this behalf by notification in the Official Gazette

Provided that the State Government may by similar notification direct that the provisions of the said Act shall apply to such notices relating to immovable properties situate wholly or partly in such other area as may be specified in the said notification

[a] Substituted for "City of Bombay" by Bom Act XVII of 1945, S. 9 and Sch. F read with Bom Act LVII of 1956, S. 3

(2) Section 52 shall be renumbered as sub-section (1) of that section and

(i) in sub-section (1) so renumbered after the word "question" the words and figures "if a notice of the pendency of such suit or proceeding is registered under section 18 of the Indian Registration Act, 1908," and after the word "property" where it occurs for the second time the word "after the notice is so registered," shall be inserted; and

(ii) after the said sub-section (1) so renumbered the following shall be inserted, namely

"(2) Every notice of pendency of a suit or a proceeding referred to in sub-section (1) shall contain the following particulars, namely :—

(a) the name and address of the owner of immoveable property or other person whose right to the immoveable property is in question;

(b) the description of the immoveable property the right to which is in question

(c) the Court in which the suit or proceeding is pending,

(d) the nature and title of the suit or proceeding,

(e) the date on which the suit or proceeding was instituted."

—Bom Act 14 of 1939, Ss. 2 and 3 [15-6-1939]

(3) "The provisions of the Transfer of Property and the Indian Registration (Bombay Amendment) Act, 1939 (Bom 14 of 1939) which amend the Transfer of Property Act, 1882 in its application to the pre-Reorganisation State of Bombay are hereby extended to, and shall be in force in that part of the State of Bombay to which they did not extend immediately before the commencement of this Act [namely, the Transfer of Property (Bombay Provision for Uniformity and Amendment) Act, 1959], and, the Transfer of Property Act, 1882 shall, from the commencement of this Act, be deemed to be amended accordingly also in that part of the State

—Bom Act LVII of 1959, S. 3 [14-10-1959]

(4) The provisions of Bom Act 14 of 1939 were extended to Shahada, Nadurbar and Taloda Talukas of West Khandesh District and Dohad Taluka and Jhalod Mahal of Panch Mahals District (now in Gujarat) by the Bombay Extension of Laws to Non-scheduled (partially excluded) Areas Act 1954 (LXVIII of 1954), S. 2 [15-11-1954].

Synopsis

1. Scope of the section.
2. Applicability of section.
3. This section and S. 51.
4. This section and res judicata.
5. This section and Government grants.
6. This section and S. 41 — See Note 16 on Section 41.
6A. This section and S. 100.
6AA. This section and S. 65-A — See Notes on S. 65-A.
7. Rights existing before suit not affected.
8. "During the pendency."
8A. "Suit or proceeding" — See Note 12.
9. Proceeding must be pending before a Court.
10. Pendency of suit when commences.
11. Pendency of suit, how long continues.
12. Pendency of proceeding when commences and how long it continues.
13. "Which is not collusive."
14. Right to immovable property must be directly and specifically in question.
15. Applicability of doctrine of lis pendens to movable property.
16. Only property in litigation cannot be transferred.
17. Administration suit.
18. Mortgage suits.
19. Partition suits.
20. Suits for maintenance.
20A. Suit for permanent injunction.
21. Pre-emption suit.
22. Suit for establishing will.
23. Suit for cancellation of trust deed.

24. Suit for specific performance of contract.
25. Winding up proceedings.
26. Suits for declaration of title.
27. "Transferred or otherwise dealt with."
28. Transfer executed before suit.
29. Transfer executed before but registered after suit.
30. Transfers by operation of law.
30A. Effect of provision in Tenancy Laws.
31. Transfer by or in execution of decree or order.
32. Compulsory sales for recovery of Government dues.
33. Sale under S. 88 of the Criminal Procedure Code (1898).
34. Transfer by permission of Court.
35. "So as to affect the rights of."
36. "Any party."
37. "Any other party" — Co-defendants.
38. "Any decree or order."
39. Lease *pendente lite*.
40. Transferee pending suit is representative of transferor — If entitled to be made party to suit
41. Injunction on party to suit not to transfer.
42. Subsequent reversal or modification of decree or order, how far affects sale in execution of such decree, or the assignment of such decree.
43. Registration of *lis pendens*.
44. Writ proceedings.

1. Scope of the section.

This section is an expression of the principle of the maxim *pendente lite nihil innovetur* (pending a litigation nothing new should be introduced)(1) and provides that *pendente lite* one their party to the litigation, in which any right to immovable property is in question can alienate or otherwise deal with such property so as to affect his appointment (2) Section 52 is based on equity and good conscience and is intended to protect the parties to a litigation against alienations by their opponent during the pendency of the suit (3) The principle of lis pendens rests on the formulation that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *lis pendens* were permitted to prevail The right under S 52 can be used both as a sword and a shield depending upon the facts of the case (4) Doctrine of *lis pendens* is based not on the doctrine of notice but on the doctrine of expediency (5) Alienation made during pendency of suit is hit by doctrine of *lis pendens* (6) Where there was no transfer by one of the parties within meaning of this section, the doctrine of *lis pendens* incorporated under section 52 of Act would

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Section 52 — Note 1

1. **AIR 1932 PC 57 (60) : 54 All 189 ** AIR 1965 Punj 415 (420) : ILR (1965) 2 Punj 97 (FB) **** ILR (1959) 38 Pat 389 (421 422) (DB) ** 1986 AD LJ 965 (969) 1986 AIR WC 319 ** AIR 1957 Pat 729 (730 731) 36 Pat 1139 (DB) ** AIR 1943 Cal 227 (236) (DB) ** AIR 1939 Bom 403 (404) (Doctrine applies to a suit for maintenance by a Hindu widow claiming a charge on specific property and if a decree creating a charge is passed
2. **AIR 1965 Punj 415 (420) : ILR (1965) 2 Punj 97 (FB) **** 1997 (2) All RC 83 (82) ** 1997 (3) Kant LJ 193 (211) (Where the judgment debtor is aware of the decree he attachment before judgment and also attachment in the execution case and still sells the suit property the transfer is intended to defeat and delay the creditors There was also no passing of consideration The private sale embarked upon by the judgment debtor was hit by *lis pendens* and no title can pass on the vendee) ** ILR (1973 K nt 235 ** AIR 1957 Pat 729 (731) 36 Pat 1139 (DB) ** 1950 Trav-Co LR 23 (29) (DB) ** (1926) 98 Ind Cas 1039 (1042) (DB) (Oudh).
3. **AIR 1918 Mad 578 (579) : 41 Mad 458 (SB) **** (1992) 2 Mad LJ (40) (143) ** (1991) 2 Cur Civ Cas 50 (53) (Mad)
4. 2000 (1) All Rent Cas 189
5. 2000 (124) Pun LR 540 (541)
6. **1996 (5) SCC 539 (541) **** 2002 (2) Cur Civ Cas 164 (165) 2002 Cg LJ (C hh) ** 2000 (2) Orissa LR 512 (513) ** 1997 (30) All LR 441 (445) ** (1973) 2 Mys LJ 176 (DB) ** (1966) 1 Mys LJ 451 (Purpose of principle of *lis pendens* is to discountenance alienation

not be attracted.(7) The law of *lis pendens* is an extension of the law of *res judicata* and makes the adjudication in the suit binding on alienees from parties pending suit, just as much as the law of *res judicata* makes the adjudication binding on the parties themselves and on alienees from them after the decree (8) Rule of *lis pendens* is based on equity, good conscience and justice Rule is based not on doctrine of notice but on expediency Rule does not annul alienation *pendente lite* but makes it subservient to the rights of the parties to the litigation.(9)

The effect of S 52 of the T P Act is that a *lis pendens* transferee is bound by the decree whether on contest, ex parte or on compromise The plaintiff is under no obligation to implead a lis pendens transferee. Section 52 has been enacted with a view to safeguarding the interest of the plaintiff so that his decree is not defeated at the instance of a third party in whose favour there has been a lis pendens transfer.(10)

The doctrine of *lis pendens* is applicable in cases where the pending litigation is ultimately compromised by the parties and a compromise decree is passed in terms of the compromise (11)

The doctrine of *lis pendens* has been recognised in England from very ancient times (12) But the theory on which it was rested was not clearly settled until the decision in *Bellamy v. Sabine* (13) in 1857.

In *Worsley v The Earl of Scarborough* (14) decided in 1746 the Lord Chancellor rested the doctrine on 'implied notice' to the purchaser of the pending litigation He observed as follows :

> " for as it is a transaction in a sovereign Court of Justice, it is supposed all people are attentive to what passes there, and it is to prevent a greater mischief that would arise by peoples' purchasing a right under litigation, and then in contest.(15)

In *Bishop of Winchester v Paine*(16) decided in 1805 Sir William Grant rested the doctrine on general convenience and not on any implied notice. He observed as follows

> "Ordinarily it is true, the decree of the Court binds only the parties to the suit. But he, who purchases during the pendency of the suit is bound by the decree, that may be made against the person from whom he derives title The litigating parties are exempted from the necessity of taking any notice of

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made by parties to suit during its pendency exposing plaintiff in that suit to multiplicity of proceedings) ** AIR 1959 Punj 490 (496) ** AIR 1957 Pat 729 (731) 36 Pat 1139 (DB) ** AIR 1915 Cal 536 (538) (DB).

7. AIR 1983 Punj 321 (323).

8. **AIR 1918 Mad 578 (580) : 41 Mad 458 (SB).** (Section applies to auction sale as well) ** (1991) 2 Ren CR 609 (611, 612) (All) ** 1988 Pat LJR (HC) 190 ** (1973) 2 Mys LJ 176 (DB) (Doctrine of *lis pendens* is only one aspect of general rule of *res judicata*) ** AIR 1959 Punj 490 (496) ** AIR 1957 Pat 729 (731) : 36 Pat 1139.

9. (1991) 2 Cur LJ (CCR) 345 (346) (Punj & Har) ** 2002 (2) Cal LJ 1 (15) ** AIR 1994 Ker 122 (126) : 1994 (2) Ren CR 336.

10. **AIR 1992 Orissa 47 : 1992 SCFBRC 199 (FB)** ** AIR 1989 Raj 43 (46, 47, 48) (1988) 1 Rajasthan LR 466.

11. AIR 1989 Raj 43 (46, 47, 48) : (1988) 1 Rajasthan LR 466.

12. (1687) 23 ER 585 (585) 1 Vern 459, Self v Madox ** (1728) 24 ER 825 (825) : 2 P Wms 482 Sorrell v Carpenter ** (1832) 58 ER 329 (335) 5 Sim 247 London v Morris

13. (1857) 44 ER 842 : 26 LJ Ch 796.

14. (1746) 26 ER 1025 (1025) : 3 Atk 392

15. See also (1862-63) 1 Hyde 160 (168) (1871) 15 Suth WR 372 (374) (If a purchase is made of property in litigation while such litigation is actually going on the purchaser is affected in the same manner as if he had notice of the dispute though in point of fact he had no express notice or actual knowledge of the circumstances)

16. (1805) 32 ER 1062 (1063, 1064) : 8 RR 131.

a title so acquired. As to them it is as if no such title existed. Otherwise suits would be indeterminable or which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined. The rule may sometimes operate with hardship upon those, who purchase without actual notice, yet general convenience requires its adoption, and a mortgage, taken *pendente lite* cannot be exempted from its operation."

The leading case on the subject is *Bellamy v. Sabine*(17) decided in 1857. The Lord Chancellor (Lord Cranworth) observed :

"It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.

"Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate the necessities of mankind require that the decision of the Court in the suit shall be binding not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit whether such alienees had or had not notice of the pending proceedings. If this were not so there would be no certainty that the litigation would ever come to an end.

After referring to certain cases which were to the effect that *lis pendens* was implied notice to all the world, his Lordship continued :

"The language of the Court in these cases as well as in *Worsely v. The Earl of Scarborough*(18) certainly is to the effect that *lis pendens* is implied notice to all the world. I confess I think that is not a perfectly correct mode of stating the doctrine. What ought to be said is that *pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent. The doctrine is not peculiar to Courts of Equity."

Turner, LJ, in the same case observed that the doctrine rested not on any peculiar tenets as to implied or constructive notice but

"upon this foundation that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail.

See also the undermentioned cases(19) arising in this country following the same view. The doctrine of *lis pendens* as applied in England was applied in this country even before the enactment

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17. (1857) 1 De G & J 566 (578) : 44 ER 842 (847, 848).

18. (1746) 26 ER 1025 (1026) : 3 Atk 392.

19. **(1907) 29 All 339 (345) : 10 Oudh Cas 314 (PC) ** AIR 1920 Mad 391 (392) : 43 Mad 37 (SB) ** AIR 1965 Punj 415 (420) : ILR (1965) 2 Punj 97 (FB) ** AIR 1946 Lah 142 (144) : ILR (1946) Lah 467 (FB).** (Transferee pendente lite is affected though he took the transfer without notice of the lis.) **** (1905) 29 Bom 435 (447) (FB) ** (1880) 6 Bom 168 (173) (FB) **** 1981 UPTC (NOC) 16 ** AIR 1973 Mys 131 (133) (1973) 1 Mys LJ 130 ** AIR 1970 Ker 188 (189, 190) (1969 Ker LT 326 (DB)) ** AIR 1966 Madh Pra 318 (323) ** ILR (1966) 1 Mad 538 (547) ** AIR 1962 Ker 309 (312) (ILR (1962) 2 Ker 55) ** AIR 1962 Madh Pra 34 (35) (ILR (1960) Madh Pra 797 (DB)) ** AIR 1959 Bom 475 (477) (ILR (1959) Bom 94) (Notice of suit to transferee not essential.) ** AIR 1957 Pat 729 (731) (36 Pat 1 : 39 (DB)) ** AIR 1954 Sau 82 (84) ** (1950) 55 Mys HCR 174 (178) (DB) ** AIR 1949 Bom 367 (371) (ILR (1949) Bom 480) (DB) ** AIR 1943 Cal 227 (230) (DB) ** AIR 1937 Bom 244 (254) (DB) (Doctrine is not based upon notice but upon expediency.) ** AIR 1934 Mad 585 (587) ** AIR 1932 Pat 270 (271) (11 Pat 415 (DB)) (Transfer was held good as it was made prior to the person's being impleaded in a property suit.) ** AIR 1931 Bom 539 (542) ** AIR 1930 Cal 539 (543) (DB) ** AIR 1929 All 943 (945) (52 All 139 (DB)) (Subsequent mortgagee paying off prior encumbrance is entitled to claim charge — Doctrine does not apply to such a case — Obiter.) ** AIR 1929 All 601 (602) ** AIR 1928 Bom 65 (66) (52 Bom 208 (DB)) ** AIR 1927 Bom 93 (95) (51 Bom 37 (DB)) (Per Fawcett, J.) ** AIR 1925 Cal 239 (244) (DB) ** AIR 1922 Pat 394 (395) (1 Pat 5 (DB)) (It is doubtful as to whether the doctrine applies to movable property.) ** (1913) 16 Oudh Cas 148 (152) (DB) ** (1910) 13 Oudh Cas 98 (102) (DB) ** (1907) 29 All 76 (81) ** (1907) 9 Bom LR 1173 (1177) (DB) (Effect of the doctrine is not to annul

of this Act **(20)** This section is merely a legislative enactment of the doctrine so applied **(21)** The right created by this section is a 'statutory right' and the mere fact that a person has made certain admissions against his interest would not deprive him of the right which the statute gives him If, however a person makes certain false statements which mislead the transferee, he will not be allowed by the Courts to take advantage of his own fraud.**(22)**

The scope of the section was described by Pal, J of the Calcutta High Court in the undermentioned case**(23)** as follows :

> "The requirements of the section are (1) the pendency of a suit, (2) non-collusive character of the suit, (3) any right to immovable property being in question in that suit being in question directly and specifically, (4) the other party (other than the party making the transfer *pendente lite*) having some right under the decree in that suit The consequence of the doctrine is that the transaction *pendente lite* shall not be allowed to affect the right under the decree."

In order to constitute a *lis pendens* the following elements must be present :—

1. There must be a suit or proceeding pending in a Court of competent jurisdiction having authority in India, or established beyond the limits of India by the Central Government
2. The suit or proceeding must not be collusive.
3. The litigation must be one in which right to immovable property is directly and specifically in question.
4. There must be a transfer of or otherwise dealing with the property in dispute by any party to the litigation.
5. Such transfer must affect the rights of the other party that may ultimately accrue under the terms of the decree or order.**(24)**

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the conveyance but to render it subservient to the rights of the parties to the litigation) 1906 Pun Re No 7, p 17 (19) (Litigating parties are exempted from taking notice of a title acquired during the litigation) ** (1903) 27 Bom 266 (268 269 (DB) (Rule applies to Court sales) ** (1901) 28 Cal 23 (27) (DB) ** (1900) 23 All 60 (62) (DB) ** (1891) 13 All 371 (373) (DB) ** (1889) 12 Mad 439 (441, 442) (DB) ** 1889 All WN 91 (92) (DB) ** (1888) 1 CPLR 19 (22) (Where the period of appeal was only one month, and the appeal was duly filed held that there was all along active prosecution of the suit within the meaning of the section) ** (1886) 9 Mad 92 (96) (DB) ** (1882) 8 Cal 690 (698) (DB) ** 1877 Bom PJ 81 (DB) ** (1874 1875) 7 Mad HCR 104 (111) (DB) ** (1874) 22 Suth WR 547 (547) (DB) ** (1874) 23 Suth WR 349 (351) (DB) ** (1874) 11 Bom HCR 24 (28, 29) (DB) ** (1874) 11 Bom HCR 64 (66, 67) (DB) ** (1872-1873) 6 Mad HCR 75 (80) (DB) ** (1872-1873) 6 Mad HCR 234 (238) (DB)

[See also AIR 1924 Bom 467 (468) (DB).]

See also Note 6A

20. **(1880) 6 Bom 168 (172) (FB)** ** (1880) 2 All 826 (827) (DB) ** (1878) 4 Cal 789 (792) (DB) ** (1874) 21 Suth WR 349 (351) (DB) ** (1874) 22 Suth WR 547 (547) (DB) ** 1874 Bom PJ 189 (DB) ** (1874) 11 Bom HCR 139 ** (1874) 11 Bom HCR 24 (30) (DB) ** (1874) 11 Bom HCR 64 (66 67) ** (1874-1875) 7 Mad HCR 610 (611) (DB) (The doctrine of *lis pendens* does not depend upon notice) ** (1873) 10 Suth WR 469 (473) (DB) ** (1873) 20 Suth WR 204 (205) (DB) ** (1871) 8 Bom HCR (AC) 55 (61) (DB) ** (1872-1873) 6 Mad HCR 75 (80) (DB) ** (1867) 2 Suth WR 225 (226) (DB) ** (1862 63) 1 Hyde 160 (167)
21. AIR 1959 Andh Pra 280 (285) (DB) ** AIR 1931 Oudh 63 (64) (DB).
22. (1940) 44 Cal WN 783 (786).
23. AIR 1943 Cal 227 (230) (DB)

    [See also AIR 2000 Punj & Har 271 (273) (Prior possession on basis of mortgage could not be sustained when there was no mention of mortgage in the sale deed) ** ILR (1984) 1 Delhi 913 (935 936)]
24. 1988 Pat LJR (HC) 190

Transaction suit by *lis pendens* is not void but voidable and subject to rights under the decree **Collusive proceedings are excluded.(25)**

See also the undermentioned cases to the same effect **(26)**

Where the suit for possession on basis of title is decreed, the transferee pending litigation is bound by the decree and could not resist execution of the decree **(27)**

The broad purpose of this section is to maintain the *status quo* unaffected by the act of any party to the litigation pending its determination. The applicability of the section cannot depend on the matters of proof or the strength or weakness of the case on one side or the other in *bona fide* proceedings. To apply any such test is to misconceive the object of the enactment **(28)**

There is no absolute rule either to grant injunction or to refuse the same on ground of *lis pendens*. **It varies on the facts of each case.(29)**

Where a person purchases property during pendency of suit, he is not entitled to take plea of *bona fide* purchaser for value without notice of previous agreement in view of clear bar imposed by S. 52.**(30)**

Explanation.— Explanation cannot go beyond the section. The presentation of the plaint stated in explanation to S. 52 denotes a proper prosecution of the plaint with all necessary parties, who ought to have been added as defendants. If any necessary party is additionally impleaded the suit as against him must be deemed to have been presented and the limitation also commence only from the date when summons has been served and subject to provision of S. 21 of the Limitation Act.**(31)**

The limitation imposed by this section on the right to dispose of property which is subject-matter of litigation is not violative of Arts. 19 and 31 of the Constitution of India **(32)**

The doctrine of *lis pendens* contained in S. 52 would not arrest the running of period of limitation during the pendency of the earlier suit **(33)** Any transaction with regard to immovable property taking place during pendency of suit would be hit by S. 52 and therefore the period of limitation for challenging the sale deed independent of the provision of *lis pendens* cannot be taken.**(34)**

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25. 2000 (2) Mad LJ 59 (63) ** 2000 AIHC 661 (672)

26 AIR 1962 Madh Pra 34 (35) ; II R (1960) Madh Pra 797 ** (1966) 1 Mys LJ 680 ** AIR 1957 Pat 729 (731) : 36 Pat 1139 (DB)

27. 2000 (2) MPLJ 402 (405)

28. **AIR 1948 PC 147 (149) : ILR (1949) 1 Cal 234.** (Where a suit ends in a compromise decree, if the section otherwise applies to the case its applicability will not be affected by the fact that the suit was based on an instrument which required registration but which was not registered — AIR 1943 Cal 227 Confirmed.) ** **AIR 1970 SC 1717 (1722) : 1971 BLJR 86** (Doctrine of *lis pendens* applies irrespective of strength or weakness of the case on one side or other — There is, however, one condition that proceedings must be *bona fide* — If proceedings are bona fide, applicability of S. 52 was not avoided. AIR 1957 Pat 408 **Reversed.**) ** 1996 (1) BLJR 633 (635) ** AIR 1987 Orissa 142 (145) ** AIR 1957 Pat 729 (731) : 36 Pat 1139 (DB).

29. 1996 AIHC 1873 (1874) (Punj & Har).

30. 1999 (2) Cal WN 222 (224)

31. 2000 (3) Mad LW 487 (496).

32. 1967 Raj LW 234 (236)

33. 1990 Rev Dec 205 (207) (All).

34. 2002 (2) Rec Civ Rep 674 (676) : 2002 (2) Pun LR 398

Where the plaintiff failed to establish that he is the owner of the property alienated by the defendant, the doctrine of *lis pendens* would not be attracted (35)

2. Applicability of section.

The Act does not apply to the Punjab This section does not therefore in terms apply to it But the section is only an enactment of a general principle of law and, therefore, the general principles underlying the section have been applied in the Punjab (1) See also the undermentioned cases (2) The principle of this section applies to agricultural leases also (3)

The effect of S. 36(2) of the Bengal Money-lenders Act (10 of 1940) is to preclude the doctrine of *lis pendens* from applying in so far as it concerns restoration of possession of properties sold by the decree-holder *pendente lite*.(4)

The doctrine of *lis pendens* has no application when two creditors are pursuing their claims in two different suits unknown to each other, one being a money suit and another on a mortgage by deposit of title deeds.(5)

3. This section and Section 51.

In *Vehusamy Naicker v Bommachi Naicker*(1) it was observed by the High Court of Madras that a *party* to a pending litigation is not entitled to claim any compensation for improvements made by him *pendente lite* with full knowledge of the risk he runs in doing so In *Moti Chand v British India Corporation Ltd* (2) where the transferee *pendente lite* made improvements pending litigation, it was held by the Allahabad High Court that such transferee had no right to claim any compensation from the decree-holder who ousted him under the decree The view was rested on the principle enunciated by that Court in *Shafiq v Samiulla*.(3) where it was observed that S 52 was a special section and S 41 a general provision and, in the case of a conflict between the two, the special section must prevail over the general The Kerala High Court has held that S 51 is not applicable to a case covered by S 52 An alienee *pendente lite* cannot claim compensation for improvements made by him Investment made by the purchaser of transaction *pendente lite* which is declared illegal, is no ground to deny relief to decree-holder (6)

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35. 2000 (1) All Rent Cas 189

Section 52 — Note 2

1. AIR 1930 Lah 356 (357) · 11 Lah 258 (FB) ** 1903 Pun Re No. 80, p. 345 (349) (FB) ** (1926) 96 Ind Cas 450 (451) (Lah).
2. AIR 1956 Trav-Co 147 (151) · ILR (1955) Trav-Co 823 (FB). (Though T P. Act was not on the statute book of Travancore the rules of S 52 were being enforced by the Courts in that area.) ** AIR 1951 Trav Co 187 (188) (DB) (Principles underlying S 52 apply in Travancore-Cochin though Act does not.) ** ILR (1955) Trav Co 570 (574) (DB) (Though the Transfer of Property Act is not law in Travancore its principles have invariably been adopted by Courts in that State when questions covered by its provisions came up for decision.) ** AIR 1942 Pesh 43 (45).
3. ILR (1955) Madh B 416 (420) ** AIR 1949 All 257 (260) ILR (1949) All 449
4. ILR (1953) 1 Cal 101 (104).
5. AIR 1977 (NOC) 343 (Mad)

Section 52 — Note 3

1. (1913) 21 Ind Cas 219 (221) (DB) (Mad)
2. AIR 1932 All 210 (214) (DB)
3. AIR 1929 All 943 (945) : 52 All 139 (DB)
4. 1958 Ker LT 557 (558).
5. AIR 1975 Punj 205 (210) · 77 Pun LR 21 ** (1966) 68 Pun LR (D) 44
6. 2001 (4) Pat LJR (HC) 732 (742) : 2002 (1) BLJR 63

However the A P High Court has struck a different note it held that, the doctrine of *lis pendens* is based not on the doctrine of notice but of expediency The effect of the maxim is not to annul the conveyance but only render it subservient to the rights of the parties to the litigation The right of the alienee is subject to ultimate decree that may be passed The doctrine applies irrespective of the fact whether the transferee has notice of the litigation or not and his rights are subject to the command of the Court The rights of successful litigant under S 52 is subject to the right of compensation for improvements made by the alienee Sections 51 and 52 should be interpreted harmoniously and S 52 cannot be interpreted in isolation (7)

See also the undermentioned case (8)

4. This section and res judicata.

As seen in note 1 the law of *lis pendens* is an extension of the law of *res judicata* and makes the adjudication in the suits binding on alienees from parties pending suit This section however cannot prevail against the rule of *res judicata* When there is an apparent conflict between the rule of *lis pendens* and the bar of *res judicata* the latter will prevail (1)

X mortgaged certain property to *A* on 29th June 1909 *A* filed a suit on the mortgage in 1920 and obtained a decree in 1922, and on 7th November of that year purchased the property in execution of his decree Meanwhile, on 28th October 1920, *X* mortgaged the property to *B* *B* sued on 17th July, 1924 on his mortgage making *A* a party to the suit Nothing was alleged in derogation of *A*'s right to priority under his mortgage *B* obtained a decree in 1924 and purchased the property in execution of his decree in 1926 The question was as between *A* and *B* who had the better title It was held that although the mortgage in favour of *B* was made pending *A*'s mortgage suit and was therefore vitiated by *lis pendens* nevertheless if *A* was bound to have raised a plea as to his priority rights and did not raise it the rule of *res judicata* would prevail over the rule of *lis pendens* but in view of the fact that *A*'s priority right was not questioned in *B*'s suit it was held that he was not bound to have the plea that the rule of *res judicata* did not apply and that therefore *A* was entitled to the property in priority to *B* (2)

5. This section and Government grants.

A "Government grant" within the meaning of the Government Grants Act 1895 is not governed by any of the provisions of this Act and is consequently not governed by this section also (1) But every transfer made by a Government Officer is not necessarily a "Government grant" within the meaning of that Act A lease granted by a Government Officer in charge of a "Khas mahal" is not a "Government grant" and consequently if such lease is made pending a suit in respect of such property, the doctrine of *lis pendens* would apply to such lease (2)

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7. 1997 (1) APLJ 41 (49, 55) : 1997 (2) Andh LD 334
8. 1969 Ker LR 52 (Purchase of land by B from A member of Tarwad pending partition suit by C another member of Tarwad — B's claim for compensation for improvements — His claim not affecting C's right for partition — Doctrine of *lis pendens* did not apply)

Section 52 — Note 4

1. ILR (1951) Trav-Co 32 (39) (AIR 1934 Cal 552, Rel on) ** ILR (1966) 1 Ker 158 (Finding in earlier suit between lessee and third person that such property was not included in lease — Not binding on lessor) ** AIR 1949 Bom 367 (372) : ILR (1949) Bom 480 (DB) (Once a judgment is duly pronounced by a competent Court in regard to the subject-matter of the suit in which the doctrine of *lis pendens* applies that decision is res judicata and binds not only the parties thereto but also the transferees *pendente lite* from them.)

   [See AIR 1982 (NOC) 42 (Cal).]
2. AIR 1934 Cal 552 (553) : 61 Cal 494 (DB)

Section 52 — Note 5

1. AIR 1935 Cal 746 (747) : 63 Cal 523 (DB) ** AIR 1974 Pun 46 (50) : 74 Pun LR 642
2. AIR 1935 Cal 746 (747) : 63 Cal 523 (DB)

6. This section and Section 41.

The plea of *bona fide* purchaser is not available to persons who purchase property during pendency of suit relating thereto. It is hit by doctrine of *lis pendens* (1) The principle embodied in S. 41 is an exception to the general rule that a person cannot pass a better title in property than he himself has and the result could be avoided only under the equitable principle of estoppel laid down in S. 41 but this principle must yield to the doctrine of *lis pendens* under S. 52 which is the rule of public policy otherwise such alienation during the pendency of suit will defeat the very purpose of litigation. S. 52 also binds the party who is not a party to the litigation case if it may cause hardship to him.

Thus where in spite of the direction by Court not to alienate suit property it is alienated with knowledge of the pendency of suit, the transferee cannot claim protection under S. 41 of the T.P. Act.(2)

See also Note 16 on Section 41.

6A. This section and S. 100.

Where in a suit for maintenance the plaintiff seeks a charge over the property and obtains a decree creating a charge over the property but the defendant transfers the property for consideration to a stranger during the pendency of the suit and before the passing of the decree, can the transferee plead that the charge created by the decree subsequent to the transfer in his favour cannot be enforced against the property in his hands on the ground that he is a transferee for valuable consideration and without notice of the charge and, therefore, protected under S. 100 of the Transfer of Property Act? No, the transferee cannot claim such protection. The reason is that the provisions of S. 100 would not apply to a case of transfer during the pendency of a litigation. That section is a general provision relating to a charge and provides that a transferee after the charge would be affected only if he has notice of the same. It does not provide as to what might happen if the transfer takes place before the charge is created. Such a case when it happens pending the suit covered by S. 52 under which the transfer cannot take place to the detriment of the person in whose favour the charge is created (1) When a decree creating a charge and providing for its execution is passed it does not put an end to the suit. The *lis* in such a case continues so long as the maintenance is due under the decree. Hence a transfer of property over which a charge is created is affected by the doctrine of *lis pendens* even though the transfer is after the decree, if the properties remain charged.

Section 52 — Note 6

1. 2001 AIHC 4803 (4805) : 2002 (1) Rec Civ Rep 458 (Punj & Har)
2. 1996 (2) Civ Court Cas 326 (329) : 1996 (2) RRR 693 (Him Pra)

Section 52 — Note 6A

1. 1959 Andh LT 509 (510) ** AIR 1959 Bom 475 (477), ILR (1959) Bom 94 , AIR 1927 Mad 502 **Diss. from.**) ** (1958) 62 Cal WN 288 (290) ** AIR 1953 Mad 71 (72) (DB) ** AIR 1945 Mad 126 (127) : ILR (1945) Mad 726 (DB) (Section 100 of the T.P. Act as amended in 1929, does not override S. 52, and cannot be read without regard to what is said in S. 52.) ** AIR 1944 Bom 191 (193) : ILR (1944) Bom 274 (DB).

   [**See also** AIR 1959 Bom 269 (271) : ILR (1959) Bom 266 (Charge decree obtained in money suit by consent of parties can be enforced against purchaser *pendente lite*) * AIR 1955 Trav-Co 234 (235) (The principle of *lis pendens* applies not only to a case where the plaintiff seeks to enforce a pre-existing charge but also to a case in which the plaintiff asks for the grant of a charge)]

   [**But see (1948) 53 Mys HCR 219 (240) (FB).** (A charge created by the decree in a suit for maintenance does not relate back to the institution of the suit for maintenance claiming charge so as to affect alienation of property after the filing of the suit but before the decree is made)]

the transferee would be bound by the charge whether he takes it with or without notice (2) [See also Note 20 and S 100 Note 28]

6AA. This section and S. 65-A.

See Notes on S. 65-A.

7. Right existing before suit not affected.

The doctrine of *lis pendens* does not operate so as to defeat any right existing before the date of the suit (1) Thus a mortgagee who has a power of sale under S 69 can exercise his power even

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2. **AIR 1951 All 141 (151, 153) : ILR (1953) 1 All 284 (FB)** (AIR 1939 All 687 **Overruled.**) ** AIR 1969 Orissa , 4 , 11 , 34 (of LT 1296) (S 52 is applicable to a case (controls second part of S 100) ** AIR 1930 Mad 988 (990) (DB) (Where a person purchases property from one of the parties after an order creating a charge is passed in an inter pleader suit the transfer is *pendente lite*) ** AIR 1945 Mad 350 , 35) (There is no conflict between Ss 52 and 100 S 52 expressly provides for all cases of decrees in suits relating to immovable property whether they involve a mortgage or a charge or recovery of possession and provides that no party to the suit can transfer or otherwise deal with the property so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the Court It makes no exception in favour of a *bona fide* transferee for value without notice)

See also Notes 11 and 20

Section 52 — Note 7

1. **AIR 1967 SC 1390 (1395)** (Lease by mortgagee before institution of suit by mortgagee for sale — Lessee acquires interest in right of redemption and is entitled to redeem — Lessee not made party to suit by mortgagee — Decree in suit does not bind him and his right of redemption will continue to exist) ** **AIR 1976 SC 1810 , (1977) 1 SCJ 159** (Suit for ejectment against sub tenant pending at commencement of W B Premises Tenancy Act of 1956 — Right under S 16(3) of that Act — he is entitled to such sub tenant — Doctrine of lis pendens not attract — ILR (1968) 2 Cal 575 **Reversed**) ** **AIR 1958 SC 838 (844) : ILR (1958) Punj 2225** ** AIR 2000 Chh 1 , 2001 (2) , J 529 (Property purchased prior to filing of suit and not during its pendency doctrine of *lis pendens* would not apply) ** (1982) 95 Mad LW 213 (218) (The doctrine of *lis pendens* applies to proceedings or creation of rights pending the suit and it will not affect a right existing before the suit) ** 1976 Rev LR 626 (629) (Pun) (Doctrine of *lis pendens* does not apply to transfers which are made in recognition of pre existing and subsisting right which is enforceable by legal action though it may not create interest in the property) ** 1975 2 Andh WR 408 (Municipality having charge on house — Charge can not be affected by some other person by filing suit earlier than the suit by Municipality) ** AIR 19 5 (Gujarat) 1 (2) (Sale during pendency of suit — Contract for that sale — Contract is hit by S 52 — **Contract for sale cannot be a part of sale**) ** (1966) 1 Mys LJ 454 (Partition suit by sons against father — Father and sons liable for debt incurred by father's father — Creditor obtaining decree and attaching part of family property before partition suit — Attachment conferring right on creditor to proceed against suit not hit by doctrine of *lis pendens*) ** ILR (1966) 1 Ker 158 (Holder of antecedent right — Taking transfer pending litigation — Antecedent right not affected — A giving lease of property to B — Subsequent execution proceeding concerning that property — During such proceeding B surrendering possession to A — A's right to realise rent and seek eviction is antecedent right — His right to be in immediate possession of property not part and parcel of his antecedent right — Surrender by B held hit by *lis pendens*) ** ILR (1963) Bom 246 (254) (DB) ** ILR (1963) Madh Pra 702 (712) (Where the earlier contractees had a super or right of specific performance against the subsequent contractees the sale deed taken by them privately during the pendency of the subsequent contractee's suit would not be affected by the decree in favour of the subsequent contractees — AIR 1958 Andh Pra 722 (723) — ILR (1958) Andh Pra 595 (DB) ** AIR 1957 Pun, 238 (243, (DB) * — AIR

during the pendency of suit for redemption **(2)** An attaching creditor who is entitled to redeem a mortgage does not lose this right by reason of the fact that he gets the property sold in execution of his decree after a suit is instituted on the mortgage **(3)** A sale *pendente lite* in execution of a decree on a mortgage executed before the date of suit will be subject to the doctrine of *lis pendens* and will not affect the rights of the parties under any decree or order passed in the suit But this will not take away the right of the mortgagee under his mortgage which was executed before the date of the suit It has been held in some cases**(4)** that a sale in pursuance of a decree on a mortgage executed before suit is merely a logical result of a transfer which has been made before suit and consequently the doctrine of *lis pendens* does not affect such a sale which is therefore valid and is not affected by any decree or order passed in the suit A contrary view has also been expressed in the undermentioned cases **(5)** It is submitted that the last view is correct As to whether a sale to a person made in

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1951 Pat 613 (615) ** (1945) 50 Mys HCR 258 (DB) ** AIR 1950 Orissa 210 (2, 1) ILR (1950) Cut 486 (DB) ** AIR 1943 Cal 577 (584) ** AIR 1937 All 108 (110) (DB) (Final decree in a mortgage suit passed before a suit for redemption was filed — *Lis pendens* does not apply) ** AIR 1934 Mad 585 (587) (Decree in favour of prior mortgagee to which subsequent mortgagee was not a party Decree in suit on second mortgage — Sale to A in execution of second mortgage decree — Then sale to B in execution of prior mortgage decree — Sale to A not affected by *lis pendens* though it was during the pendency of a suit on prior mortgage — The reason is that if rights are not affected the remedy to enforce those rights must also continue) ** AIR 1931 Lah 435 (436) (DB) (Do) ** 1908 Pun Re No 26 p 144 145) (DB) ** AIR 1929 Lah 589 (590) (The right of the defendants pre-emptors had accrued before the declaratory suit was instituted and also they had obtained their decree for pre-emption long prior to the institution of this suit held that the doctrine did not affect their right) ** (19, 2) 6 Ind Cas 779 (779) (DB) (Mad) (Suit by puisne mortgagee Private purchase *pendente lite* by prior mortgagee in discharge of his debt — Prior mortgagee disregarding his sale and suing on his mortgage — **Held** the sale was affected by *lis pendens* but his rights as a mortgagee were intact and he could proceed on the basis of his mortgage) ** (1880) 2 All 826 (827) (DB) (Prior mortgage with a stipulation prohibiting subsequent mortgage — Mortgagor subsequently mortgaging the property — Suit by second mortgagee — Sale to prior mortgagee by mortgagor during the suit — **Held** sale is affected by *lis pendens* but the prior mortgagee s right under the **stipulation is not affected.**)

[**See also** AIR 1916 Pat 282 (284) (DB) (Mortgage in favour of plaintiff — Suit on mortgage and purchase by plaintiff in execution of mortgage decree In the meantime property sold to defendant for arrears of revenue — **Held** purchase at revenue sale was subject to plaintiff's mortgage Interest of original mortgagor having passed at the revenue sale to defendant purchase at execution sale of mortgage decree against original mortgagor did not give plaintiff right to possession Plaintiff held had right to put mortgaged prop **erty to sale if defendant failed to redeem.**)]

2. AIR 1922 Mad 390 (391) 45 Mad 774 (DB) ** (1878) 2 Bom 252 (255) (DB)

3. AIR 1932 All 356 (357) (DB) ** AIR 1928 Nag 97 98) 23 Nag LR 164 (Attaching creditor purchasing equity of redemption pending mortgage suit — Right to redeem under S 91 existing before the suit — **Held** that right was not affected by *lis pendens* — **Overruled on another point by AIR 1936 Nag 209 (FB)**).

4. **AIR 1931 All 466 (485) : 53 All 1023 (FB).** (Per Mukerji J Minority view) ** **(1948) 53 Mys HCR 219 (240) (FB) . AIR 1999 Ker 213 (224) : 1999 AIHC 2281 : 1999 (1) Ker LJ 702 (FB).** (Majority view in AIR 1931 All 466 **Dissented from.**)** 1955 Ker LT 836 (838 839) ** AIR 1957 Ker 48 (50) ILR (1957) Ker 35 (DB) ** AIR 1950 Mad 189 (190) ** (1949) 27 Mys LJ 61 (69) (DB) ** AIR 1945 Nag 86 (93) ILR (1944) Nag 852 (DB) ** AIR 1939 Cal 655 (656) (DB) (Mortgage prior to institution of maintenance suit — Mortgage sale taking place during pendency of it — Purchaser is not affected) ** AIR 1934 Nag 36 (38) 30 Nag LR 284 (Foreclosure) ** AIR 1934 Nag 585 (587) ** AIR 1932 Mad 566 (573) 56 Mad 115 (DB) ** (1905) 32 Cal 891 (905) (DB) (Per Mitra, J.)

Also see Note 31

5. **AIR 1931 All 466 (480, 481) : 53 All 1023 (FB).** (Per majority of Full Bench — Mukherji,

recognition of his pre-existing superior or equal pre-emptory rights is affected by doctrine of *lis pendens* see Note 21.

Doctrine of *lis pendens* cannot be extended to cover an involuntary alienation in execution of a mortgage or charged decree, where the mortgage or charge came into effect prior to the filing of a suit.(6)

See also the undermentioned case (7)

8. "During the pendency."

The words used in the old section were "during the active prosecution". This was apparently based on certain decisions of the English Courts that in order that the doctrine of *lis pendens* may apply "the suit should be 'kept alive and in activity'." (1) But the words led to much uncertainty in the application of the rule and caused a divergence of judicial opinion. Thus, it was held in some cases that if a decree was not executed for a long time it was not "actively prosecuted" within the meaning of this section and that the doctrine did not apply to a sale made after such decree (2) In other cases a delay in the execution of the decree was held not to affect the right of the decree-holder (3) In a third class of cases it was held that the active prosecution of a suit or proceeding ended with the

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J. Contra: ** AIR 1962 Bom 19, (196 ILR (1961) Bom 927 ** AIR 1989 Pat 490 (495, 496) ** AIR 1943 Cal 577 (585) (Suit by prior simple mortgagee without impleading puisne mortgagee. Puisne simple mortgagee filing suit to which prior mortgagee was a party. During pendency of suit by puisne mortgagee property was sold in execution of decree of prior mortgagee and was purchased by prior mortgagee. Sale held was affected by *lis pendens*.) ** AIR 1928 Lah 505 (507)

6. 1983 TLNJ 111

7. (1983) 1 Cal HN 57 (65, 66) (1983) 1 Cal LJ 306 (In the instant case a Hindu female had a right to recover the maintenance allowance out of property which right was created when the property was charged for payment of maintenance to her under a final decree for partition of property long before the suit brought by the Howrah Municipality to enforce the statutory charge for arrears of rates. She sought remedy for non-payment of maintenance to her by enforcing her right to recover the same in execution of the said partition decree, and herself auction purchased the said holding in a Court sale during the pendency of the suit brought by Howrah Municipality to enforce the statutory charge. Further there was no evidence that she knew about the suit brought by the Municipality to get opportunity to be added as party. **Held** that the Court sale was not hit by doctrine of *lis pendens* under S. 52 of T.P. Act as the said doctrine did not affect pre-existing rights.) ** AIR 1980 Andh Pra 305 (1980) 2 APLJ (HC) 152 (DB) (*Lis pendens* does not apply to successive mortgages created prior to any suit in a Civil Court or in matters arising for enforcement of the rights under such mortgages.)

Section 52 — Note 8

1. (1831) 39 ER 236 (238, 239) 9 LJ Ch 276 Kinsman v. Kinsman ** (1888) 13 Bom 217 (221) (DB)

2. AIR 1960 Ker 98 (100) ILR (1959) Ker 820 (Where a transfer was executed by the defendant on the date of filing the suit there is no presumption that the filing of the plaint is to be considered as taking place at the earlier period of the day.) ** AIR 1931 Nag 138 (140) (Suit for specific performance — Decree passed — No execution over two years — Delay being inordinate *lis* held not to continue.) ** (1913) 37 Bom 621 (628) (DB) (Decree obtained in 1902 — Alienation in 1906 — Execution proceedings commenced in 1907 — **Held**, lis not continued.) ** (1913) Nag LR 155 (157)

[See also AIR 1932 Bom 301 (303).]

3. (1911) 9 Ind Cas 840 (841) (Cal) (Four years.) ** (1905) 32 Cal 891 (906) (DB) (Per Mitra, J.)

decree or final order.(4) though it was recognized that if the decree or order was the inception of further proceedings, the *lis* might continue till final orders were passed in such proceedings (5) Thus, it was held that a decree in a suit for account did not determine the *lis* (6) In a fourth class of cases it was held that if an appeal was filed after a deal, there was no active prosecution.(7) It was to remove this uncertainty, the words 'active prosecution' were removed and the word 'pendency' and the Explanation were substituted (8) It did not introduce any new rule of law but merely gave legislative sanction to judicial pronouncements in which it had been held that the *lis* continued till the end of the proceedings in execution (9) The amendment is not retrospective in operation and in cases of transfers before the date of the amendment, the question whether the suit was actually prosecuted must be determined with reference to the law as interpreted by decisions before that date.(10)

Where the appeal against cancellation of earlier allotment of plot and its resumption by the Development Authority was dismissed and reallotment of the said plot to another person was made thereafter by the Authority, the doctrine of *lis pendens* would not apply since no litigation was pending on the date of re-allotment.(11)

To attract the principles of *lis pendens* as contained in S 52, the property concerned need not be in dispute right from the inception of the suit The property may get involved at any stage throughout the span of the commencement of the suit or proceeding and its termination That too would be during the pendency 'During' signifies "throughout the course of throughout the continuance of, in the time of, after the commencement and before the execution of " The submission that unless the property forms part of the plaint, the third party will have no notice of the proceedings

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4. **See** (1905) 2 All LJ 294 (296) (DB).

5. **AIR 1917 Mad 128 (132) (SB)** ** AIR 1932 Bom 301 (302) ** AIR 1921 Mad 30 (37) 44 Mad 232 (DB) ** (1888) 12 Bom 217 (220) (DB) ** (1898) 22 Bom 939 (942) (DB) (The *lis pendens*, except in administration suits and suits for an account, and in suits of a similar nature in which the decree is the inception of subsequent proceedings ends with the decree.) ** 1898 Bom PJ 386 (DB) ** (1913) 37 Bom 621 (628) (DB)

   [**See also** 1889 Bom PJ 99 (DB). (12 Bom 217, **Followed.**)]

6. (1746) 26 ER 1025 (1026) 3 Atk 392 Worsley v Scarborough (Earl) ** (1842) 59 RR 726 (729) : 2 Dr & War 356. Higgins v. Shaw ** (1901) 23 All 331 (334) (DB).

7. AIR 1917 Lah 13 (14) (DB) (Cross-objection filed after a delay of two and a half years Cross objections whether treated as an appeal or not plea of *lis pendens* not available as they were filed after delay.)

   [**See also** (1911) 12 Ind Cas 849 (850) (Low Bur) (**Held** that even if the application for review was held to reopen the *lis pendens* the applicant was not entitled to the benefit of the right as he was clearly guilty of laches in not prosecuting his proceeding actively and without remission.)]

8. **AIR 1937 PC 260 (261).** (Question of active prosecution of a suit is one of fact) ** AIR 1959 Bom 475 (477) : ILR (1959) Bom 94.

9. AIR 1932 All 210 (212, 213) (DB)

10. **AIR 1944 PC 96 (99) : 24 Pat 89.** (When the mortgage came into existence before the amendment of 1929 came into force the doctrine of *lis pendens* applicable to the case is that enacted in S 52 before it was amended by Act XX of 1929) ** AIR 1931 Nag 138 (140) (Decree not executed for two years **Held,** no active prosecution.)

    [**But see** AIR 1945 Bom 409 (412) (DB) (Section 52 as amended is retrospective — Submitted not good law in view of the Privy Council decision in AIR 1944 PC 96 which is not noticed.)]

    Also see S. 2. Note 5

11. AIR 1999 Punj & Har 140 (141) : 1999 (123) Pun LR 757

to put in defence carries little weight. The reason being that to apply S. 52 notice to the third party affected by the suit or proceeding is not a pre-requisite (12).

8A. "Suit or proceeding."

The words "suits or proceedings" used in S. 52 cannot be extended to proceedings initiated by Magistrate under S. 145 of Cr. P.C. since an enquiry under S. 145 of Cr. P.C. has no reference to merits of title of the parties.(1)

A proceeding instituted under Arts. 226 and 227 of the Constitution which is not collusive and in which any right to immovable property is directly and specifically in question will be a proceeding attracting S. 52 of the Transfer of Property Act and as such the property concerned in the proceeding cannot be transferred or otherwise dealt with by any party to the proceeding so as to affect the rights of any other party thereto under an order which may be passed therein except under the authority of the High Court and on such terms as it may impose.

It cannot be said that the words 'any suit' or 'proceeding' occurring in S. 52 of the Transfer of Property Act must be read as contemplating either a suit or a proceeding instituted in an ordinary Civil Court. In other words, it cannot be said that the word 'proceeding' occurring in S. 52 of the Transfer of Property Act only relates to original proceeding. A proceeding under Arts. 226 and 227 of the Constitution apart from being a civil or criminal or some other proceeding depending upon the nature of the right enforced in that proceeding is also an original proceeding. No doubt it is not an ordinary original jurisdiction but it is an extraordinary original jurisdiction. It is an independent proceeding and not a continuation of the proceeding before the authorities below. If the plea that S. 52 of the T.P. Act does not contemplate writ proceeding or does not take into its fold the writ proceeding, is accepted, it would lead to disastrous consequences. In many cases it may so happen that even when the petitioner succeeds in the writ petition, the alienation if any made during the pendency of the writ petition shall have to remain unaffected, the order passed under Arts. 226 and 227 of the Constitution would be rendered infructuous or ineffective. The parties would be deprived of the fruits of the litigation.(2)

Transfer of immovable property relating to which an arbitration award is passed, would be invalid in view of S. 52. When the transferor had no right, title or interest in the property transferred after passing of the award, the transferee would not acquire any right, title or interest in his favour.(3)

Where a person initiated restoration proceedings before Tahsildar for recovery of possession of land and the proceedings were not in the nature of suit nor for execution of any decree but was only summary proceedings, the sale deed of the land executed during pendency of those proceedings would not be affected by the doctrine of *lis pendens* (4).

See also Note 12

9. Proceeding must be pending before a Court.

The doctrine applies only where the *lis* is pending before a Court. A Collector acting under S. 43 of the Madras Marumakkathayam Act (XXII of 1933) is not a Court for the purposes of this section.(1) Pendency of proceedings before the Magistrate under S. 145 of Cr. P.C. cannot be said

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12. 1987 All LJ 27 (31) : (1987) 1 Civ LJ 459

Section 52 — Note 8A

1. 1984 Mah LJ 99 : 1983 Cri LR (Mah) 124
2. AIR 1992 Kant 71 (76) : ILR (1991) Kant 3288
3. AIR 1990 Punj & Har 254 (258)
4. AIR 2002 Madh Pra 130 (138) : 2002 (1) MPLJ 200.

Section 52 — Note 9

1. AIR 1939 Mad 151 (152)

to be such as to attract operation of S 52 of T.P Act **(2)** It was held in the undermentioned Madras case**(3)** that a Registrar of Co-operative Societies acting under the Co-operative Societies Act (11 of 1912) as a Court and a proceeding before him operated as a *lis pendens* This view has been over ruled by the Supreme Court**(4)** and it has been held that nominee of Registrar appointed under S 95 of the Maharashtra Co-operative Societies Act is not a Court within S 45, Criminal P C A Revenue Court dealing with partition proceedings is a Court and the proceedings will operate as *lis pendens* **(5)**

The Court must be one which *has authority within the limits of India* excluding the State of Jammu and Kashmir or is established beyond such limits by the Central Government A *foreign Court* **is not a Court for the purposes of this section.**

Thus, the Courts in England and France are foreign Courts **(6)** A suit in a foreign Court is **therefore, not *lis pendens*.(7)**

The Court contemplated is a Court *competent to try the suit Where the Court has no jurisdiction* to try the suit, a transfer pending such suit cannot operate as *lis pendens* and cannot affect any decrees or orders in such suit **(8)** In the undermentioned case**(9)** it was held that a suit filed on the equity side of the Supreme Court of Calcutta did not operate as *lis pendens* so as to affect a transfer of immovable property in the mofussil inasmuch as the Supreme Court has no jurisdiction over property in the mofussil The present High Courts have, under their Letters Patents power to try suits relating to land partly within their jurisdiction and partly without it, provided that leave of the Court is obtained for doing so When the High Court so acquires jurisdiction to determine the suit the suit will operate as *lis pendens* **(10)** It must be noted that a higher Court cannot be said to have no jurisdiction merely because the suit should, under S 15 of the Civil Procedure Code be filed in a Court of a lower grade **(11)** Auction of the assets of a small scale limit by the State Financial Corporation during pendency of writ petitions against the Corporation was held to be hit by *lis* ***pendens*.(12)**

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2. 1984 Mah LJ 99 : 1983 Cri LR (Mah) 124

3. **AIR 1934 Mad 40 (42) : 57 Mad 426 (FB). (Overruled** in AIR 1969 SC 724)

[See AIR 1942 Mad 24 (25) (Madras Co-operative Societies Act VI of 1932) (**No longer good law** in view of AIR 1969 SC 724.)]

4. **AIR 1969 SC 724 : 1969 Cri LJ 1069 : (1969) 1 SCA 629.**

5. AIR 1927 All 679 (680) : 50 All 22 (DB)

[**See also** 1977 WLN (U C) 317 (319) (Raj) (Proceedings for determination of ceiling area) ** AIR 1968 Orissa 36 (37) 1968 Cri LJ 336 33 Cut LT 974 (Principle under the section applies to proceeding before Revenue or a Rent Court) ** AIR 1948 Nag 283 (284) ILR (1948) Nag 324 (Proceedings before a Revenue Court may also operate as *lis pendens* – Even if S 52 does not apply *proprio vigore* principle underlying it must apply — Case under C P Tenancy Act)]

6. (1884) 8 Bom 571 (574)

7. (1896) 19 Mad 257 (262) (DB). (Suit in the Court at Singapore)

8. AIR 1953 Trav-Co 573 (574) ** AIR 1938 Bom 121 (125) ILR (1937) Bom 895 (DB)

[**See also** AIR 1957 Mad 214 (216) (Section 52 expressly limits the operation of the doctrine of *lis pendens* to suits in respect of immovable properties situated within India and not in territories outside India)]

9. (1869) 11 Suth WR 554 (555) (DB).

10. AIR 1931 Cal 763 (767) : 58 Cal 598 (DB).

11. (1910) 5 Ind Cas 691 (692) (DB) (Cal).

12. AIR 1998 Raj 42 (48).

Also see Note 10

10. Pendency of suit when commences.

The explanation to the section makes it clear that a suit *commences* from the date of the presentation of the plaint in a Court of competent jurisdiction. This is in accordance with the provisions of O. 4, R. 1 of the Code of Civil Procedure. The doctrine of *lis pendens* therefore, applies to all alienations made from the date of the presentation of the plaint itself (1). Accordingly, the doctrine of 'lis pendens' has been held to be applicable to transfers made between the date of the presentation of the plaint and the date of the service of summons (2).

It is necessary that the plaint should be presented to the *competent* Court, i.e., competent to try the suit. Where the Court is not competent to try the suit and consequently returns the plaint presented to it for presentation to the proper Court and the plaint is subsequently represented to the competent Court, the suit will be deemed to commence only from the date of such subsequent representation (3). The observations in the undermentioned cases(4) that the doctrine of *lis pendens* would apply even where the suit is presented in a wrong Court, must be deemed to be overruled by the explanation (5). A plaint presented to a Court of a *higher grade* must be taken to be presented to a competent Court, though, by virtue of S. 15 of the Code of Civil Procedure, the suit should be instituted in the Court of the lower grade competent to try it (6). Consequently, the suit must be deemed to be pending from the date of the presentation of the plaint to the Court of the higher grade, though the plaint is returned by that Court and is subsequently represented in the Court of the lower grade.

Where a plaint is *rejected* for insufficient stamp and is again presented after making good the deficiency, the suit cannot be deemed to be pending from the date of the original presentation (7). But where the Court instead of rejecting the plaint for insufficiency of stamp, receives the plaint and grants time to make good the deficiency, the suit must be deemed to be pending from the date when it is first received (8). So also where a suit is dismissed for default and is *restored*, it must be

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Section 52 — Note 10

1. **AIR 1956 SC 593 (597) : ILR (1956) Mys 152.** (Pauper suit for maintenance and for creation of charge on specified property — Lis commences on the date of plaint and not on the date of decree which creates charge. ** AIR 1961 Pun 299 (30). — Rule of computation contained in explanation applies in Punjab.) ** AIR 1958 All 24 (25) (DB). (Mortgage suit.) ** AIR 1957 Pat 729 (731). 36 Pat 1139 (DB). (The lis commences on the date of the plaint and not on the date of the decree.)
2. **AIR 1945 Mad 219 (221).**

   [See also AIR 1948 PC 147 (149). ILR 1949 1 Cal 234. (Transfer effected next day after institution of suit. — Nothing to show that transferor was aware of institution of suit. — Section held to apply to transfer.)]
3. AIR 1957 Ker 10 (13). ILR (1957) Ker 5 (DB). ** AIR 1940 Nag 185 (186). ILR (1941) Nag 652 ** AIR 1933 Sind 117 (118) (DB).
4. AIR 1927 Rang 145 (148). 5 Rang 601 (DB). ** (1910) 5 Ind Cas 691 (692) (DB) (Cal).
5. See AIR 1957 Ker 10 (13). ILR (1957) Ker 5 (DB). (AIR 1927 Rang 145 **Held not good law** after amendment in 1929.) ** AIR 1933 Sind 117 (118) (DB). (AIR 1927 Rang 145 **No longer good law.**)
6. **(1910) 5 Ind Cas 691 (692) (DB) (Cal).**

   Also see Note 9.
7. **AIR 1920 Cal 675 (676) (DB).**
8. AIR 1943 Bom 27 (30). (Suit for specific performance of contract of sale. — Plaint presented on 2nd September 1937 with deficit Court fee. — Deficit fee paid with leave of Court on 28th September 1936. — Attachment before judgment by a third creditor of property on 22nd September 1936. — **Held,** principle of lis pendens is applicable to the attachment.)

deemed to be pending from the date of the original presentation.(9) In the undermentioned case(10) where a transfer was made after the application for restoration and before the order was passed on it restoring the suit, it was, however, held that the order had the effect of restoring the suit from the date of the *application for restoration*.

A suit instituted in *forma pauperis* commences from the date when the application for leave to sue as a pauper is made and not when the same is registered as a suit.(11)

11. Pendency of suit, how long continues.

Under the section as it stood prior to the amendment of 1929, there was a difference of opinion as to how long the pendency of a suit continued. On the one hand, it was held that the general rule was that the *lis pendens* ended with the decree(1) except in suits in which the decree was the inception of further subsequent proceedings, e g., administration suits, suits for account and suits of a similar nature (2) It was, however, held that the taking of *execution* proceedings *revived* the *lis pendens* and while transfers made after decree and before the taking of execution proceedings were not subject to *lis pendens*,(3) transfers made during the pendency of execution proceedings were affected by the doctrine (4) On the other hand, it was held that the *lis pendens* continued until the decree was fully executed(5) and consequently that a transfer made after the decree but before execution was taken out was affected by *lis pendens* (6) An *appeal* was held to be a continuation of the suit(7) so as to make a transfer, made pending the suit or appeal(8) or after the

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9. See the AIR Commentaries on the Code of Civil Procedure (1908) 10th (1985) Edn O 9 R 9, Note 1. ** AIR 1959 Bom 475 (477) : ILR (1959) Bom 94

10. AIR 1919 Cal 40 (42) (DB).

11. (1961) 65 Cal WN 701 (705) (DB) ** (1953) 32 Pat 903 (916) AIR 1955 NUC (Pat) 231 ** AIR 1939 Mad 275 (275) ** AIR 1936 Mad 853 (854, 855) ** (1898) 30 A., 95 (102 103) (DB).

Section 52 — Note 11

1. AIR 1925 Cal 23 (25) (DB) (In order to constitute *lis pendentia* there must be a continuance of *litis contestatey* and, therefore, if the suit is ended by decree there is no longer any *lis pendens*.) ** (1898) 22 Bom 939 (942, 943) (DB).

   [See also (1873) 20 Suth WR 204 (205) (DB) (Case before T P Act — Per Glover J)]

2. AIR 1931 Mad 120 (122) (Maintenance decree Transfer in this case was made before the amendment) ** (1898) 22 Bom 939 (942, 943) (DB) ** (1911) 39 Cal 220 (225) (DB). (Suit for possession and mesne profits.)

3. (1913) 37 Bom 621 (625, 629) (DB).

4. (1898) 22 Bom 939 (942, 943) (DB) ** (1876) 1 Cal 337 (344) (DB) ** 1898 Bom PJ 38 (DB).

   [See also (1913) 37 Bom 621 (625) (DB).]

5. AIR 1944 PC 96 (99) : 24 Pat 89. (A mortgage executed after a mortgage decree and in the course of execution proceedings of the decree is subject to lis pendens) ** AIR 1927 Oudh 261 (263) 2 Luck 496 (DB) ** (1909) 3 Ind Cas 696 (699 700) (DB) (Cal)

6. AIR 1945 Mad 350 (350) ** AIR 1934 Mad 353 (355) (DB) ** AIR 1931 Mad 120 (122) (Transfer before the amendment of the Act) ** AIR 1918 Nag 221 (224) 14 Nag LR 176

7. AIR 1929 Bom 262 (264) 53 Bom 453 (DB) (3 Bom 214, Followed)

8. (1901) 23 All 60 (63) (DB) (Transfer made pending appeal though at the instance of Court Doctrine applied) ** (1888) 15 Cal 94 (99) (DB) (Transfer pending suit is subject to result to appeal.) ** (1885) 9 Mad 130 (132) (DB) (Purchase pendente lite) ** (1884) 6 All 506 (509) (DB) (Do) ** (1912) 13 Ind Cas 641 (641) (All) (Pending appeal mortgage was executed.)

decree and before the appeal was filed,**(9)** subject to the result of the appeal

The present explanation introduced in 1929 gives effect to the second of the two conflicting views expressed above**(10)** and provides that the pendency of a suit continues until the suit is disposed of by a final decree and until such decree is fully executed or becomes barred by limitation.**(11)** A transfer made—

(1) during the pendency of execution proceedings,**(12)** or of an appeal from the decree,**(13)** or

(2) between the date of the decree and the date of the execution application or

(3) between the date of the decree and the date of filing the appeal,**(14)** or

(4) between the date of the death of the original defendant and the expiry of the time pre-

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[**See also** (1884) 7 Mad 96 (99) (DB) (Pending appeal — Case before the Act of

9. AIR 1915 Mad 495 (498) (38 Mad 535 (DB)) ** (1908) 31 Mad 268 (270) (DB) (Transfer after decree but before appeal is affected.) ** (1908) 28 Cal 23 (27) (DB) ** (1888) 1 CPLR 19 (22)

[**See also** (1873) 20 Suth WR 204 (206) (DB) (Case before T P Act — Per Mitter J.)

10. AIR 1945 Mad (350) (350) ** AIR (1934 Mad 353 (355) (DB) (The explanation seems to embody the Madras view that the lis in a mortgage suit continues until the actual sale in execution of the decree.) ** AIR 1931 Mad 120 (122)

11. AIR 1959 Ker 67 (71) (ILR (1958) Ker 1266 (FB) ** AIR 1951 All 141 (153) (ILR (1953) 1 All 284 (FB) ** AIR 1981 All 235 (1981 All LJ 769) (1981) 7 All LR 301 (FB) ** AIR 1994 All 167 (168) (1994 All LJ 663) (1993 (2) All RC 383) ** ILR (1968) 1 Ker 281 ** AIR 1968 Pat 238 (244) (Suit or proceeding) ** AIR (1958 All 24 (25) (DB) ** AIR 1929 Mad 197 (197) (DB) (A mortgage suit does not finally come to an end with the passing of a preliminary decree.) ** AIR 1945 Mad 350 (350) ** AIR 1930 Oudh 362 (364) (DB) (The section applies to transfers made during the pendency of execution proceedings also.)

[**See also** AIR 1953 Mad 71 (72) (DB) ** AIR 1941 Pat 577 (580), 20 Pat 346 (SB). (Lis pendens extends right to the conclusion of the litigation including the appellate stages and the execution proceedings.)]

12. (1953) 32 Pat 903 (906) (AIR (1955 NUC (Pat) 231) ** AIR 1975 SC 1810 (1813, 1814) : 1975 UJ (SC) 631. (Property attached in execution of decree against owner of property — Lease of property during attachment is hit by doctrine of lis pendens and also by provisions of S. 64 C.P.C.) ** 1977 Pun LJ 352 (353) (DB) ** AIR 1949 Pat 304 (307) (27 Pat 1132 (DB) ** AIR 1937 Oudh 127 (129) (DB)

[**See also** ILR (1977) Cut 516 (522) (Private purchasers purchased the property under attachment during execution proceedings — Transfer is void ab initio under S. 64 C.P.C. as well as under S. 52, T.P. Act.)]

13. AIR 1966 Orissa 98 (102) (DB) ** AIR 1959 Ker 67 (71) : ILR (1958) Ker 1266 (FB) ** 1969 Raj LW 557 ** AIR 1963 Guj 30 (32) (Proceeding under O. 33 R. 1 C.P.C. — Question of sufficient means — Property subject matter of previous suit or of appeal from which suit pending — Property cannot be taken into account ** (1955) 55 Mys HCR 174 (179) (DB) ** AIR 1932 All 3 (1) (2) (3) (DB) (In a mortgage suit lis continues at least till the passing of a final decree.)

[**See also** AIR 1967 SC 1793 (1968) 1 SCJ 257 (Suit by adopted son of R against first widow of R for declaration of title and possession of suit lands — Suit decreed in favour of adopted son in 1951 — In 1952 widow leased lands — Appeal preferred by widow from decree passed against her dismissed in 1954 — Held after passing of decree she could not create any right in favour of anybody.)]

14. ILR (1964) 14 Raj 1120 (1121) ** AIR 1959 Bom 475 (477) (ILR (1959) Bom 94

scribed for bringing his legal representative on record.(15) or

(5) during the continuance in force of a charge created by a decree for maintenance (16) would, under the present explanation, be clearly affected by the *lis pendens*

The Madras High Court has held that even in the case of a declaratory charge decree the *lis* continues until the possibility of enforcing the charge by a separate suit remains (17) But the Allahabad High Court is of the view that in the case of declaratory decree not admitting of execution proceedings being taken by *lis* ends with the passing of the decree (18)

It was held in a case before the amendment that a cross-objection under O 41, R 22 is not an appeal and is not a continuation of the suit for the purpose of *lis pendens* (19) It is doubtful whether this view is correct in view of the explanation It was also observed in a case(20) before the amendment that an application for *review* or *revision* cannot be said to be a continuation of the suit so as to attract the operation of the doctrine of *lis pendens*.

But in the undermentioned case(21) it has been held that a transfer pending revision against an order in consolidation proceeding is hit by doctrine of *lis pendens* provided the proceedings are not illusive or fraudulent See also the undermentioned cases(22) taking the view that the expression "final decree or order means, decree or order, of ultimate Court of appeal or revision as the case may be."

Where the security bond was executed in favour of the Court by which a party undertook to pay the amount of ultimately found liable to pay the same and the reference to L P appeal was only for the proper investigation of the case Then it could not be contended that the security bond was given only for purpose of the L P appeal and became unenforceable on the dismissal of the same 'The security bond was enforceable when the decree of the trial Court was restored by the Supreme Court in appeal against the L P appeal In view of the specific undertaking not to alienate The suit property during the pendency of litigation of the doctrine of lis pendens was applicable to alienation made in favour of the petitioner In the circumstances the effect of such alienation, during the pendency of litigation would be that decree-holder can enforce the security bond to the extent of the amongst secured thereunder by the sale of the properties specified therein (23)

The remedy under Art 136 of the Constitution is an extraordinary remedy and is not in ordinary line of appeal By grant of leave, proceedings cannot be said to become pending and are in continuation of original suit.(24)

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15. AIR 1945 Mad 219 (221).

16. (1958) 62 Cal WN 288 (290) (Transfer after preliminary decree declaring charge but before final decree ; ** AIR 1951 Orissa 306 (310) ILR (1949) 1 Cal 336 (DB) ** AIR 1945 Mad 350 (351)

    Also see Notes 6a and 20

17. AIR 1950 Mad 396 (396)

18. **AIR 1951 All 141 (153) : ILR (1953) 1 All 284 (FB).**

    [See also AIR 1957 All 575 (582) (DB) (Where a decree declares an annual allowance to be a charge on the property but does not direct the sale of the property in enforcement of the claim, the transferees will not be subject to the doctrine of lis pendens)]

19. AIR 1917 Lah 13 (14) (DB).

20. (1911) 12 Ind Cas 849 (850) (Low Bur.)

21. 1971 All LJ 578 : 1971 All WR (HC) 108 (DB)

22. 1971 All LJ 578 : 1971 All WR (HC) 108 (DB)

23. (1984) 2 Andh WR 328 (332, 333)

24. AIR 1971 Punj 244 (246)

However, in a later decision of the same High Court it was held that the proceedings in a civil appeal before the Supreme Court in pursuance of grant of special leave under Art. 136 of the Constitution is a continuation of the proceedings in the original suit and the principle of lis pendens as well as restitution shall apply to the proceedings **(25)**

As to the retrospective effect of the amendment of the section in 1929 See Note 8

12. Pendency of proceeding when commences and how long it continues.

The words *suit or proceeding* show that the word *proceeding* is something different from *suit* In the Code of Civil Procedure the word *proceeding* has been construed as referring to all proceedings of an *original* nature such as guardianship and probate proceedings **(1)** It is conceived that the same meaning will apply to the word *proceeding* as used in this section Thus an application under O 21, R 58, or under O 21 R 100 of the Code of Civil Procedure**(2)** is a proceeding which will operate as *lis pendens* on transfers made during the pendency thereof So also an application to file an award in Court.**(3)**

The proceedings under Displaced Persons (Compensation and Rehabilitation) Act 1954 are also ordered by this section and therefore transfer of property during pendency of such proceedings is hit by doctrine of lis pendens.**(4)**

The proceeding will commence on the making of an application or petition in a Court of competent jurisdiction and will continue till a final *order* is passed in it and complete satisfaction or discharge of such order has been obtained The same principles as stated in Note 10 regarding the return, representation etc of a plaint will apply to a proceeding also

A claim *suit* under the provisions of O 21 R 63 Civil PC now repealed must be regarded as a continuation of the claim proceedings or as a proceeding by way of appeal against the claim order and the claim proceedings must be deemed to continue until the claim suit is finally disposed of consequently a transfer executed between the date of the claim order and the claim suit will be affected by *lis pendens.(5)*

In the undermentioned case**(6)** it was observed that the claim order was not a *final* order within the meaning of this section until either a suit to contest the order is finally decided or the period of limitation has expired

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25. AIR 1996 Punj & Har 158 (159) : 1996 (113) Pun LR 138

Section 52 — Note 12

1. See S 141 of the Civil Procedure Code and the AIR Commentaries thereon 10th 1985 Edn

2. AIR 1935 Oudh 462 (464) 11 Luck 283 (DB) (Application under O 21 R 100) ** (1967) 1 Mad LJ 260 (DB) (Final decree in mortgage suit — Dismissal of application under Order 21 Rule 90 followed by confirmation of sale — Restoration of application in appeal — Confirmation of sale is vacated — Auction purchaser selling away property in the meantime — Such purchaser can be required to surrender possession under Order 34 Rule 5, doctrine of lis pendens being applicable)

   [But see AIR 1947 Mad 458 (460) ILR (1948) Mad 4 5 Section 52 has no application to a petition under O. 21. R 100, Civil P C)]

3. AIR 1946 Bom 207 (210) ILR (1945) Bom 885 (DB) Application to file award fixing charge for maintenance is on same footing as plaint in ordinary maintenance suit in which charge is claimed.) ** 1892 Bom PJ 5 (6) (DB)

4. AIR 1980 (NOC) 153 : 1980 Land LR 228 (Punj)

5. (1957) 1 Andh WR 285 (288 ** AIR 1951 Nag 194 (197) ILR (1951) Nag 24 ** AIR 1949 Oudh 178 (179) 14 Luck 543 ** AIR 1937 Rang 473 (474 ** AIR 1925 Nag 82 (85) : 22 Nag LR 67 ** AIR 1915 Mad 495 (498) · 38 Mad 535 (DB)

6. AIR 1940 Lah 497 (498)

In *The Official Assignee of Madras v Ramchandra Aiyar*(7) Ramesam, J., doubted if the pendency of an insolvency petition, by reason of which there is an undischarged insolvent and his properties are vested in the Official Assignee so that they may be utilised for paying off the creditors, can be regarded as a pending litigation for the purpose of applying the doctrine of *lis pendens*

Amendment proceedings — An application for amendment is similar to the plaint Amendment proceedings commence from the date of the presentation of the amendment application and not from the date when the amendment is ordered The delay caused by the Court in ordering the application ought not to prejudice the parties Thus, where in a suit for maintenance claiming a charge on property X an application for amendment seeking to include property Y is made, an alienation of property Y made subsequent to the date of the application but prior to the date on which the amendment is ordered, will be affected by the doctrine of *lis pendens* (8)

13. "Which is not collusive."

The section used the words *a contentious suit* before it was amended in 1929 This gave rise to a conflict of opinions as to what exactly was meant by the word *contentious* Prior to the decision of the Privy Council in *Faiyab Husain v Prag Narain*(1) the following views had been expressed

(1) A suit becomes contentious *only when*—

(i) *the summons is served on the defendant;*(2)

(ii) the *written statement is filed;*(3)

(iii) *issues are framed in the case;*(4)

(2) a suit is not contentious if it ends in a *consent* decree(5) or in an *ex parte* decree.(6)

(3) the word *contentious* is used in the sense which it has in probate practice and means the opposite of common form or voluntary business;(7)

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7. **AIR 1928 Mad 735 (741) : 51 Mad 417 (FB).**

8. AIR 1945 Mad 219 (220) (Fact tht transferor did not know that property Y was included until the amendment was ordered is of no consequence.)

[**See also** AIR 1982 NOC 81 1982 Pun LJ 57 (59) (Suit for maintenance or in alternative for possession of one-half of property of deceased husband — Sale of suit property — Plaint amended and claim in lieu of maintenance substituted by one for possession of one-half share of property as heir — Amendment related back to date of original suit — Sale of suit property was hit by doctrine of lis pendens whether by virtue of original plaint or by virtue of amendment)]

Section 52 — Note 13

1. **(1907) 29 All 339 (345) : 10 Oudh Cas 314 (PC).** (Suit contentious in its origin and nature is also contentious within the meaning of this section though a summons is not served on the opposite party.)

2. (1898) 1 Oudh Cas 280 (283) ** (1899) 21 All 408 (409) (DB) ** 1891 Pun Re No 30, p 171 (178) (DB) (Doctrine will not apply to a case of sale made after an appeal was filed and before notice of the appeal) ** (1888) 15 Cal 647 (651) (DB) ** (1888) 12 Mad 180 (182) (DB)

3. (1904) 31 Cal 658 (662) (DB).

4. 1899 Pun Re No. 32, p. 161 (165) (DB)

5. **See** (1903) 6 Oudh Cas 294 (298) (Decree in suit going in appeal - Appeal struck off on request of the appellant who was not desirous of prosecuting it **Held** suit was not continuous)

6. (1904) 31 Cal 745 (753) (DB).

7. **(1906) 26 Mad 426 (430) (FB).** (12 Mad 439, **Overruled.**)

(4) a suit would become contentious even if *one* of several defendants was not served with the summons;(8)

(5) if a suit is subsequently contested it becomes a contested suit from the beginning;(9)

(6) a contentious suit means a real and not collusive suit (10)

In *Faiyaz Husain's case*(11) referred to above their Lordships of the Privy Council overruled the view that a suit cannot be contentious until the summons was served on the defendants. After the decision in *Faiyaz Husain's case*(12) the following views were expressed

(1) a suit cannot be said to be not *contentious* on the ground that the summons was not served on the defendant;(13)

(2) a suit cannot be said to be not contentious by reason of the fact that it ends in a compromise decree,(14) or in an *ex parte decree*;(15)

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8. (1906) 28 All 196 (198, 199) (DB) (It cannot be held that a suit can be regarded as contentious as against some of the defendants and not contentious as against the others.)

9. (1899) 27 Cal 77 (84) (DB).

   [See also (1904) 31 Cal 745 (752) (DB).]

10. (1907) 31 Bom 393 (404) (DB)

11. (1907) 29 All 339 (345) : 10 Oudh Cas 314 (PC).

12. (1907) 29 All 339 (345) : 10 Oudh Cas 314 (PC).

13. AIR 1915 Nag 89 (91) : 11 Nag L R 21 (Lease granted during the pendency of a contentious partition proceeding.) ** AIR 1919 Lah 427 (427) (DB) (Re-sale by a non-proprietor to a proprietor taking place after the institution of the suit.) ** (1908) 30 All 95 (102, 103) (DB) (Suit in forma pauperis — It is begun as soon as application to sue in forma pauperis is filed.) ** (1908) 30 All 467 (DB) (After the filing of a suit for pre-emption but before service of summons on the defendants, the defendant vendee sold the property claimed to a second vendee.)

14. (1906) 29 Mad 426 (429, 430) (FB) ** 1930 Mad WN 572 (576) (Case decided before the amendment came into force.) ** AIR 1930 All 354 (355) (DB) (Suit for pre-emption — Suit contentious at its inception.) ** AIR 1928 Oudh 146 (148) (DB) (Lease during pendency of suit — Suit by successful claimant to avoid lease and eject lessee.) ** AIR 1925 Pat 462 (464) : 4 Pat 6, 9 (DB) (The fact that the compromise was the result of inducement in money makes no difference.) ** AIR 1924 Mad 359 (360) (DB) (A sale of property pending a mortgage suit relating to the same is affected by the doctrine of lis pendens. The fact that the suit was finally compromised does not make it non-contentious.) ** AIR 1923 Cal 252 (256) (DB) ** AIR 1922 Cal 358 (361) : 49 Cal 220 (DB) ** AIR 1919 Pat 146 (154) : 4 Pat LJ 580 (DB) (But a compromise should not be a collusive one in order to defraud the purchaser.) ** (1913) 18 Ind Cas 177 (181) (DB) (Cal) (Suit to enforce simple mortgage, ending in compromise.) ** (1910) 13 Oudh Cas 98 (100) (DB) ** (1910) 6 Nag LR 140 (142) (A suit to enforce a mortgage lien on immovable property.) ** (1909) 3 Ind Cas 696 (699) (DB) (Cal) (Suit for specific performance — The doctrine of lis pendens applies notwithstanding that the conveyance had not been executed and that the vendee had not paid the purchase money.) ** (1908) 8 Cal LJ 153 (156) (DB) (A suit for sale on a mortgage praying relief against the mortgagors.)

15. AIR 1930 All 354 (355) (DB) ** AIR 1920 All 246 (247) : 42 All 319 (DB) ** (1909) 3 Ind Cas 791 (792) (DB) (Cal) (In this case after the passing of an ex parte preliminary mortgage decree but before that decree was made absolute the mortgagor sold his interest in the property.) ** (1908) 8 Cal LJ 153 (156) (DB) ** (1911) 11 Ind Cas 464 (465) (DB) (Cal) (A purchase of the mortgaged property by the mortgagee in execution of an ex parte mortgage decree, has priority over a previous purchase by an execution creditor in execution of a money decree obtained against the mortgagor during the pendency of the mortgage suit.)

(3) a contentious suit is one other than a collusive or friendly suit brought by agreement of parties;**(16)**

(4) the section becomes operative from the very moment of the institution of a *bona fide* suit which is not collusive.**(17)**

The removal of the words "contentious suit" and the substitution of the words *which is not collusive* clearly express the law as laid down by their Lordships of the Privy Council in *Faiyaz Husain's case***(18)** and by the various High Courts subsequent to *Faiyaz Husain's case* **(19)** It is now clear that the fact of suing in itself initiates a contest and starts the *lis* **(20)** The mere fact that the suit ended in a compromise decree,**(21)** or in an *ex parte* decree **(22)** or that the defendant admits the plaintiffs claim**(23)** does not render the suit a non contentious or collusive one

A *collusive* suit is not a real suit at all**(24)** and the doctrine of *lis pendens* does not apply to such suits **(25)** The doctrine of lispendens does not apply where suit at its inception was collusive

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16. AIR 1930 All 354 (355) (DB) ** (1930) Mad WN 572 (577, Even real suit is contentious — Case before the amendment.) ** AIR 1922 Cal 358 (361) 49 Cal 220 (DB) ** AIR 1915 Mad 884 (884) 38 Mad 450 (DB) (31 Cal 658 and 745, **Held** to be erroneous.) ** (1899) 27 Cal 77 (92) (DB) (Transfer of an undivided share after the institution of a partition suit.)

[**But see** (1907) 31 Bom 393 (398) (DB) (Friendly suits may be contentious.)]

17. AIR 1929 All 943 (945) : 52 All 139 (DB)

18. **(1907) 29 All 339 (345) : 10 Oudh Cas 314 (PC).**

19. **(1907) 29 All 339 (345) : 10 Oudh Cas 314 (PC).**

20. AIR 1940 Nag 8 (13) (DB) (Essence of doctrine is that the property in question should form a subject-matter of a dispute.)

21. (1953) 32 Pat 903 (917) AIR 1955 NUC (Pat) 23, ** AIR 1963 NOC 172 (All) (1983) 9 All LR 269 (Section 52 applies to transfers effected during pendency of a contentious suit or proceedings even when such a suit or proceeding is subsequently compromised. If a decree is passed in pursuance of such compromise not tainted by fraud or collusion, Section 52 is not attracted. A judgment entertained into by consent of parties in a cause in which the Court has jurisdiction of the subject-matter and of the parties is no less efficacious than if entered after a trial of suit by contempt.) ** AIR 1951 Nag 194 (196) ILR (195.) Nag 241 ** (1950) 55 Mys HCR 174 (179) ** AIR 1949 Bom 367 (372) ILR (1949) Bom 480 (DB) ** AIR 1934 Pat 270 (271)

[**See also AIR 1948 PC 147 (149) : ILR (1949) 1 Cal 234.** (Section applies to compromise decree.)]

22. AIR 1949 Bom 367 (372) IL (1949) Bom 480 (DB) ** AIR 1971 Mad 371 (374, 375) : (1971) 1 Mad LJ 65

23. AIR 1963 Nag 400 (402) : ILR (1937) Nag 452

[**See also** 1980 MPLJ 805 (The provisions of S. 52 were not meant for enabling a party who had no right, title or interest to snatch away the property from the hands of a purchaser pendente lite on the basis of an admission made by the co-defendant transferor subsequent to the date of transfer stating that he had no right, title or interest and that the plaintiff was the owner.)]

24. AIR 1963 Mad 300 (301) ILR (1963) Mad 59 (DB) ** (1907) 31 Bom 393 (398) (DB) ** (1882) 6 Bom 703 (711, 712)

25. (1958) 71 Mad LW 391 (398) * 1984 Rev LR 169 (171) 1984 Cur LJ (Civ & Cri) 170 (Pun) ** AIR 1954 Mys 26 (29) (1953) Mys 332 * AIR 1946 Oudh 99 (101) 21 Luck 185 (DB) * AIR 1935 Pat 230 (230) * (1913) 16 Oudh Cas 225 (231) (DB)

or decree therein was obtained in collusion **(26)** There is a fundamental distinction between a proceeding which is collusive and one which is fraudulent In the former, the claim is fictitious the contest is unreal and the decree is a mere mask In the latter the claim is untrue but the claimant obtains in his favour the verdict of the Court by practising fraud on the Court While in collusive proceedings the combat is sham in a fraudulent suit it is real and earnest **(27)** Whether the suit or the proceedings which resulted in the decree and the sale in execution thereof are collusive is essentially a question of fact **(28)** The collusion need not be at the inception but might well develop during pendency of the proceedings **(29)** When a compromise is effected into by a party to the suit with the opposite party subsequent to the transfer of his interest in favour of a stranger with a view to defraud that stranger transferee the decree passed on such a compromise is said to be obtained in a collusive manner, and the principle of *lis pendens* will not apply to such a case **(30)**

A *friendly* suit brought to obtain a declaration of the rights of parties cannot be said to be *collusive* within the meaning of the section **(31)** The conflict of opinion that had been expressed before the amendment as to whether a *friendly* suit was a *collusive* suit or not **(32)** is now merely of any importance But though a collusive suit does not operate as *lis pendens* a decree passed therein may be binding on the actual parties to the suit.**(33)**

An abandoned suit is very much like a collusive one and the dismissal of a suit brought about by the abandonment by the plaintiff will not operate to affect the title secured by a purchaser *pendente lite*.**(34)**

14. Right to immovable property must be directly and specifically in question.

The section applies only to suits or proceedings in which any right to immovable property is directly and specifically in question **(1)** The suits in which no right to immovable property are

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26. AIR 2002 Kant 96 (100) : 2000 (6) Kant LJ 545

27. AIR 1956 SC 593 (599) Mys 152 ** (1975 [illegible] WR 764 (DB) (Merely because the parties to suit belong to the same caste [illegible] even assuming they [illegible] collusion [illegible] not be inferred)

28. AIR 1956 SC 593 (598) ILR (1956) Mys 152 ** (1971 [illegible] Mys LJ 176 (DB) [illegible] cannot be inferred on the sole evidence that the defendants remained absent when the appeal was heard)

29. (1958) 71 Mad LW 39, 39S (If there is [illegible] apply.) ** AIR 1955 Trav-Co 3 (5) ILR (1954) Trav-Co 794 (DB) (A suit may be collusive in its very inception or a decree may be obtained by collusion in a suit which was honestly begun) 7 Trav LR 42 18 Trav LJ 478 [illegible] 18 Trav LJ 65N [illegible] (Diss from.)

30. 1984 Rev LR 169 (172) : 1984 Cur LJ (Civ & Cri) 170 (Punj)

31. (1907) 31 Bom 393 (398) (DB)

32. See cases cited in foot note (1) to the effect that a friendly suit is not collusive

33. (1887) 11 Bom 708 (713) (DB)

34. AIR 1963 Mad 300 (301) : ILR (1963) Mad 592 (DB)

Section 52 — Note 14

1. AIR 1963 Pat 319 (320) (Suit for declaration that defendant was not adopted by plaintiff's husband - During pendency of suit certain properties transferred by plaintiff - Compromise decree — **Held** scope of title suit could not be enlarged by compromise decree and suit with respect to properties - Doctrine of lis pendens not applicable [illegible] 1951, Kant 186 (191) ** AIR 1975 Andh Pra 217 (1974) 2 APLJ 325 (Claim to mesne profits) 1975 MCC 186 (Delhi) ** AIR 1957 Andh Pra 454 (456) ILR (1956) Andh Pra 132 (DB) (The property to which the doctrine of lis pendens applies is property which is the subject matter of the suit) ** AIR 1957 Pat 729 (731) 36 Pat LJ 39 (DB) [illegible] 55 M HCR 174 (195) (DB)

involved are outside the scope of S 52 (2) The question whether a right to immovable property is directly and specifically in question is not one of mere form It is really a question of substance of the litigation and if the property transferred is not actually in litigation the section will not apply even though the plaint prima facie includes it (3) Suits or proceedings for *personal* reliefs against the defendants are outside this section Thus a proceeding under O 34, R 6 of the Code of Civil Procedue(4) or a suit for rent(5) or eviction of tenant(6) or a simple suit for money(7) does not operate as *lis pendens* The mere fact that in such a suit an 'injunction' is granted against the defendant from alienating his property(8) or an *attachment* is made of his properties(9) does not make the suit one, in which a right to such property is directly and specifically in question In

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[See also AIR 1957 Pat 408 (413) (DB) (Section 52 prohibits alienation, or any transaction in respect of immovable property forming the subject-matter of a suit or proceeding)]

2. 1996 (1) BLJR 633 (635).

3. AIR 1957 Pat 408 (413) (DB) (Where by virtue of the lease of a part of the mortgaged property, such property is free from encumbrance and consequently it is not in controversy at all in the proceedings for the mortgage award to the knowledge of both the mortgagor and the mortgagee the inclusion of the property in the application for award does not alter the position) ** (1950) 55 Mys HCR 174 (195) (DB) (It is not enough if the property is specified without the right to it being directly in issue.)

   [See 1976 Pun LJ 183 (186) (AIR 1928 Nag 198 AIR 1941 Cal 436 Rel on)]

4. AIR 1930 Oudh 93 (95) 51 Luck 625 (DB) (Simple money decree) ** AIR 1975 Ker 155 (157)

5. AIR 1952 Pat 9 (11) 30 Pat 317 (To make lis pendens act as notice to purchaser suit must relate specifically to estate and not to money secured on it) ** AIR 1949 Nag 114 (115) ILR (1948) Nag 573 (Suit for rent of holding — Sale of holding during pendency of execution proceedings in suit is not hit by lis pendens) ** AIR 1928 Cal 441 (442 443) 53 Cal 701 (DB) (Lis pendens to be a notice to a purchaser suit must relate specifically to the estate and not to money secured on it) ** AIR 1926 Cal 191 (192) (DB) (Proceedings under Bengal Tenancy Act) ** AIR 1936 Cal 279 (281) 63 Cal 1117 (Do)

6. 1996 (1) BLJR 633 (635) (A landlord filed a suit for eviction against a tenant and during its pendency sold the premises The new owner thereafter filed suit for eviction against the tenant In a suit for eviction no right or title of the tenant in the property is invoked and therefore the principle of lis pendens is inapplicable Court's permission was not necessary for the landlord for selling the premises)

7. AIR 1959 Andh Pra 280 (286) (DB) (Decree for mesne profits is nothing more than a simple decre for money) ** AIR 1957 Pat 408 (414) (DB) ** AIR 1940 Oudh 104 (105) (Dower suit — Decre does not create charge on property in hands of heirs of the deceased Muhammadan — Section 52 does not therefore, apply if the heirs mortgage the property in their hands bona fide and for value subsequent to the decree but pending the appeal) ** AIR 1932 Bom 301 (302) ** AIR 1931 Oudh 63 (65) (DB) (Claim for dower is simple money claim) ** 1880 Pun Re No 113 p 276 (282) (DB) (Suit for merely a money decree on a mortgage bond.)

8. AIR 1930 All 387 (388, 389)

   [See AIR 1914 Lah 356 (357)

   [See also AIR 1930 Lah 858 (859).]

9. AIR 1950 Bom 278 (285 286) ILR (1950) Bom 114 (DB) ** AIR 1941 Mad 208 (214) (DB) (AIR 1929 All 846 and 6 Ind Cas 40, Followed) ** AIR 1929 All 846 (846, 847) (Attachment operates as a valid prohibition against alienation only from the date of proclamation under O 21, Rule 54) ** AIR 1915 Oudh 157 (158) ** (1910) 6 Ind Cas 40 (42) (DB) (Cal)

Worsley v The Earl of Scarborough(10) where money was secured upon an estate and, in a suit in the Court of Chancery the main question was as to the right to the money and the question relating to the estate on which the money was charged was only *collaterally* and not *directly* in question it was held that the purchaser of the estate pending the suit was not affected by *lis pendens*. A suit against *X* a legal representative of *Y* for recovery of money to be realised from the *assets of Y* in the hands of *X*, is not one in which the right to the property constituting the assets is directly and specifically in question (11) In *Anando Mayee v Dhonendra Chandra*(12) which was a case before the Act, where *X* had attached certain properties in the mofussil before a suit for foreclosure had been instituted in the High Court of Calcutta and purchased the same in execution pending the foreclosure suit their Lordships of the Privy Council held distinguishing the case of *Bishop of Winchester v Paine*(13) that the decree for sale made in the foreclosure suit could not operate as a judgment *in rem* in the mofussil but operated only *in personam* and could not affect the title of persons who were no parties to the suit.

The underlying principle of this section is that no immovable property which is the subject matter of the litigation can be transferred or dealt with by any party to the suit to the detriment of the other party The decree may be for possession or sale of the property or it may only create a charge on the property But whatever the nature of the decree it is binding on the person to whom the property is transferred during the litigation (14) Though a charge is not an interest in immovable property, it amounts to a right to immovable property within the meaning of this section (15) The Calcutta High Court has held that though a decree for arrears of rent creates a first charge on the property it does not render the suit used as one in which a right to immovable property is directly and specifically in issue (16) The Orissa High Court has held that a charge under S [illegible] of the Orissa Tenancy Act is not a charge within the meaning of S 52 of this Act and proceeding for execution of a rent decree is not one in which any right to immovable property is in dispute between the parties until a valid attachment is effected (17) The Patna High Court [illegible] that a charge referred to in S 65 of the Bihar Tenancy Act is not a charge within the meaning of S 52 of this Act

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10. (1746) 26 ER 1025 (1026) : 3 Atk 392.

11. (1910) 8 Ind Cas 1208 (1209) (Low Bur) ** 1908 Pun LR No 52 p 129 (135) (DB) ** (1903) 26 All 28 (31, 32) (DB) (**Dissenting from** 19 All 504)

    [**See also** (1882) 9 Cal 406 (409) (DB) ** (1906) 2 Cal LJ 138 (141) (DB)]

12. **(1871) 14 Moo Ind App 101 (109) (PC).**

13. (1805) 32 ER 1062 (1063) : 8 RR 131

14. AIR 1944 Bom 191 (193) ILR (1944) Bom 274 (DB) (The principle of lis pendens in S 52 applies to a suit for maintenance in which it is sought to have certain properties charged for the maintenance and lis applies to those properties if they are charged under the decree If the decree creates a charge, that charge is in all cases binding on the transferee and the question of notice is immaterial.)

15. **AIR 1956 SC 593 (597) . ILR (1956) Mys 152** [illegible] charge on specific properties) ** AIR 1969 Orissa 114 (116) 34 Cut LT 1296 (Charge created by maintenance decree) ** AIR 1966 Madh Pra 318 (323) ** AIR 1959 Bom 475 (477) ILR (1959) Bom 94 (Suit by Hindu wife for maintenance claiming charge on husband's property AIR 1957 Mad 502 **Diss from**) ** **AIR 1951 All 141 (146 151, 153) : ILR (1953) 1 All 284 (FB)** ** AIR 1945 Cal 322 325 (DB) ** AIR 1943 Cal 227 (231) (DB).

    [**But see** AIR 1964 Bom 1 (4) ILR (1963) Bom 509 (DB) ** **AIR 1943 Oudh 354 (360) : 19 Luck 1 (FB).** The essence of the doctrine of lis pendens is to [illegible] property should form the subject matter of the dispute and proceedings [illegible] on immovable property do not imply that a right to immovable property is directly and specifically in question.)]

16. AIR 1951 Cal 221 (224) . ILR (1951) 1 Cal 283 (DB).

17. AIR 1951 Orissa 41 (45) : ILR (1950) Cut 195 (DB)

and a transfer after the rent decree but before execution will not attract the provisions of this section (**18**) Where the genuineness of a deed such as a deed of settlement, is only in question, there is no right to immovable property directly and specifically in question (**19**)

An easement being a right or interest in immovable property S 52 will apply to a case where *A* obtains a decree against *B* for an injunction restraining him from interfering with his right to drain off water through his lands and *C* purchases the property from *B* after the passing of the decree (**20**)

In suit under S 36, Bengal Money-lenders Act (10 of 1940), the right to immovable property is not directly and specifically in question.(**21**)

A suit or proceeding, in which, at its inception, no question as to right to any property is directly or specifically raised, may at a subsequent stage thereof, become a suit or proceeding in which such question is involved Thus, a suit for maintenance in which no charge is asked for against any property is not at its inception, one in which any right to immovable property is in question But if the decree declares a charge on any particular property, the litigation *thereafter* becomes one in which such right is in question and a subsequent transfer of the property will be affected by *lis pendens* (**22**) Similarly, where in a suit for mesne profits, the defendant furnishes security of specific immovable property for any amount that may be decreed in the suit, the litigation becomes, from the date the security is given, one in which a right to immovable property is in question A transfer, therefore, of such property after the date on which it is given as security will be affected by *lis pendens* (**23**) Where a security bond for due performance of decree is executed not by any surety, but by the judgment-debtor himself and is accepted by the Court at a time when the decree is being enforced against his person, it is perfectly competent for the execution Court to enforce the liability that is created under the bond as accepted by Court Persons who have taken the subsequent hypothecation bond from the judgment-debtor are not entitled in law to any notice of the proceedings in execution based on the order on the security bond and the rights acquired by these persons are clearly affected by the rule of *lis pendens* (**24**) So also where, in execution of a simple money decree against *A* as the legal representative of *B* certain properties of *A* were attached and *A objected* to such attachment, it was held in a case, before the Act, that from the moment the objection was raised, the right to the property became the subject-matter of the litigation, and that a subsequent transfer thereof would be affected by *lis pendens* (**25**) In *Bazayet Hossein v Dooli Chand*(**26**) where, in a suit by creditors of a deceased person against his heirs for recovery of money from out of the assets, a *decree* was passed directing the defendants to account for the property, a transferee, who took the property after the decree, was held affected by *lis pendens* A contrary view has, however, been taken by the Nagpur High Court,(**27**) namely that the doctrine of *lis pendens* will not apply unless from the *very beginning* of the suit or proceeding the right to the

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18. AIR 1952 Pat 9 (11) : 30 Pat 317 (DB).

19. AIR 1945 Mad 454 (456)

20. AIR 1955 Andh 199 (200) : ILR (1955) Andhra 257.

21. AIR 1955 NUC 2069 : ILR (1953) 1 Cal 101 (105).

22. AIR 1936 Mad 589 (592) (Essential to constitute lis pendens stated)

[**See also** AIR 1944 Bom 191 (193) (DB) (Decree creating charge for maintenance comes under section.)]

23. AIR 1936 Mad 589 (592)

[**See also** AIR 1953 Trav-Co 364 (366) (DB) (AIR 1936 Mad 580, Rel on)]

24. AIR 1953 Trav-Co 364 (366) (DB).

25. (1873) 19 Suth WR 197 (197) (DB)

26. (1879) 4 Cal 402 (410) (PC).

27. AIR 1940 Nag 8 (13) (DB)

property was in question, and that, where a suit for money a charge is declared by the decree on certain property, a transfer of the property subsequent to the decree, is not affected by *lis pendens*. Their Lordships relied upon the decision of the High Court of Patna in the undermentioned case (**28**). In that case the plaintiff sued for the recovery of money and also claimed that certain properties should be charged for the amount that may be decreed but the Court granted merely a money decree without giving any charge on any property. It was held that a transfer of the property pending the suit was not affected by *lis pendens* for two reasons, *firstly* that the actual decree did not affect in any way the property transferred, and secondly that the suit, even though asking for a charge in the plaint, was not one in which any right to immovable property was in question. It is submitted that the Nagpur view is not correct. Nor is the second reason given by the Patna High Court correct.

A suit which, at its inception, is one in which a right to property is in question may, at a subsequent stage, cease to involve any such question in which case it will cease to operate as *lis pendens*. Thus, where in a mortgage suit for sale of the mortgaged property a money decree was passed against the defendant and subsequent to the decree the defendant transferred the mortgaged property, it was observed by their Lordships of the Privy Council that so long as the decree stood the title of the defendant to the property was not directly and specifically in question (**29**). In such cases, really, the transfer does not affect in any way the rights of the parties under the decree (**30**).

A transfer made *before* the property is brought within the control and jurisdiction of the Court is not affected by *lis pendens*. Thus where the plaintiff sued in respect of property *A and B* and the defendant transferred property *C* while the suit was pending but subsequently the plaintiff got the plaint amended by substituting property *C* for property *B* in the plaint description of property it was held that the amendment did not relate back to the date of the plaint and that the transfer of *C* was not not affected by *lis pendens* (**31**). But the amendment order will relate back to the date of application for amendment hence, a transfer of property *C* in the above illustration after the date of application for amendment, but before it is ordered, will be clearly affected by *lis pendens* (**32**).

The section will apply only where the property transferred is the *same* as the property in litigation. It has been held in some cases (**33**) that in order that the doctrine of *lis pendens* may apply the property in litigation must be described with sufficient precision so that its identity can be ascertained. This view appears to be based on the theory that *lis pendens* operates as *notice* to the alienee and that the description of the property must be sufficiently precise to put him on his guard. It was accordingly held in the undermentioned case (**34**) that an alienee who *knew* that the particular property was in litigation cannot rely upon the fact that the property was misdescribed in the plaint. In the case noted below (**35**) the High Court of Bombay pointed out that the doctrine of *lis pendens* is not based on any theory of notice, and that therefore the knowledge of the alienee as to the identity of the property he is buying, with the property described in the plaint is immaterial but it held that the real question was whether the *parties knew* from the description given in the plaint what pro-

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28. AIR 1936 Pat 571 (572)

29. **(1905) 32 Cal 198 (212, 217) (PC).**

30. AIR 1936 Pat 571 (572)

Also see Note 35.

31. AIR 1962 My 189 (189) ILR (1962) Mys 312 ** AIR 1920 Nag 92 (92, 93) ** AIR 1919 All 320 (321, 322) : 41 All 534 (DB)

32. AIR 1945 Mad 219 (220).

33 AIR 1935 Oudh 49 (51) (DB) ** (1940) 44 Cal WN 783 (784, 785) (What does not will be sufficient in a particular case would depend on the facts of the case [illegible] 85 (86, 87) (Cal).

34. AIR 1921 Cal 730 (741) (DB)

35. AIR 1937 Bom 244 (252, 253) (DB)

perties exactly were included in the litigation. It is submitted that the doctrine of *lis pendens* is based neither upon the theory of notice to the alienee nor upon the fact that the party transferring *know* that the property is included in the litigation. If *as a fact* the property is the subject of litigation, then a transfer thereof will be affected by *lis pendens*. The question of the description of property in the plaint or proceeding is merely relevant in order to find out whether the property transferred is, or is not, included in the litigation.

15. Applicability of doctrine of lis pendens to movable property.

This section does not in terms apply to the transfers of *movable* property *pendente lite*. But does the principle underlying the section apply to such cases? In *Wigram v. Buckley*(1) it was held by the Court of Appeal in England that the doctrine of *lis pendens* does not apply to personal estate other than chattel interests in land. Lindley, L.J. observed :

> "If the doctrine of *lis pendens* were applicable to personal property generally, bankers and others could not safely make advances on ships or goods and that which represents them in commerce for example, bills of lading, dock warrants, wharfingers receipts, nor upon stock and share certificates, not upon debentures or policies, nor even on negotiable securities, without making searches in the Judgment Registry Office. Such a doctrine would paralyse the trade of the country, and there is no warrant for it either in the statutes relating to *lis pendens* or in the decisions of the Courts."

The view taken in *Wigram's case*(2) was followed in this country in the undermentioned cases(3) and it was held that the principle underlying the section had no application to *movable* property. A different view has, however, been taken in some cases. In *Banke Behari Lal v. Raghuni Dayal*(4) Sulaiman, J., expressed the view that the principle of the section would be applicable to movable property. In *Tatari v. Viswanathan*(5) it was observed *obiter* that the principle of the section was applicable to movable property "if the alienee is proved to have had notice of the pending suit" (6). It is submitted that these views are not correct. In the undermentioned case(7) it was held that though S. 52 may not apply in strict sense to moveable property, still the cardinate principle for which it stands cannot be ignored.

16. Only property in litigation cannot be transferred.

The section applies only where the property *in litigation actually* is transferred. It cannot obviously, apply where the property transferred is other than the one in litigation (1).

Section 52 — Note 15

1. (1894) 63 LJ Ch 689 (692, 693) : (1894) 3 Ch 483 (493)
2. (1894) 63 LJ Ch 689 (692, 693) : (1894) 3 Ch 483, Wigram v. Buckley
3. AIR 1962 Ker 309 (312) : ILR (1962) 2 Ker 55 ** AIR 1952 Mad 59 (59, 60) ** (1939) 29 Trav LJ 1252 (1255) (DB) ** AIR 1943 Mad 94 (97) (DB) (36 Bom 189, Followed.) ** (1912) 36 Bom 189 (196) (DB) ** (1901) 25 Bom 406 (422) ** (1896) 9 CPLR 22 (24, 26)

   [See (1901) 23 All 331 (335) (DB) (Assumed that doctrine does not apply to movable property — But mortgage decree held to be immovable property and the doctrine held applied to the transfer of such decree.)]

   [See also AIR 1922 Pat 394 (395, 396) : 1 Pat 5 (DB) (It is more than doubtful if the doctrine of lis pendens is applicable to movable property.)]
4. AIR 1930 All 380 (381, 382) (DB). (Transfer of decree.)
5. AIR 1915 Mad 502 (502) (DB)
6. See also AIR 1934 Mad 40 (43) : 57 Mad 426
7. 2000 (2) Mad LJ 417 (419).

Section 52 — Note 16

1. AIR 1953 Trav-Co 573 (574) (Where the suit is for redemption of the mortgage in favour

There is no general doctrine of law that *nothing* that accrued between the date of the suit and the date of the decree could alter the relations existing between the parties. Where therefore *A* a cosharer in a village sold *his shares* to a stranger, and *B* another cosharer instituted a suit for pre-emption but during the pendency of the suit the stranger obtained by gift from another cosharer *another share* in the village and thus himself became a cosharer, it was held by their Lordships of the Privy Council that *B* lost his right to pre emption (2). This case was decided on a state of law which existed prior to the enactment of the Agra Pre emption Act, XI of 1922, which provided in S 19 that the right of pre-emption must not only exist at the date of the suit but also at the date of the decree. The Act has, however, now been amended by the Agra Pre-emption (Amendment) Act (U P. Act IX of 1929), and as amended a right of pre-emption cannot be defeated by any voluntary transfer made in favour of the vendee after institution of a suit for pre emption.

As for repeal of the Agra Pre-emption Act, see S 339 of the U P Zamindari Abolition and Land Reforms Act (1 of 1951).

Even if a compromise decree covers a matter which was not subject matter of the suit, it is executable and the principle of lis pendens applies, the judgment debtor cannot object execution of the decree on ground that it contains certain terms which do not relate to the suit (3).

17. Administration suit.

An administration suit like any other suit will operate as *lis pendens* if the property transferred is directly and specifically in question in the suit. In a mere general claim for administration of a trust or of a deceased person's estate, the suit does not operate as *lis pendens* for though a property included in the estate may be *directly* in question it cannot be said to be *[illegible]* in question (1). But where the particular property is sufficiently indicated in the suit, the suit would operate as *lis pendens* (2). Thus, where a Commissioner is appointed in the suit and he makes a report to the Court in which he finds that a particular land should be dealt with as the estate of the deceased person, the property comes from that time directly and specifically in question (3). So also where an administration order is passed in the suit for sale of certain specified properties (4).

In *Chatturpat Singh v. Maharaj Bahadoor* (5) their Lordships of the Privy Council held that a transfer, after an order for sale by the Receiver in an administration suit, and before such sale is

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of defendant No 1 and not for the redemption of the sub-mortgages [illegible] No 1 it does not mean that the plaintiff was redeeming the sub-mortgages [illegible] therefore transfer of possession by sub-mortgagees during the pendency of the suit for redemption cannot be vitiated. ** AIR 1935 Nag 274 (277) : 2 Nag L R [illegible] Cal WN 783 (784, 785).

2. **AIR 1932 PC 57 (60) : 54 All 189.** (AIR 1929 All 53 (FB) Approved.)
3. AIR 1989 Raj 43 (48) : (1988) 1 Rajasthan LR 466

Section 52 — Note 17

1. AIR 1923 Rang 69 (70) (DB) (Suit between an heir and an administrator [illegible] by the administrator.) ** AIR 1924 Rang 221 (232) : 2 Rang 4 (DB) (Do.)

   [See also AIR 1927 Rang 186 (187) : 5 Rang 266 (DB).]
2. AIR 1924 Rang 221 (229) : 2 Rang 4 (DB) ** (1887) 35 Ch D 297 (305) : 56 LJ Ch 530 (535), Price v Price.

   [See also (1768) 27 ER 439 (439) : Amb 676, Walker v Smallwood.]
3. AIR 1930 Rang 132 (136) : 7 Rang 734 (DB) (Doctrine applies to transfers after Court sales independently of T.P Act.)
4. AIR 1925 Cal 395 (398) : 51 Cal 1033 (DB)
5. **(1905) 32 Cal 198 (218) (PC).**

   [See also AIR 1925 Cal 395 (397) : 51 Cal 1033 (DB) ** AIR 1925 Cal 703 (704) (DB) ** AIR 1941 Rang 79 (80) : 1940 Rang LR 826 (DB).]

subject to the result of the suit by virtue of the doctrine of *lis pendens*. Their Lordships also observed that apart from the doctrine of *lis pendens* there was a broader proposition of law applicable to such cases and their Lordships stated the proposition as follows:

> 'When the estate of a deceased person is under administration by the Court or out of Court a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration. In fact 'the right of the residuary legatee or heir is only to share in the share ultimate residue which may remain for final distribution after all the liabilities of the estate including the expenses of administration have been satisfied.'

In *Puran Chand v. Monmotho Nath*,(6) a suit was filed against the trustees of a certain estate for the ascertainment of the respective rights of the parties interested in the trust deed and for directions as to the administration of the trust. By an interim decree R. N. was declared entitled to one-sixth share of the property *X* and, after other declarations, it was ordered that the trustees should retain the costs of the suit out of the trust properties. Thereupon, while further proceedings in the suit were still pending, R. N. mortgaged his one-sixth share to *M*. Subsequently, a further order in the suit was passed that property *X* should be sold for raising monies for payment of the costs of the trustees and the property was sold to *N*. It was held that *M* took his mortgage only subject to the further orders of the Court in the suit and therefore took it only subject to the sale. Their Lordships of the Privy Council further held relying upon *Chatturput Singh v. Maharaj Bahadoor*(7) that the principle of the decision applied equally to a suit for administration of the trust as to a suit for the administration of a deceased person's estate.

In *Ma Chit Su v. National Bank of India Ltd.* (8) where pending, a suit for administration in the Chief Court, the property comprised in the suit was sold under the permission granted by a subordinate Court to the administrator appointed by it in a proceeding under the Probate and Administration Act, 1881 and the administrator was a party to the suit in the Chief Court, their Lordships of the Privy Council observed as follows :

> 'The suit for an administration of the estate had been entertained by the Chief Court, and was pending in that Court and it is difficult for their Lordships to understand that the Legislature could have intended that when a suit for administration of an estate is before a Court competent to entertain it and to order that accounts should be taken in the suit any other Court should have power to grant permission for the sale of property (part of the estate) but it appears from the judgments in this suit of the Chief Court that according to some rules of practice of the Chief Court, the Chief Court recognised a power of another Court to grant permission, for the sale of property of the estate before the Chief Court."

18. Mortgage suits.

The doctrine of *lis pendens* applies to mortgage suits also. In such suits the equity of redemption of the mortgagor is directly and specifically in question(1) and a transfer either privately by the

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6. AIR 1928 PC 38 (39) : 55 Cal 532 : 55 Ind App 81.

7. (1905) 32 Cal 198 (217) (PC).

8. AIR 1925 PC 261 (263).

Section 52 — Note 18

1. AIR 1931 All 466 (480) : 53 All 1023 (FB) ** AIR 1922 Nag 89 (91) (FB) ** AIR 1943 Cal 577 (584) ** AIR 1954 Sau 82 (84) ** AIR 1930 All 597 (599) (DB) (Transfer of property after final decree but before complete satisfaction of it.) ** AIR 1933 All 201 (202) : 55 All 235 (DB) (Transfer of property pending foreclosure proceeding.) ** (1910) 13 Oudh Cas 50 (52) (DB) ** (1908) 8 Cal LJ 153 (155) (DB) ** (1913) 18 Ind Cas 177 (178, 179) (DB) (Cal). (Suit to enforce a simple mortgage.)

   [See also (1921) 63 Ind Cas 144 (144) (DB) (All) (Final decree for sale — Judgment-debtor transferring his interest in the property mortgaged — The transfer or the fact that the transferee's name did not appear in the decree held no impediment to the sale and did not affect the rights for the decree-holder to realise his money.)]

mortgagor(2) or by way of compulsory sale in execution of a decree or otherwise(3) would be

2. **AIR 1967 SC 1390 (1395) : ILR 46 Pat 870.** (Lease by mortgagor pending suit for sale by mortgagee.) ** **AIR 1937 PC 260 (261)** ** **(1888) 15 Cal 756 (761) (PC)** ** (1977) Mad LJ 196 (198). (Purchase after extinguishment of mortgage — Doctrine of lis pendens does not apply.) ** AIR 1957 Ker 121 (124) (DB) ** AIR 1954 Trav-Co 38 (40) (DB). (Suit on mortgage pending — Subsequent mortgage pending — subsequent mortgage on same property — Property sold in execution of decree obtained in suit — Property goes to auction purchaser free of charge created during pendency of suit.) ** AIR 1943 Lah 113 (118) (DB). (A subsequent mortgage effected during the pendency of a suit by a prior mortgagee against the mortgagor does not, under the rule of *lis pendens*, affect the rights of the prior mortgagee, and the subsequent mortgagee cannot impugn the rights of the latter except to the extent to which he is protected by the rule of subrogation.) ** AIR 1957 Pat 13 (13) — 15 Pat 372 (DB — Sale.) ** 1936 Mad WN 1069 (1069). (Sale by assignee of prior mortgagee — Assignee obtaining decree and purchasing suit property — Suit by subsequent mortgagee — Prior mortgagee's assignee impleaded — Sale by assignee of prior mortgagee to stranger during pendency of latter suit — Transfer hit by doctrine of *lis pendens*.) ** AIR 1918 Bom 105 (106) — 43 Bom 240 (DB). (Mortgage.) ** AIR 1916 Oudh 232 (233) — 18 Oudh Cas 369 ** (1908) 22 All 243 (245) (DB). (A second mortgagee who takes a mortgage from a defendant mortgagor during the pendency of a suit on a prior mortgage should be treated as a representative of the defendant in execution of decree within the meaning of S. 244 Civil Procedure Code.) ** 1889 All WN 91 (91) (DB). (Mortgage.) ** (1884) 6 All 444 (446) (DB). (It makes no difference that the purchase is by a registered document while the suit is on an unregistered one relating to the same property.) ** (1874) 11 Bom HC R 64 (67) (DB). (Reversionary mortgagee during pendency of suit by mortgagee under unregistered deed for foreclosure and sale — Rule of *lis pendens* applied.) ** 1874 Bom PJ 189 (DB). (Sale.) ** AIR 1935 Oudh 49 (51) (DB). (Do.) ** (1875) 23 Suth WR 382 (382) (DB). (Suit on an unregistered mortgage — During the suit sale by mortgagor by registered deed — **Held**, sale was subject to the doctrine of *lis pendens*.)

3. **(1888) 15 Cal 756 (761) (PC)** ** **AIR 1952 Nag 341 (347) : ILR (1952) Nag 211 (FB)** (Purchaser in sale held under S. 157 C.P. Land Revenue Act during pendency of mortgage suit in respect of that property is bound by the decree in view of S. 52.) ** **AIR 1931 All 466 (480) : 53 All 1023 (FB)** ** AIR 1983 Andh Pra 49 (56, 57) (1982) 2 Andh LT 280 (DB). (Where the compromise decree was passed in a suit and before satisfaction of such decree the property in dispute was sold, the sale would be hit by the provisions of S. 52.) ** AIR 1972 Ker 68 (70) — 1971 Ker LT 730 ** AIR 1962 Bom 191 (196) — ILR (1961) Bom 977 ** (1962) 2 Mad LJ 336 (337) ** AIR 1959 Ker 133 (135) — ILR (1958) Ker 480 (DB). (Sale in execution of money decree subsequent to mortgage suit.) ** AIR 1955 All 24 (25) (DB). (AIR 1931 All 466 (FB), Rel. on.) ** ILR (1955) 1 All 673 (685) (DB). (House sold for realization of arrears of income tax after preliminary mortgage decree and during pendency of mortgage suit is hit by doctrine of *lis pendens* and is subject to the rights of the mortgagee.) ** AIR 1952 All 298 (299). (Revenue sale under S. 262 C.P. Land Revenue Act (1901) for realisation of money due to a Co-operative Bank — Sale taking place during pendency of a mortgage suit — Subsequent sale in execution of mortgage decree — Purchaser under revenue sale is bound by sale in execution of mortgage decree.) ** AIR 1950 Orissa 36 (41) — ILR (1949) 1 Cut 557 (DB). (Rent decree under S. 199 Orissa Tenancy Act — Mortgage suit on the holding pending — Execution sale under rent decree before passing of final decree in mortgage suit — Decree holder purchaser gets only right of redemption which is barred on confirmation of sale under final decree in mortgage suit.) ** (1950) Trav-Co LR 636 (640) (DB). (1 TLJ 28 and (6 TLJ 510 (FB) Rel. on.) ** AIR 1949 Mad 207 (208) ** 1943 Trav LR 33 ** AIR 1929 Nag 601 (602). (Auction sale in execution of Government dues.) ** AIR 1928 Lah 505 (507). (Sale in execution of decree in a suit by a puisne mortgagee during the pendency of suit by a prior mortgagee to which the puisne mortgagee was a party is affected by *lis pendens*.) **

affected by the doctrine of *lis pendens* The transferee would be bound by the decree in the suit **(4)** He takes it subject to the incidents of the suit**(5)** and one of the incidents is that a purchaser under the decree in the suit gets a good title against all persons whom the suit binds **(6)** He cannot claim to redeem the mortgagee or purchaser in execution of the decree on the ground that he was not a party to the suit, though he could have redeemed the mortgagee before the sale **(7)**

(1911) 9 Ind Cas 772 (773) (Rang) (Sale in execution of money decree against morggagor) ** 1898 Bom PJ 38 (DB) (Sale of the same property by Court in execution of money decree) ** AIR 1925 Oudh 496 (498) 29 Oudh Cas 37 (DB) (Sale of property in execution of money decree) ** AIR 1917 Bom 151 (152) 42 Bom 215 (DB) (Transfer effected under another Court s order pending suit) ** (1874) 11 Bom HCR 139 (143) (DB) (Sale in execution of money decree pending suit.)

4. AIR 1954 Trav Co 38 (40) (Suit on mortgage pending — Subsequent mortgage — Properties sold in execution of decree obtained in suit — Property goes to auction purchaser free of charge created during pendency of suit) ** 1975) 1 Andh WR 264 (DB) (Mortgage executed despite notice of pending suit in which charge in respect of the same properties was claimed — **Held** mortgage was hit by S 52) ** (1973) 2 Mys LJ 176 (DB) (Mortgage with possession — Mortgagee acquiring equity of redemption in execution of money decree against mortgagor — Suit by mortgagor under S 16 Jamkhandi Agriculturists Relief Act 1939 — Mortgage of defendant is affected by doctrine of *lis pendens*) ** (1933) 142 Ind Cas 188 (189) (Cochin) (DB) ** AIR 1940 Cal 150 (152 153) (DB) ** AIR 1933 All 201 (202) 55 All 235 (DB) ** AIR 1928 Mad 612 (613) (DB) ** (1889) 16 Cal 335 (363) (DB) (Where a mortgage decree becomes inoperative by reason of the law of limitation a purchaser *pendente lite* is no longer bound by it) ** (1885) 9 Bom 141 (145) (DB) (Redemption suit by mortgagor Transfer of a part of the property *pendente lite.*)

Also see S 60, Note 54

5. **AIR 1967 SC 1390 (1395) : ILR 46 Pat 870** ** (1991) 1 Bank LJ 382 (384) 1989 (2) Bank CLR 470 (MP) ** AIR 1933 All 201 (202) 55 All 235 (DB) ** AIR 1922 Cal 235 (236) (DB)

6. **AIR 1967 SC 1390 (1395) : ILR 46 Pat 870** ** AIR 1954 Trav-Co 38 (40) (Suit on mortgage pending — Subsequent mortgage — Properties sold in execution of decree obtained in suit — Property goes to auction purchaser free of charge created during pendency of suit) ** AIR 1918 Bom 105 (106) 43 Bom 240 (DB) ** 1874 Bom PJ 189 (DB) (Purchaser at sale in execution of decree acquires better title than the purchaser *pendente lite.*)

7. **AIR 1967 SC 1390 (1395) : ILR 46 Pat 870 ** (1890) 18 Cal 164 (178) (PC)** AIR 1950 Orissa 36 (41) ILR (1949) 1 Cut 559 (DB) (Rent decree under S 199 Orissa Tenancy Act — Mortgage suit on the holding pending Execution sale under rent decree before passing of final decree in mortgage suit — Decree-holder purchaser gets only right of redemption which is barred on confirmation of sale under final decree) ** AIR 1948 Nag 97 (99) ILR (1947) Nag 719 (He is bound by the result of the lis and cannot claim a right to redeem the mortgaged property The same principle applies to a person acquiring title by adverse possession) ** AIR 1933 All 201 (203) 55 All 235 (DB) (Suit for foreclosure — No authority of the Court for transfer was obtained) ** AIR 1929 All 601 (602) ** AIR 1925 Oudh 496 (498) 29 Oudh Cas 37 (DB) ** (1899) 26 Cal 966 (970) **(DB) ** (1909) 4 Ind Cas 731 (732) (DB) (Cal).**

[See also AIR 1940 Cal 150 (152, 153) (DB) ** AIR 1934 All 972 (973) (If a defendant wanted to take advantage of a private sale made by a mortgagor after the decree in mortgage suit it is his duty to intervene in the execution proceedings and to pay the mortgage money and to stop the sale and after the sale had taken place, it is not open to the purchaser from the mortgagor, against whom a decree for sale has been passed to say that he **could nullify the purchase under the mortgage decree)]**

[See however AIR 1946 Mad 51 (52) (Maintenance decree creating charge — Execution

An application to file an award directing the sale of mortgaged property is an original proceeding to which the doctrine of *lis pendens* will apply **(8)** A suit for contribution under S 82 operates as a *lis pendens* and a transfer pending such a suit would be subject to the result of such suit **(9)**

Where pending a suit between the mortgagor and the mortgagees, the mortgagor sold the equity of redemption to a stranger and the amount decreed as due in the first Court was increased in appeal the purchaser was held bound by the result of the appeal and not entitled to claim that he was liable to pay only such sum as had been decreed at the time of the purchase as due to the mortgagees.**(10)**

The *lis* in a mortgage suit continues until the mortgage decree is fully executed.**(11)** or, where the suit is one for foreclosure, until a final decree foreclosing the mortgagor's right is passed **(12)** A transfer by the mortgagor of the mortgaged property between the date of the decree and before the date of the sale in execution of the decree, will be affected by *lis pendens* **(13)** So also will be a transfer by him between the dates of the preliminary and final decrees **(14)** In an old case before the

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and sale under decree — Mortgage of charged properties after decree but before sale Mortgagee was held entitled to redeem and pay off charge decree holder at any time before sale was confirmed)]

Also see S 60, Note 54

8. (1880) 4 Bom 34 (36, 37) (DB)

9. (1891) 13 All 371 (373) (DB)

10. **AIR 1929 PC 243 (245) : 51 All 686.**

11. AIR 1934 Mad 353 (354, 355) (DB) ** AIR 1931 Mad 170 (172) (The same principle applies to maintenance suit ** AIR 1929 Mad 197 (197) (DB) (A mortgage suit does not finally come to an end with the passing of a preliminary decree) ** AIR 1927 All 309 (310) (A person claiming under a transfer during the pendency of a mortgage suit cannot prescribe a title against the mortgagee by adverse possession until the latter becomes entitled to actual possession by virtue of his purchase in execution of his mortgage decree) ** AIR 1925 Mad 1039 (1039, 1040) ** AIR 1921 Cal 730 (734) (DB) ** (1940) 44 Cal WN 783 (786) (Lis in mortgage suit does not terminate till the security has been realised for satisfaction of the judgment debt) ** (1911) 9 Ind Cas 1027 (1028) (DB) (Cal) ** (1910) 6 Ind Cas 40 (41) (DB) (Cal) ** (1910) 6 Nag LR 140 (142) ** (1901) 23 All 333 (334) (DB)

[**See also** (1867) 7 Suth WR 67 (67) (DB) (A purchaser under a decree for sale obtained by the mortgagee under a simple mortgage does not purchase subject to a conditional sale executed by the mortgagor after the prior mortgagee had obtained a decree of sale but before the property was actually sold)]

12. (1907) 29 All 76 (80, 81).

13. **AIR 1931 All 466 (480) : 53 All 1023 (FB)** ** (1968) 1 Mys LJ 384 (Alienations made subsequent to decree were affected by doctrine of *lis pendens*) ** AIR 1931 Pat 64 (67) 10 Pat 234 (DB) ** AIR 1925 Mad 1039 (1040) ** AIR 1918 Cal 524 (525) (DB) (Purchase in execution of a money decree after the passing of a mortgage decree but before the sale of the property in execution thereof) ** AIR 1915 Sind 9 (9) (DB) (Second mortgage executed after the decree for sale on the first mortgage ** (1912) 16 Ind Cas 144 (144) (DB) (All) ** (1911) 9 Ind Cas 840 (840) (Cal) ** (1911) 10 Ind Cas 49 (50) (DB) (Cal) ** (1909) 3 Ind Cas 791 (792) (DB) (Cal) (Suit though proceeded ex parte still was held to be a contentious one) ** (1909) 1 Ind Cas 213 (215) (DB) (Cal) ** (1909) 1 Ind Cas 62 (66) (DB) (Cal) ** (1909) 4 Ind Cas 731 (731, 732) (DB) (Cal) (Revenue sale of share of estate during pendency of execution proceedings on a mortgage decree) ** (1908) 7 Cal LJ 1 (35) (DB) (**Reversed** on another point in 40 Cal 89 (PC)) ** (1905) 2 Cal LJ 288 (300) (DB) ** (1905) 32 Cal 891 (906) (DB) ** (1904) 9 Cal WN 171 (174) ** (1904) 28 Bom 361 (363) (DB) ** (1898) 22 Bom 939 (943) (DB)

14. AIR 1935 Oudh 49 (51) (DB) ** AIR 1932 All 210 (212) (DB) ** AIR 1926 Nag 21 (22)

Act it was held that a transfer by the mortgagee of the mortgaged property when a suit by him for foreclosure was pending, could not be allowed to stand between the mortgagor and those rights to redeem which that suit, in its ultimate issue, may have left open and affirmed to him.(**15**)

Where the agreement to purchase mortgaged property is entered into by a person during pendency of the suit for enforcement of mortgage, the doctrine of *lis pendens* is attracted. A transfer pendente lite is not per se void or illegal but is subject to the decree that may be ultimately passed. Thus the person who has entered into the agreement to purchase property *pendente lite* is not precluded in law either on account of the rule of *lis pendens* or on account of S. 52 from filing a suit for specific performance or in filing an application under O. 2, R. 89, CPC to safeguard his interest under the agreement, when he has in fact filed such suit for specific performance and it is pending the court auction sale of the property in the suit for enforcement of mortgage will also be subject to the rule of lis pendens.(**16**)

Though under the last para of S. 60, T. P. Act, the co-mortgagor cannot redeem the entire hypotheca and has to redeem only the mortgagor's share, that principle does not apply if the purchase of a share by the mortgagee is after the filing of the suit for redemption by the co-mortgagor. In that case the co-mortgagor can sue for redemption and possession of the entire hypothica and the mortgagee can cling on to the possession of the property by purchasing after suit a share of the hypotheca, however small from the non-redeeming co-mortgagors. In that event he is subject to S. 52, T. P. Act and has to first surrender possession of the entire hypotheca qua-mortgagee and then sue for partition and possession.(**17**)

The plaintiff-Bank filed a suit against the defendant for recovery of loan amount and sale of the property mortgaged with the Bank. During pendency of the suit the defendant filed an application for permission to sell the suit property and produce an agreement of sale with third party. It was held that the court could not grant permission to the defendant-mortgagor on ground that he had right to decide what was the adequate price and that the sale would be beneficial to both the mortgagor and mortgagee.(**18**)

Where the lease deeds were executed by the tenants long after preliminary and final decrees were passed in a mortgage suit, and there was no material to show that the deeds were executed during the pendency of the excution petition, S. 52 would not apply (**19**)

See also Note 7

19. Partition suits.

A suit for partition of immovable property is one in which rights to immovable property are directly and specifically in question. Such suits will therefore operate as *lis pendens*. A transferee of property pending such a suit will therefore be bound by the decree passed in the suit (**1**). In some

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23 Nag LR 86 (Decree for foreclosure) ** AIR 1925 Nag 132 (134) 22 Nag LR 110 (Decree for foreclosure) ** AIR 1915 All 27 (28) (DB) ** (1910) 6 Nag LR 140 (142)

[See also ILR (1955) 1 All 673 (685) AIR 1955 NUC 1698 (Sale of property under S. 162, U.P. Land Revenue Act (1902) for recovery of arrears of income tax held after preliminary mortgage decree is affected by doctrine of *lis pendens*.)]

15. (1867) 8 Suth WR 399 (403) (DB).

16. (1987) 100 Mad LW 225 (231) (DB)

17. AIR 1988 Andh Pra 215 (225, 226) : (1987) 2 APLJ (HC) 27

18. (1989) 2 Bank CLR 470 (473) (MP)

19. 1993 (1) Andh LT 120 (128).

Section 52 — Note 19

1. AIR 1966 Orissa 98 (102) (DB)** AIR 1982 (NOC) 42 (Cal) (AIR 1926 Cal 714 (FB), AIR

cases(2) before the amendment of the section it was however, held that a particular suit was not necessarily a *contentious suit* and that the question whether it was a *contentious* suit would depend upon the facts of the particular case These cases are no longer law in view of the amended section But it has been held in a case of the Calcutta High Court(3) that a partition suit in which there is no contest as to the fractional share of the parties is not one in which their rights to the immovable property are directly and specifically in question, and that S 52 does not apply to such a case A similar view has been expressed by the Oudh Chief Court in the undermentioned case (4)

Section 52 embodies in its ambit the term "proceedings" and this term will include partition proceedings also The sale effected during partition proceedings pending before the Revenue Officer will be hit by the rule of lis pendens Partition proceedings operate as lis pendens with the result that a purchaser of undivided share pending partition proceedings takes only that property which is allotted on partition to the vendor The purchaser cannot avoid partition proceedings and is bound by it since his vendor was a party to the partition proceedings(5)

Where during pendency of partition suit a person purchased an item of property which was a subject-matter of that partition suit, he being interested party is entitled to be impleaded in appeal arising out of that suit, under O 22, R 10, CPC (6)

Where however, a person enters into agreement to purchase part of the property which is the subject-matter of a partition suit, he does not acquire any interest in the property in view of the last para of s 54 Again, in view of the doctrine of *lis pendens* he could not be considered to be either necessary or proper party to the partition suit Having no legal interest he could not be impleaded as a party in the partition suit.(7)

1926 Cal 714 (FB) AIR 1970 Ker 187 AIR 1964 Punj 525 **Rel. on.**) ** AIR 1970 Ker 188 1969 Ker LT 326 ** AIR 1961 Ker 335 (335 336) (Tenant inducted by party during pendency of partition suit is bound by decree) ** (1958) 1 Andh WR 85 (86) (DB) (Sale after institution of partition suit Prior agreement to sell does not affect application of S 52 **Overruled** on another point in AIR 1959 Andh Pra 523 (FB)) ** 1954 BLJR 356 (359) AIR 1955 NOC 1597 ** AIR 1946 Pat 306 (309) 25 Pat 13 (DB) (A partition suit operates as *lis pendens* with the result that the purchaser of an undivided share pending a suit takes only that property which is allotted on partition to his vendor) ** AIR 1939 Mad 275 (275) (Rule of *lis pendens* operates from date of application for leave to sue in forma pauperis, praying for partition) ** AIR 1936 Mad 887 (888 889) 11 R (1937) Mad 66 (DB) ** AIR 1936 Nag 125 (126) ILR (1936) Nag 22 (DB) ** AIR 1934 Lah 457 458 (DB) ** AIR 1931 All 45 (47) (DB) (Auction sale) ** AIR 1928 Bom 65 (66) 52 Bom 208 (DB) ** AIR 1927 All 679 (680) 50 All 22 (DB) (Transfer during partition proceedings in Revenue Court — Doctrine of *lis pendens* applies) ** AIR 1924 Nag 393 (394) (DB ** AIR 1915 Nag 89 (90) 11 Nag LR 21 (Agricultural lease during pendency of transfer proceedings) ** 1930 Mad WN 572 (576) (Partition suit is not non contentious suit) ** (1898) 26 Cal 127 (128 129) ** (1926) 98 Ind Cas 1039 (1042) (DB) (Oudh (Mortgage of a grove) ** (1913) 18 Ind Cas 492 (493) (DB) (All) (A transfer of mortgage debt during a partition suit is a transfer of immovable property) ** (1900) 27 Cal 77 83 84) (DB).

[See also (1928) 107 Ind Cas 195 (197) (Nag)]

2. AIR 1928 Nag 198 (198 199) ** AIR 1917 Nag 44 (44 45) 14 Nag LR 18 (**Held**, the doctrine of *lis pendens* did not affect a transfer made after institution of partition proceedings but before raising of question of title) ** (1987) 1 Cal WN 62 (64) (DB) (**Overruled** in AIR 1926 Cal 714 (FB))

3. AIR 1941 Cal 436 (437, 438)

4. AIR 1946 Oudh 99 (101) : 21 Luck 185 (DB).

5. (1992) 2 Cur LJ (CCR) 55 (57) (Punj & Har)

6. 1988 TLNJ 62 (64) (Mad)

7. 1999 (1) Cal LT 480 (488)

The alienation affected during the pendency of the suit is not void *ab initio*. It is subject to the decree that may be passed in the suit. Where alienation of one of the items of joint family property is made without authority of the court by a coparcener in favour of a stranger during pendency of the partition suit, the validity of alienation would depend upon the decree that may be passed. The alienee is entitled to exercise all rights of alienating co-parcener. The alienation made during pendency of the suit cannot be declared to have no effect in the eye of law **(8)**.

Where in a partition suit a compromise decree was passed, a transferee by way of gift during the pendency of a suit could not claim any right to the property when transferor plaintiff in partition suit had admitted the claim about share in the property of contesting opposite party **(9)**.

Where a co-owner seeks review of the final decree passed in partition suit and during its pendency sells his share to a third party and subsequently the review is allowed, the transfer would be hit by S. 52.**(10)**

Where tenants are inducted on a portion of the suit property (shops) by one of the co-owners during pendency of partition suit, and that portion came to the share of other co-owners, the tenancy would not be binding on them. It would be hit by *lis pendens*. The tenants would be liable to be ejected and would not be protected under the Rent Laws **(11)**. Where a co-tenant lets out the suit property during pendency of the litigation, S. 52 will apply with all its vigour. Even otherwise the co-tenant could not create tenancy without consent of other co-owners **(12)**.

A suit for permanent injunction restraining first defendant from alienating the suit property before partition between the parties was filed. The first defendant was not willing and did not adduce any evidence. The property was sold during pendency of the suit. The purchaser wanted to adduce evidence held that apart from the doctrine of *lis pendens*, the subsequent purchaser did not get any right to adduce evidence, since he stepped into the shoes of the first defendant **(13)**.

Where joint family property belonging to *A* and *B* was mortgaged to *C* and pending a suit for partition between *A* and *B*, *C* purchased the whole property the share of the *plaintiff A* as well as of the defendant *B* in execution of his decree on the mortgage, it was held that the suit for partition could not continue, as *C* having purchased the property could not be both a plaintiff as well as a defendant, and that his purchase could not be annulled by invoking the doctrine of *lis pendens* **(14)**. See also the undermentioned cases.**(15)**

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8. ILR (1991) Kant 2761 (2774) (DB)

9. AIR 1985 All 163 (165) : 1984 (10) All LR 711

10. AIR 1987 Orissa 142 (145) : (1986) 2 Orissa LR 155.

11. 2002 (2) Rent CR 288 (290) (Punj & Har).

12. 2002 (97) DLT 22 (27) : 2002 (2) Pun LR (D) 3

13. 1997 (30) All LR 319 (320) (SC) .

14. AIR 1929 Cal 697 (699) : 57 Cal 597 (DB).

[**See also** AIR 1946 Pat 306 (309) : 25 Pat 13 (DB) (Partition suit of joint family property — Sale of property pending suit in execution of decree for pre-partition debt binding on whole family — No provision made in decree in the partition suits as to above debt — Execution sale not affected by *lis pendens*. AIR 1929 Cal 697, Rel. on.)]

15. AIR 1971 Ker 154 (155) : 1971 Ker LJ 162 (Partition suit pending — Decree against some of the co-owners in suit to which other co-owners were not parties — Decree must be subject to result of partition suit — Execution sale will not operate to confer any title in the specific property on the auction-purchaser as against other co-owners and will not entitle former to restrain them from executing partition decree.) ** (1970) 2 Mad LJ 77 (Estate under the management of the Receiver appointed by the Court in a partition action — Preliminary decree for partition — Purchased of undivided coparcener's share is subject to the doctrine of *lis pendens* — It cannot prevail as against the later sale by Receiver — Purchaser of an undivided share of a Hindu coparcener gets only an equity to enforce

20. Suits for maintenance.

A maintenance suit in which a *charge* is asked for against properties described in the plaint is one wherein the right to immovable property is directly and specifically in question and the doctrine of *lis pendens* applies to such suits **(1)** The *lis* commences on the date of the plaint and not on the date of the decree which creates the charges **(2)** The fact that the whole family property is enumerated in the schedule of the plaint but the charge is asked to be given on a *sufficient portion* thereof**(3)** or the decree gives a charge only against some of the properties though a charge is asked for against all the properties**(4)** does not prevent the applicability of the doctrine of *lis pendens*

Where a husband transferred all his property during pendency of suit for maintenance filed by his wife against him and there was no evidence of any consideration passing to him and thus the transfer was gratuitous, he died during the pendency of suit, and the purchaser had full notice of the right of the wife for maintenance, the suit for maintenance could be decreed against the purchasers under the Hindu Adoptions and Maintenance Act read with ss 39 52 of the T P Act **(5)**

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partition) ** AIR 1968 Orissa 134 (137) 34 Cut LT 379 (Transfer of share in dwelling house of undivided family to stranger — Suit for partition by member of the family Plaintiff entitled to right of pre emption under S 4(1) Partition Act on date of institution of suit Subsequent transfer back by stranger purchaser to co sharer transferor Latter transfer is hit by doctrine of *lis pendens* Right of plaintiff under S 4(1) is not affected — **Overruled** on another point in AIR 1971 Orissa 127)

Section 52 — Note 20

1 **AIR 1928 Mad 713 (719) (FB) ** AIR 1951 All 141 (146, 151) : ILR (1953) 1 All 284 (FB).** (AIR 1943 Oudh 354 (FB) **Dissented from:** AIR 1939 All 687 **Overruled**) ** AIR 1974 Mad 89 (90) 86 Mad LW 651 (DB) ** (1968) 2 Andh WR 26 ** AIR 1967 Mad 126 (126 ** AIR 1966 Madh Pra 318 (324) ** (1966) 1 Mys LJ 680 ** 1959 Andh LT 509 (510) ** AIR 1959 Bom 475 (477) ILR (1959) Bom 94 (AIR 1927 Mad 502 **Diss from.**) ** AIR 1955 Mad 571 (575) ** 1953) 32 Pat 903 (906) AIR 1955 Nag 2 (1951) 1 Mad LJ 143 (145) (Suit by Hindu wife against her husband for maintenance and for charge — Alienation by husband pending such suit is affected by *lis pendens* — AIR 1927 Mad 502 **Diss. from.**) ** AIR 1946 Bom 207 (209) ILR (1945) Bom 885 (DB) ** AIR 1945 Mad 219 (221) ** AIR 1945 Mad 126 (127) ILR 1945 Mad 726 (DB) ** AIR 1944 Bom 191 (192) ILR (1945) Bom 274 (DB) ** AIR 1943 Cal 227 (232) (DB) ** AIR 1940 Bom 395 (396) ILR (1941) Bom 1 (DB) (Affirming AIR 1939 Bom 403) ** AIR 1939 Cal 655 (656) (DB) (In this case however the mortgage was prior to the institution of maintenance suit — Purchaser at a mortgage sale which took place during pendency of the maintenance suit was held not to be hit by *lis pendens*) ** AIR 1939 Bom 403 (404) (Even if the sale is to pay off the mortgage prior to the institution of the maintenance suit) ** AIR 1936 Mad 84 (85) (DB) ** AIR 1935 Mad 867 (868) 59 Mad 161 (DB) ** AIR 1930 Mad 824 (832) 54 Mad 132 (DB) ** AIR 1929 Sind 102 (105 106) (Partition taking place subsequent to the institution of maintenance suit — *Lis pendens* applies) ** (1906) 29 Mad 508 (510) (DB) ** (1936) 169 Ind Cas 169 (171) (Nag)

[**See also AIR 1938 Mad 357 (358, 359) , ILR (1938) Mad 829 (SB) ** AIR 1956 SC 593 (603) : ILR (1956) Mys 152.** (Charge decree for maintenance Purchaser in execution acquires good title subject to right of person having right of redemption of prior mortgage — Decree not open to attack by person taking transfer pending maintenance suit) ** AIR 1933 Mad 858 (859) (Doctrine of lis pendens not applied because the property had devolved on official assignee in bankruptcy by operation of law)]

2. **AIR 1956 SC 593 (597) : ILR (1956) Mys 152.** (AIR 1927 Mad 502 and 53 Mys HCR 219 taking a contrary view must be held to be **Overruled.**) ** AIR 1959 Bom 475 (477) ILR **(1959) Bom 94. (AIR 1927 Mad 502. Diss. from.).**

3. **AIR 1936 Mad 84 (85) (DB).**

4. **AIR 1936 Mad 84(85) (DB).**

5 AIR 1998 All 211 (217) 1998 All LJ 1371 1998 (34) Ali LR 351 (DB)

In a suit for maintenance filed by the wife an order of interim injunction was issued against the husband from non-alienating the two pieces of land held by the husband A yadi to that effect was also directed to be sent to the office of the sub-registrar still the husband executed registered sale deed in favour of transferee Hence in view of Ss 52 and 39, T P. Act The transferee could not be held to have acquired a title to the said property If the wife exhausts her remedy as against the unalienated piece of land and if any claim still remains due as against the husband, it will then be open for the wife to proceed as against the piece of land purchased by the transferee **(6)**

But where no charge is claimed in the maintenance suit and properties are described in the schedule of the plaint for the purpose merely of determining the amount of maintenance, no question of *lis pendens* arises.**(7)**

Where properties are charged by the decree awarding maintenance, a transfer of such properties is affected by the doctrine of *lis pendens* even though the transfer is after decree, so long as the properties remain charged under the decree **(8)** The *lis* in such a case continues so long as the maintenance is due under the decree **(9)** The fact that the transfer was effected to pay off the plaintiffs husband's debts does not affect the above rule **(10)**

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6. (1988) 1 Cur CC 183 (184) (Bom)

7. (1906) 19 Mad 271 (272, 273) (DB)

8. AIR 1951 Orissa 306 (310) ILR (1949) 1 Cut 336 (DB) ** AIR 1968 Pat 238 (244) ** AIR 1945 Mad 350 (351) ** AIR 1939 Bom 403 (405) ** AIR 1935 Mad 867 (869) 59 Mad 101 (DB) ** AIR 1928 Mad 612 (612) (DB) ** (1939) 169 Ind Cas 169 (171) (Nag)

[**See also** AIR 1946 Mad 51 (52) (Maintenance decree charging properties — Sale in execution — Mortgage subsequent to decree and before sale — Right to pay off decree and redeem — Mortgagee is not barred by *lis pendens* from redeeming and paying off charge decree-holder so long as execution sale under charge decree had not been confirmed)]

Also see Notes 6a and 11.

9. AIR 1951 All 141 (153) : ILR (1953) 1 All 284 (FB). (Suit for maintenance — Decree specifically creating charge on specific immovable property is not merely a declaratory decree but is executable — Transferee of property whether with notice or otherwise is bound by decree until it is fully satisfied — AIR 1943 Oudh 354 (FB) **Dissented from:** AIR 1939 All 687 **Overruled.**) ** AIR 1969 Orissa 114 (116) 34 Cut LT 1296 * AIR 1946 Bom 207 (209) ILR (1945) Bom 885 (DB) ** AIR 1945 Mad 350 (350) (Maintenance suit — Decree creating charge — Sale after decree but before execution — Purchaser cannot succeed against purchaser in execution of charge decree) ** AIR 1935 Mad 867 (869) 59 Mad 101 (DB) ** (1936) 169 Ind Cas 169 (171) (Nag) (A maintenance decree creating a charge and ordering periodical payments in future is in its nature an executory decree — It remains valid and operative during the period the decree-holder lives — The lis should therefore be held to be pending until the death of the decree-holder)

[**See also** AIR 1950 Mad 396 (396) (Declaratory charge decree — Lis continues until possibility of enforcing charge by separate suit remains.)]

[**See however** AIR 1957 All 575 (582) (DB) (Decree declaring a sum to be a charge on property but not directing sale of property in enforcement of charge — Transferee not subject to doctrine of lis pendens)]

10. AIR 1940 Bom 395 (396) ILR (1941) Bom 1 (DB) (No distinction between the debt of husband and the debt of the joint family.)

[**See also** AIR 1944 Bom 191 (193) ILR (1944) Bom 274 (DB) (Even if the purchaser has paid off a previous mortgage he is bound by the charge)]

Where a maintenance suit is filed by wife in forma pauperis, a charge is created over suit property from date of filing suit. Sale of the property by husband during pendency of suit is hit by principles of lis pendens.(11)

It has been held that where the suit is only a *personal* claim for mainenance as for example by Hindu wife against her husband, this section has no application inasmuch as no right to any immovable property is in question in the suit and an alienation by the husband of his properties pending such a suit is therefore not affected by *lis pendens* (12)

Where a property is sold not in pursuance of a money decree but in pursuance of a charge created under the maintenance decree even before filing of the suit for specific performance, the maintenance decree is not hit by the principle of lis pendens (13)

An application to file an award creating a charge stands on the same footing as a plaint in the ordinary maintenance suit in which a charge is claimed. The doctrine of *lis pendens* applies to such proceedings.(14)

20A. Suit for permanent injunction.

Where the suit property is alienated during pendency of a suit for permanent injunction and affirmatively decree for permanent injunction is passed, the decree can be executed against the transferee. Injunction is a remedy in personam. Yet, the enforcement of the decree for injunction against a legal representative of the deceased as against the purchaser of the suit property *pendente lite* is saved by S. 50, C.P.C. and S. 52 T.P. Act respectively (1)

21. Pre-emption suit.

The doctrine of *lis pendens* applies also to suits for pre-emption, as in the case of other suits (1) Even a resale of the property by the vendee in favour of the vendor pending the suit for pre

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11. 2000 AIHC 2961 (2964), 2000 (3) Andh LT 178

12. AIR 1939 Bom 403 (404)

[See AIR 1927 Mad 502 (502) (The mere fact that the plaintiff mentions in the plaint at the property of the husband would not make the property subject matter of the suit.)

13. 1983 TLNJ 111 (115) (Mad)

14. AIR 1946 Bom 207 (210) : ILR (1945) Bom 885 (DB)

Section 52 — Note 20A

1. AIR 2000 Kant 298 (308) ; 2000 (5) Kant LJ 477 ** 1999 AIHC 4469 (4476) ; 2000 (1) ICC 229 (Bom)

Section 52 — Note 21

1. AIR 1958 SC 838 (842) : ILR (1958) Punj 2225 ** AIR 1970 J & K 37 (40) : 1969 Kash LJ 454 (FB). (Suit property cannot be sold by vendee after period of limitation to one having equal right as plaintiff.) ** **AIR 1946 Lah 142 (143) : ILR (1946) Lah 467 (FB) ** AIR 1930 Lah 356 (357) : 11 Lah 258 (FB) ** AIR 1941 Lah 433 (441) : ILR (1942) Lah 155 (FB) ** AIR 1952 Nag 51 (53) : ILR (1951) Nag 830 (FB) ** 1973 Pat LJ 350** (Vendor selling his land — Plaintiff filing suit for pre-emption — Vendor's son filing another suit against vendee in which suit vendee agreed to treat his sale as mortgage in his favour — As the transaction of converting sale into mortgage was during pendency of plaintiff's suit doctrine of lis pendens applied and plaintiff was entitled to pre-emption.) ** 1971 BLJR 994 (DB) (Pre-emption — Purchaser transferring land to another — Execution and registration completed before filing of pre-emption application — Application filed against original purchaser will be of no effect when sale was completed under S. 54 of the Act.) ** ILR (1970) 2 Delhi 332 (DB) ** AIR 1968 Orissa 154 (156) : 34 Cut LT 379 (Transfer of share in dwelling house of undivided family to stranger — Suit for partition by member of the family — Plaintiff entitled to right of pre-emption under Section 4(1), Partition Act on date of institution of suit — Subsequent transfer back by stranger purchaser to co-sharer transferor — Latter transfer is hit by doctrine of lis pendens.)**

emption will be affected by *lis pendens* and cannot affect the pre emptor's claim to a decree for pre-emption (2) But it has been held that a sale pending a pre emption suit in *favour of a person* having an *equal or superior* right of pre-emption to that of the plaintiff, does not conflict with the doctrine of *lis pendens* and is therefore valid (3) The reason given is that the sale does not really vest any new rights All that the vendee does in such a case is to take the bargain in the assertion of his pre-existing pre-emption right and hence the sale does not offend the doctrine of *lis pendens* (4) It is necessary, however, that the transfer should have been *in recognition of the superior right* A transfer made in favour of a person having a superior right but not in recognition of such right, will be affected by *lis pendens* (5) Where the transferee had, at the time of the transfer to him lost his right of pre-emption by lapse of time, the transfer will be affected by *lis pendens* (6) although made in

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Right of plaintiff under Section 4(1) Is not affected) ** 1964 Cur LJ 200 (201) ** AIR 1947 Lah 175 (176) ** AIR 1946 Nag 367 (371) : ILR (1943) Nag 758 (**Overruled** on another point in AIR 1952 Nag 51 (FB)) ** AIR 1942 Pesh 43 (45) ** AIR 1934 Oudh 303 (307) : 9 Luck 475 ** AIR 1930 All 354 (355) (DB) ** AIR 1929 All 440 (441) (DB) ** AIR 1927 All 336 (337) 49 All 516 (DB) ** AIR 1926 All 179 (180) 47 All 923 (DB) ** AIR 1926 All 180 (181) : 48 All 221 (DB) ** AIR 1925 All 502 (502) (DB) ** AIR 1925 All 487 (488) 47 All 625 (DB) ** AIR 1919 Lah 427 (427) (DB) ** AIR 1914 Oudh 352 (353) : 17 Oudh Cas 150

2 AIR 1929 All 440 (441) (DB) ** AIR 1926 All 179 (180) 47 All 923 (DB) ** AIR 1925 All 487 (488) 47 All 625 (DB) ** AIR 1925 All 502 (502) (DB) ** AIR 1918 All 401 (401) (DB) ** (1911) 11 Ind Cas 645 (646) (DB) (All) ** (1909) 5 Nag LR 136 (145) (Pre-emption is a right of substitution and not of re purchase) ** (1906) 2 Nag LR 150 157 (Sale to vendor after decree.)

3. **AIR 1952 Nag 51 (54) : ILR (1951) Nag 830 (FB)** (AIR 1946 Nag 367 **Overruled**) ** **AIR 1949 East Punj 193 (195) : ILR (1949) East Punj 305 (FB) ** AIR 1946 Lah 142 (145) : ILR (1946) Lah 467 (FB) ** AIR 1941 Lah 433 (436) : ILR (1942) Lah 155 (FB) ** AIR 1930 Lah 356 (357) : 11 Lah 258 (FB)** AIR 1974 Punj 91 (92) 1973 Punj LJ 528 ** AIR 1960 J & K 112 (114, 115) (DB). (Plaintiff pre-emptor in order to succeed must show his superior right of pre emption) ** AIR 1935 Lah 808 (809) (DB) (Superior right.) ** 1910 Pun Re No 7 5 Ind Cas 249 (251) (Do) ** AIR 1935 Lah 529 (532) 16 Lah 921 (DB) (Equal rights) ** AIR 1923 All 294 (294) (DB) (Equal rights) ** 1911 Pun Re No 53 10 Ind Cas 367 (369) (DB) (Transfer to person having superior right of pre emption) ** (1911) 10 Ind Cas 842 (843) (Lah) (This equal or superior right must be subsisting at the date of sale.)

[See also (1906) 2 Nag LR 150 (157). (Equal right — Obiter)]

[But see (1908) 30 All 467 469) (DB) (Sale *pendente lite* to person having equal right — Lis pendens applies and plaintiff is entitled to a decree) ** AIR 1926 All 180 (181) 48 All 221 (DB) (*Lis pendens* applies even where sale is made to a person having an equal right — But proper procedure is to devide the property between the two plaintiffs and the vendee pending suit.) ** AIR 1927 All 336 (337, 338) : 49 All 516 (DB). (Do.)]

4. **AIR 1958 SC 838 (844) : ILR (1958) Punj 2225.** (If the pre existing right became unenforceable by reason of the fact of limitation or otherwise the transfer though ostens bly made in recognition of such a right in fact creates only a new right pendente lite AIR 1954 Pepsu 59 **Reversed.**) ** **AIR 1946 Lah 142 (145) : ILR (1946) Lah 467 (FB)** ** AIR 1966 Punj 179 (181) (DB) (1964 Cur LJ 200 Affirmed) ** ILR (1963) Bom 246 (254) (DB) ** AIR 1931 Lah 435 (435) (DB) ** AIR 1929 Lah 589 (590) ** 1911 Pun Re No 53 : 10 Ind Cas 367 (370) (DB) ** 1908 Pun Re No. 26, p. 144 (146)

5. **AIR 1949 East Punj 193 (195) : ILR (1949) East Punj 305 (FB)** ** AIR 1921 Lah 363 (363) (DB).

6. **AIR 1958 SC 838 (844) : ILR (1958) Punj 2225 ** AIR 1946 Lah 142 (144) : ILR (1946) Lah 467 (FB)** ** AIR 1921 All 105 (106) (DB) ** AIR 1914 All 356 (357) 36 All 60 (DB) ** AIR 1914 Oudh 352 (352) : 17 Oudh Cas 150 ** 1891 Pun Re No. 30 : 10 Ind Cas 1007 (1008) (DB).

performance of an agreement entered into at a time when his right to sue for pre-emption was subsisting and in express recognition of such right (7) Where pending a suit for pre-emption the defendant vendee sold the property again to a third person and the plaintiff thereupon got the plaint amended by impleading the third person as a party who raised the question of his own preferential right of pre-emption, and the same was heard and decided against the plaintiff it was held that the latter could not thereafter fall back upon S 52 and claim that the sale to the third party was affected by *lis pendens*.(8)

The vendee-defendant in a pre-emption suit can improve his status pending the suit by dealing with the land, so as to defeat the claim of the pre-emptor (9) Thus where a vendee with an equal right of pre-emption with the plaintiff has lost it by associating a stranger with himself as a joint purchaser, he can buy the stranger's share during the suit and thus remove the defect in his title (10)

If the transferee of property transfers it to a person other than the person claiming pre-emption by a document executed and registered before filing of the application for pre-emption the transferee gets good title, however, if the document is executed and registered after the filing of the application for pre-emption the transfer would be hit by the doctrine of *lis pendens* (11)

Where a registered sale deed was executed on the same day on which an application for pre-emption was filed against the vendor in terms of S 16 3 of the Bihar Land Reforms Fixation of Ceiling Area and Acquisition of Surplus Lands Act the lis about the claim for pre-emption would be deemed to be pending from the date of institution of the proceedings and thus the sale deed would be hit by the doctrine of "*lis pendens*" (12)

Certain land was sold to first purchaser who in turn sold it to second purchased The pre-emptor filed an application to pre-empt against first purchaser and filed application to implead second purchaser in that proceeding But no application for pre-emption was filed against second purchaser The sale deed in favour of second purchaser was executed and registered prior to filing of pre-emption application against first purchaser Thus the second purchaser got his title to the property the moment sale deed was registered in his favour His right could not be defeated by pre-emption application The doctrine of *lis pendens* would not apply in such situation (13)

In somewhat similar circumstances the Kerala High Court however held that where the plaintiff filed a suit for specific performance and on the same day the defendant executed a registered sale deed in respect of the suit property in favour of third party and the plaintiff failed to discharge his burden to prove that the transfer of the property under the sale deed was after the commencement of his, it could not be said that the transfer was affected by S 52 (14)

In a suit for possession on ground that plaintiff has right to pre-emption on the land in defendant's possession consent decree was passed on 6-10-1976 on basis of the compromise between the parties It was agreed that defendant will sell the portion of land in his possession to plaintiff for Rs 1500/- and will execute deed of conveyance within 15 days from date of decree But defendant executed sale deed dated 12-10-1976 in favour of a third person Plaintiffs execution petition was dismissed by executing court **Held** under the consent decree defendant agreed and undertook to execute sale deed in respect of land in his possession and cultivation in favour of plaintiff within 15

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7. AIR 1946 Lah 322 (325) : ILR (1947) Lah 213 (FB).
8. (1905) 27 All 544 (547) (FB) ** AIR 1929 All 440 (441) (DB)
9. AIR 1941 Lah 433 (442) : ILR (1942) Lah 155 (FB).
10. AIR 1941 Lah 444 (446) : ILR (1942) Lah 190 (FB).
11. AIR 1984 (NOC) 207 : 1984 BBCJ (HC) 390 (394)
12. AIR 1994 Pat 34 (36) 1993 (2) BLJR 1098 (1984 BBCJ (HC) 890) **Held per incuriam**
13. 1996 (2) BLJR 48 (50)
14. AIR 1990 Ker 177 (180) : 1989 (2) Ker LT 379

days of the date of decree It is only when the judgment-debtor/defendant expreses his readiness and willingness to execute the deed of conveyance that the decreeholder was under obligation to pay the consideration As a matter of fact the judgment-debtor has hardly within five days of the passing of the consent decree executed the conveyance deed in favour of third person on 18-10-76 In that state of affairs the plaintiff/decreeholder could not have tendered the amount The executing court was clearly in error in expressing it inability to extend the time under O 20, R 14 of the CPC. Even if the consent decree in question is taken as a decree for pre-emption in respect of a particular sale of property The decree did not specify any date on which the pre-emptor, i.e. the decreeholder had to deposit the amount, failing which the suit stood dismissed The consent decree in question was not one decreeing the claim to pre-emption in respect of a particular sale of property It is more in the nature of decee of specific performance of an agreement to sell and therefore the court would not be justified in rejecting the execution of the decree on the ground that the decreeholder has failed to pay the amount of consideration The executing court has failed to exercise the jurisdiction which it was bound to exercise by executing the decree against defendant /judgment debtor and the third person/transferee pendente lite since the defendant had no right to transfer the property or otherwise deal with it so as to affect the rights of the decreeholder render the decree during the pendency of the suit in view of S 52 of T P Act Transferee pendente lite cannot successfully resist the claim of execution of the decree holder The Transfer of Property Act No 57 of 1959 merely extended the provision of T P Act and Indian Registration (Bombay Amendment) Act No 14 of 1939 to other part of recognised State of Bombay but since there was no notification issued under proviso to S 2 of Act No 14 of 1939 The amended provision of S 52 would not come in force in other areas of the recognised State of Bombay including Saurashtra where the property is situated.**(15)**

Where a sale-deed was executed and registered in favour of the petitioner and on the same date an application for pre-emption in terms of earlier sale deed in respect of the same property was filed by other party before the Collector the lis about claim for pre-emption would be deemed to be pending before the Collector on the date of execution of sale deed and the deed would be hit by the doctrine of lis pendens.**(16)**

22. Suit for establishing will.

In a suit by devisees under a will for establishing the will, the heir at law is at liberty to invalidate the will. An alienation by the devisees pending the suit will be affected by *lis pendens*.**(1)**

Where the sale of property in favour of testator suffered from doctrine of *lis pendens*, the person claiming title to that property through the will executed by the testator in his favour is not entitled to declaration that he is owner and for injunction **(2)**

23. Suit for cancellation of trust deed.

A suit for the cancellation of a trust deed and for recovery of the immovable property comprised in the trust is a suit in which the right to immovable property is directly and specifically in question.**(1)**

24. Suit for specific performance of contract.

Suits for specific performance of contracts to transfer immovable property are suits in which

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15. AIR 1985 Guj 184 (185, 186) : 1985 Guj LH 39.

16. AIR 1994 Pat 34 (38) : 1993 (2) BLJR 1098

Section 52 — Note 22

1. (1742) 26 ER 509 (509) : 2 Atk 175, Garth v. Ward

2. 2001 (3) Mad LJ 512 (522)

Section 52 — Note 23

1. AIR 1925 Cal 239 (244) (DB)

the right to immovable property is directly and specifically in question and constitute *lis pendens* (1) The principle of *lis pendens* is applicable to suits for specific performance of contract to transfer immovable property (2) Even if a subsequent purchaser purchases the suit property after dismissal of the suit for specific performance of an agreement to sell the property The purchaser is subject to *lis pendens*, if an appeal is afterwards filed against the dismissal of suit (3) The principles contained in S 52 are in accordance with the principle of equity good conscience and justice and it is well established that wherever T P Act is not applicable such principle in the provisions of the said Act, which are based on justice, equity and good conscience, are applicable (4)

Provisions of S 52 are applicable in a suit for specific performance of a contract of sale of immovable property, but in spite of the fact that in such a suit a plaintiff is protected by *lis pendens* the court does at times protect him further by an injunction restraining the defendant from transgressing the property during the pendency of the suit particularly where the court prima facie finds that a valid contract of sale exists (5) It is true that the doctrine of *lis pendens* as enunciated in S 52 of the T P Act, takes care of all pendente lite transfers but it may not always be good enough to take fullest care of the plaintiffs interest vis a-vis such transfer Where suit is one for specific performance of sale in respect of the suit property of the defendant is not restrained from selling the

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Section 52 — Note 24

1. **AIR 1948 PC 147 (149) : ILR (1949) 1 Cal 234 ** AIR 1964 Mys 269 (274) FB ** (1963) (1) All Rent Cas 427 (430) ** AIR 1979 (NOC) 185 (1979) 48 Cut LT 25 (27) ** AIR** 1978 All 318 (1978 All W C 54 DB) (S 52 is not subject to S [illegible] of Specific Relief Act 1963) ** (1976) 1 Andh WR 438 (443) ** AIR 1928 All 25 [illegible] (The transferee cannot rely upon Section 2 (b) of the Specific Relief Act 18[illegible] or S [illegible] of the Specific Relief Act 1963 for avoiding the applicability of Section 52 of the T P Act Nor is there any necessity for the Courts to go into the question whether the transfer *pendente lite* was **bona fide and for value.) ** ILR (1973) 2 Punj 142 (DB) (S 52 overrides S 19(b) of** Specific Relief Act 1963) ** AIR [illegible] Madh Pra [illegible] MPLJ 44 ** AIR **1962 Madh Pra 34 (36) ILR (1960) Madh Pra 797 (Suit for specific performance of** subsequent agreement for sale of property pending [illegible] Execution of sale deed on basis of prior agreement for sale Hit by doctrine of *lis pendens* Notice of transfer pendente lite to purchaser not necessary) ** AIR 1962 Madh Pra 25 (27) ILR (1961) Madh Pra 9[illegible] (198) ** **1958 Ker LT 836 (839) ** AIR 1943 Bom 2[illegible] (30) (Attachment before judgment such property pending suit subject to doctrine of *lis pendens*) ** AIR 1943 Cal 22[illegible] (236) (2[illegible]) (DB) ** AIR 1934 All 713 (714) (A lease of property pending suit for specific performance of an agreement to lease) ** AIR 1924 Mad 3[illegible] (3[illegible]) (Agreement to sell) ** AIR 1922 Cal 4[illegible] (414) 49 Cal 495 (DB) ** 1909 3 Ind Cas 6[illegible] (6[illegible]) (DB) (Purchaser at an execution sale is bound by the doctrine) ** 1[illegible] 2 Ind Cas 26[illegible] (26[illegible]-268) (DB) (Cal) (Contract of lease.)**

   [See also AIR 1964 Orissa 176 (182) ILR (1964) Cut 86 (DB) (Aggrieved party in establishing that under provisions of Specific Relief Act he is entitled to specific performance — S 52 not applicable) ** AIR 1928 Nag 246 (247, 248) (S [illegible] contracting to purchase and obtaining decree for specific performance against C — Mortgage by C to A in the meantime — G purchasing subsequent to decree and redeeming the mortgage — S's decree is binding on G subject to proportionate repayment of the mortgage debt by S)

   [See however 1971 Raj LW 157 (Doctrine of *lis pendens* is not applicable to transfers and other transactions dealing with the property in suit which are made in recognition of pre existing and subsisting right which is enforceable in law though it may not create interest **in the property. AIR 1964 Mys 269, Dissented from.)]**

2. AIR 1991 Mad 137 (146) ** 1999 (1) Cal HN 10 (13) ** AIR 1998 All 167 (168) [illegible] 1994 All LJ 663 (1993 (2) All RC 383 (That transferee was not party to the suit is no ground)

3. **AIR 1996 Mad 353 (363)**

4. **AIR 1986 Delhi 364 (370, 371) : (1986) 2 Ren CR 446**

5. **AIR 1990 Delhi 13 (18) : (1989) 37 DLT 114.**

property to a third party and accordingly, a third party purchases the same bona fide for value without any notice of pending litigation and spends a huge sum of the improvement whereof or for construction thereon the equity in his favour may intervene to persuade the court to decline in the exercise of his discretion The equitable relief of specific performance to the plaintiff of the trial and to award damages only in favour of the plaintiff It must be noted that R 1 of O 39 of the Code clearly provides for interim injunction restraining the alienation for sale of the suit property and if the doctrine of *lis pendens* as enacted in S 52 of the T P Act was regarded to have provided all the panacea against *pendente lite* transfer, the legislature would not have provided in Rule 1 for interim injunction restraining the transfer of suit property R 1 of O 39 clearly demonstrates that notwithstanding the rule of *lis pendens* in S 52 of T P Act, there can be occasion for the stand of injunction restraining *pendente lite* transfers in a fit and proper case **(6)**

In a suit for specific performance, the plaintiff sought interlocutory injunction against alienation or otherwise encumbering the property during pendency of the suit, the same was, however not granted since the plaintiff failed to deposit the stipulated amount in court within time **Held** that non grant of injunction would not make any difference to the operation of rule of *lis pendens* under S 52 Two months time granted to the plaintiff to have the lis registered **(7)**

Where the suit property was transferred to third person during pendency of the suit for specific performance of an agreement to sale and ultimately the decree for specific performance was passed, the subsequent transferee could not resist delivery of possession of the plaintiff decree-holder by revising objection under S 47 CPC that he is a bona fide purchaser The principle of *lis pendens* under S 52 would supply **(8)** In an execution of decree for specific performance the transferees of the property in dispute filed objection u/S 47 of the CPC asserting that the decree was not binding on them inasmuch as they were not parties to the suit and that the decree was not executable against them as they were the bona fide transfrees for value Lis comes into existence from the point of institution of suit and continues to survive till the satisfaction of the decree In view of doctrine of *lis pendens* the transferees are as much bound by the decree and judgment as their transferor the judgment-debtor **(9)** If a third party purchases the property which is the subject-matter of the suit for specific performance during pendency of the suit he would be bound by the decree passed against the vendor, plea that the third party was a bona fide purchaser without notice is of no consequence In the case of transfer which is hit by the doctrine of *lis pendens* under S 52 the question of good faith which is essential to be established before an equitable relief can be given in favour of a subsequent vendee under S 41 or S 51 is totally irrelevant **(10)** Section 19(6) of Specific Relief Act protects a transferee but not a transferee pending litigation S 52 of the Transfer of Property Act has an overriding effect **(11)** In a suit for specific performance of contract to sell immovable property to the plaintiff, the defendant sold the property to the third person, by a registered deed, pending litigation The Court after finding that the subsequent sale could not affect the rights of plaintiff was, therefore entitled to a decree sought for A was held that the subsequent transferee could not pursue *pendens lis* remedies against defendant in present proceedings The equities between the transferee and transferee pending litigation must be left to be decided in a future suit **(12)** Where during pendency of the suit for specific performance of agreement to sale the property was sold in auction in execution of decree against the vendor, the plaintiff is not

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6. AIR 1988 Cal 25 (27, 28) : (1987) 91 Cal WN 1094

7. AIR 1992 SC 1200 (1201) : 1992 AIR SCW 1165.

8. (1989) 2 Rev LR 172 (2) (173) : (1989) 96 Pun LR 408

9. AIR 1994 All 167 (168) : 1994 All LJ 663 : 1993 (2) All RC 383

10. AIR 1987 Punj & Har 189 (190) : 1985 Pun LJ 354

11. AIR 1984 (NOC) 319 : (1984) 26 DLT 162.

12. AIR 1984 (NOC) 319 : (1984) 26 DLT 162

entitled to a decree for specific performance but is entitled to damages **(13)** It is axiomatic that the subject-matter of the contract entered into between the parties should be sufficient as adequate consideration of any attempt on alienation of property is made after filing of the suit for the specific performance S 52 of T P Act comes into play and such contract is hit by the doctrine of *lis pendens* The *purchaser* would get no title Even if the suit filed in the circumstances of the case is decreed only for refund of the earnest money even then S 56 of T P Act creates a statutory charge for the earnest money to be recovered from the property the subject of the contract under the circumstances the need to seek an attachment before judgment is redundant **(14)**

Plantiff filed a suit for permanent injunction restraining the Union of India to auction certain immovable property for recovery of tax The Court allowed that auction may take place during pendency of suit but the same will not be confirmed Accordingly auction was held The auction purchaser applied under O 1 R 10 CPC for being impleaded **Held** that they have to accept the sale subject to the decision of the suit since the auction took place during pendency of the suit Their presence was not necessary to effectually and completely alienate the suit and therefore they were not entitled to be impleaded under O. 1, R 10, CPC **(15)**

A sale after institution of the suit in pursuance of an agreement before the suit is not protected against the operation of S 52 Sections 52 and 54 read together would mean that sale which takes place after the institution of the suit in pursuance of a prior agreement to sell is hit by S 52.**(16)**

Where the vendor did not disclose that the attachment was subsisting at the time of sale of the property and thus cheated the vendee the sale is hit by the rule of *lis pendens* **(17)** Where the suit property is transferred by the defendant to a near relative and at a less than market value pending suit for specific performance, the transfer is hit by S 52 of the Act **(18)**

A suit for specific performance of an agreement to purchase suit property was decreed The plaintiff decree holder could not deposit requisite amount within time specified by the Court and extension of time was refused the preferred revision and during its pendency the defendant sold the suit property to a third person Held that the same is hit by *lis pendens* **(19)** In the instant case a suit for specific performance of an agreement to sale immovable property was decreed ex parte However, instead of drawing correct decree for specific performance a wrong decree i e a mortgage decree was drawn up Defective decree was allowed to stand without seeking its rectification by the parties Plaintiffs did not acquire any rights to purchase the property under the said decree The auction purchaser was not bound by the subsequently rectified/amended decree since he was not a party to that amendment proceedings Therefore the doctrine of *lis pendens* could not be held operative against the purchase of the said property by the auction purchaser **(20)**

Where the property involved in a suit for specific performance is the subject matter of partition suit filed earlier, and was allotted to other co-sharer than the vendor of the plaintiff in the suit for specific performance, the plaintiff will be bound by it in view of S 52 **(21)**

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13. 1986 HRR 39 (43) (Punj & Har)

14. (1985) 2 Andh LT 431 (432)

15. 1982 Rev LR 193 (195) (Punj & Har)

16. 1988 Cur CLJ (MP) 190 (196)

17. (1987) 5 Reports 170 (176) (Mad).

18. AIR 1988 Punj & Har 60 (64) : (1987) 91 Pun LR 185

19. 1996 AIHC 1652 (1653) : 1995 (1) Civ LJ 196 (All)

20. AIR 1997 Kant 306 (311) : 1997 (3) Kant LJ 691.

21. 2002 (3) Andh LT 754 (777)

25. Winding up proceedings.

A petition to wind up a company does not constitute a *lis pendens* against a contributory of the company(1). As to insolvency proceedings, see Note 12.

26. Suit for declaration of title.

Suits for declaration of title to immovable property are suits in which rights to immovable property are directly and specifically in question and consequently the doctrine of *lis pendens* applies to such suits(1). Where a suit was for a declaration that the sale deed executed by the widow in respect of certain property was not binding on the reversioners, it was held that the right to the immovable property the alienation of which was sought to be set aside was involved directly and specifically in the suit(2).

27. "Transferred or otherwise dealt with."

The words "otherwise dealt with" will include the following :

(1) The entering into a contract for sale of the land in suit, which is capable of specific performance(1).

(2) Partition of the property in suit(2) though a mere filing of a suit for partition is not a "dealing" with the property such as is contemplated by the section(3).

(3) The obtaining of a collusive decree or order(4) relating to the property

(4) The entering into a compromise with a third party regarding the subject-matter of the suit(5).

(5) The erection of a fresh obstruction pending suit for removal of obstruction to property(6).

Section 52 — Note 25

1. (1866) LR 2 Ch 171 (177) 15 LT 523 In re Barned's Banking Co Ex parte Thornton

Section 52 — Note 26

1. AIR 1957 Pat 729 (731) : 36 Pat 1139 (DB) ** AIR 1938 Lah 448 (451)

[See also AIR 1916 Lah 379 (380) (DB)]

2. AIR 1957 Andh Pra 454 (456) : ILR (1954) Andh Pra 137 (DB)

Section 52 — Note 27

1. AIR 1917 Oudh 193 (194) : 20 Oudh Cas 13

2. (1913) 37 Bom 427 (439) (SB) ** AIR 1959 Ker 67 (72) : ILR (1958) Ker 1266 (FB). (ILR 37 Bom 427 Foll.) ** AIR 1950 Assam 149 (126) ILR (1950) 2 Assam 225 (DB) * 1950 Trav-Co LR 23 (30) (DB).

[See also (1976) 2 UCR (Bom) 215 (219) (Auction sale during pendency of partition suit in the execution of award would be hit by the principle of lis pendens AIR 1970 SC 1717, AIR 1967 SC 1440, Foll.)]

3. AIR 1928 Mad 735 (741, 745) : 51 Mad 417 (FB). (Per Ramesan and Madhavan Nair, JJ.)

4. (1934) 11 Oudh WN 390 (392 393) (DB) ** AIR 1982 Punj 44 (47) (Pendente lite transfer in tenant's favour effected by means of the consent decree would be hit by the rule of lis pendens.) ** 1906 Pun Re No 7, p 17 (19) (Consent decree in favour of another pre-emptor during pre-emption suit Lis pendens applies.) ** (1926) 96 Ind Cas 450 (451, 452) (Lah).

[See also 1982 All LJ 188 (192) (Where during the pendency of suit the defendants transferred the suit property to some persons and subsequently a compromise decree was passed in the pending suit, the persons claiming title under the defendants could not in the subsequent suit, be permitted to go behind the compromise decree AIR 1948 PC 147 Relied on.)

5. AIR 1952 Lah 403 (404) : 3 Lah 264

6. AIR 1934 Lah 978 (979)

(6) Surrendering property to a third person pending suit for possession(7).

See also the undermentioned cases(8).

In the undermentioned case(9), the doctrine of *lis pendens* has been applied to a case of acquisition of title by adverse possession pending a suit.

In the following cases, the acts of a party were held not to amount to any transfer or other dealing with the property in suit :

(1) Where a party to a pending suit entered into a compromise with a third party merely recognizing a transfer which had been made to him before suit(10).

(2) *A* executed a mortgage in favour of *B* of certain properties and afterwards executed a trust deed vesting such property in the trustees. Subsequently, the trustees were discharged and *A* took possession of the properties. *B* then brought a suit on the mortgage and, pending the suit, *A* appointed new trustees. It was held that *A*'s act was not a "transfer or other dealing" with the property within the meaning of this section(11).

(3) An adoption *pendente lite*(12).

(4) An admission by a party to the suit of the execution of a deed before the Registering Officer(13).

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7. ILR (1955) Madh B 416 (419, 420) : AIR 1955 NUC 3706 (Words "otherwise dealt with" in S. 52 include such transactions as a surrender of holding by tenants to zamindar during pendency of suit filed against them by certain persons for enforcing right to purchase the property.) ** AIR 1925 Nag 421 (421) : 21 Nag LR 441 ** AIR 1925 Nag 132 (134) : 22 Nag LR 110.

[See also AIR 1953 Trav Co 12 (13) (Surrender to a person having no title cannot operate as a surrender. It will, however, operate as an assignment.)]

[See however AIR 1958 Pat 115 (118) (Surrender by a Hindu widow in favour of nearest reversioner during pendency of suit by reversioner is not hit by doctrine of *lis pendens*.)]

8. AIR 1953 Trav-Co 573 (574) : Transfer of possession *pendente lite* will be a transfer of property within S. 52.) ** 2000 AIHC 1021 (1023) (Mad) ** 1981 LPLT (NOC) 106 (If during pendency of suit by tenant to restrain landlord from disturbing use of open land, the landlord builds room, they are liable to be demolished if tenant succeeds.) ** 1974 Ker LT 895 (DB) (Granting of right to cultivate on varam arrangement will amount to "dealing with property within meaning of section.") ** AIR 1970 All 648 (649) : 1969 All LJ 1055 (Suit for possession of vacant land — Defendant putting up superstructure after filing of suit — Cannot claim advantage out of the buildings wrongfully put up.) ** AIR 1968 Madh Pra 229 (231, 232) : 1969 MPLJ 44 (The delivery of possession of land under the decree by the judgment debtors to the transferee during the pendency of the appeal falls within the bar imposed by the expression "cannot be otherwise dealt with" occurring in Section 42.) ** AIR 1924 Bom 434 (436) : 48 Bom 435 (DB) (Gift by A to B — Suit by A before registration of gift deed to revoke gift — B getting document registered pending suit — **Held**, per Macleod C.J., that *lis pendens* applies.) ** 1888 Pun Re No. 101, p. 270 (271) (DB) (Mortgage with possession — Suit for pre-emption — Mortgagor executing simple money bond pending suit in substitution of mortgage bond — Pre-emption cannot be defeated by such act.) ** AIR 1918 Cal 277 (278) (DB) (Settlement by jardar with tenant during pendency of suit for ejectment held not binding on landlord.)

9. AIR 1948 Nag 97 (99) : ILR (1947) Nag 719.

10. AIR 1929 Bom 337 (339) (DB).

11. AIR 1939 Oudh 161 (172) : 14 Luck 548 (DB).

12. (1880) 5 Bom 630 (634, 635) (DB).

13. AIR 1957 Punj 238 (243) (DB) ** (1913) 9 Nag LR 155 (157).

(5) Pending a mortgage suit, the mortgagor executed a mortgage to *X* for paying off other mortgages which had been executed prior to the suit in favour of *Y* and *Z*. It was held that *X* merely took over the prior mortgages and that the act of the mortgagor was not a new transaction or dealing with the property during the pendency of the suit(**14**).

(6) An institution of a suit relating to the same property(**15**).

(7) Taking of forcible possession by one party from another during pendency of a litigation(**16**).

See also the undermentioned cases(**17**).

28. Transfer executed before suit.

It has been seen in Note 7 that rights *existing* before the suit are not affected by *lis pendens*. It follows that this section has no application to transfers made *before* suit(**1**). Where a person is subsequent to the institution of a suit, added as a party to the suit, the general principle is that the suit must as against him, be deemed to have been instituted only on the date when he was so made

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14. (1910) 7 Ind Cas 473 (DB) (Cal).

[See also AIR 1929 All 943 (945) : 52 All 139 (DB)]

15. AIR 1948 Pat 111 (112)

16. **AIR 1965 Punj 415 (420, 423) : ILR (1965) 2 Punj 97 (FB).** (Suit by A against B for declaration of title and possession — A taking forcible possession of suit land by evicting B during pendency of his suit — Suit dismissed — B's suit for possession after 12 years from date of his dispossession — Section 52 does not apply and A's adverse possession for more than 12 years is not affected — B's suit held barred by limitation under Art 142, Limitation Act or alternatively under Art 144 Per Grover and Dulat JJ Dua J contra) ** **AIR 1973 SC 2537 : (1975) 1 SCJ 470.** (Takings of illegal possession or their continuance neither resemble nor are comparable to transfer They are one sided wrongful acts and not bilateral transactions of a kind which ordinarily constitute deals or dealings with property.)

17. (1963) 2 Andh WR 465 (471) (DB) (Suit for possession pending — One of the defendants redelivering land to another defendant on expiry of them of lease — *Held* there was no surrender but expiry of lease by efflux of time Section 53 did not apply) ** AIR 1982 Bom 191 (197) (Where during the pendency of the suit for possession of the disputed properties the ratification deed purporting to perfect the title of plaintiff was brought into effect and the defendants failed to prove their title by adverse possession S 52 would not be applicable in such case and the document could not be hit by doctrine of *lis pendens*) ** (1980) 6 All LR 557 (559) (Where the mortgagor during the pendency of suit for redemption had sold the equity of redemption, the sale would not be affected by rule of *lis pendens*) ** AIR 1924 Mad 602 (602) (DB) (Order under O 21, R 101 of Civil Procedure Code passed during the pendency of suit, by which defendant was put in possession of property and more than a year had elapsed before the suit was disposed of *Held lis pendens* did not apply.)

Section 52 — Note 28

1. **AIR 1949 East Punj 193 (195) : ILR (1949) East Punj 305 (FB).** (Transfer before suit to person having equal or superior right of pre-emption — Transferee can resist suit by another pre emptor on the strength of his own pre-emptive right irrespective of whether transfer to him was made in recognition of his superior pre-emptive right or not Form of transfer so long as it can be shown that transferee acquired full title of vendee is immaterial) ** AIR 1957 Ker 48 (50) ILR (1957) Ker 35 (DB) ** AIR 1915 Mad 805 (806 807) (DB) (Sale by auction by Court before suit Confirmation after suit — *Lis pendens* does not apply as purchaser's title arises on the date of sale though it is confirmed afterwards)

[See (1982) 1 Mad LJ 425 (1982) 95 Mad LW 213 (218) (The doctrine of *lis pendens* could not be applied to the case of a mortgage executed prior to the suit wherein the right of private sale was conferred on the mortgagee AIR 1922 Mad 390 Foll)]

a party(2). A transfer by such person *before* he was so made a party cannot, therefore, be affected by the doctrine of *lis pendens*(3). On the same principle where a person, *not* a party to the suit, transfers property pending suit, and subsequently, is made a legal representative of a party who dies, the transferee cannot be affected by the doctrine of *lis pendens*(4).

29. Transfer executed before but registered after suit.

The section cannot apply so as to affect a transfer of property made before suit but registered thereafter(1). As pointed out by their Lordships of the Privy Council while registration is a necessary solemnity in order to enforce a transfer, it does not suspend the transfer until registration actually takes place(2). This view is also held by the undermentioned cases(3).

30. Transfers by operation of law.

The words "the property cannot be transferred or otherwise dealt with *by any party* to the suit" clearly show that the section in terms does not apply to a transfer by operation of law. Section 2, Cl (d) also makes this clear. A transfer by operation of law takes place in cases of succession, bankruptcy and forfeiture. Thus, where pending a suit the defendant becomes an insolvent and his property vests in the Official Receiver, neither this section nor the principle of *lis pendens* applies(1). Section 52 of the Transfer of Property Act does not apply to acquisition by the State in

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2. See Limitation Act S 21(1) and also Civil Procedure Code O 1 R 10(6).
3. AIR 1932 Pat 270 (271) : 11 Pat 415 (DB) ** AIR 1925 Mad 487 (488).
4. AIR 1925 Bom 176 (177) (DB).

Section 52 — Note 29

1. AIR 1960 Ker 98 (100) : ILR (1959) Ker 820. (Transfer deed executed on date of filing suit but registered four days thereafter — Plaintiff not showing that he filed plaint earlier in point of time than the execution of transfer deed — Transfer held not vitiated by *lis pendens*.) ** (1984) 1 Andh WR 36 : (1983) 2 APLJ 3, 2 (DB). (Section 52 will not be applicable to a sale which had the effect of putting the third parties in possession of immovable property, under a valid and genuine agreement to sell prior to the creation of the equitable mortgage in favour of the plaintiff, though a regular registered sale deed in respect of the sale was executed thereafter.) ** **(1979) 2 Malayan LJ 267.** (Even if a transfer is registered pending action for specific performance it cannot prevail over the earlier purchaser.) ** AIR 1973 Pat 199 (205) : 1973 Pat LJR 534 (DB) ** AIR 1969 Pat 504 ** AIR 1951 Pat 613 (6, 6) (DB) ** AIR 1935 Mad 710 (710) (DB). (Sale deed executed before but registered after suit.) ** AIR 1925 Mad 359 (359) ** AIR 1922 Mad 249 (249, 258) (DB). (Suit on prior mortgage without impleading puisne mortgage — Puisne mortgage treated as *pendente lite* — Effect of.) ** 1877 Bom PJ 81 (DB).

[**See however** AIR 1960 J & K 2, 113 (DB). (Pre emption suit — Deed of exchange between defendant 1 and defendant 3 executed before suit but registered after institution of suit — So far as plaintiff is concerned document is effective from date of registration under S 47 of Registration Act (1908) — Plea of doctrine of lis pendens is open to plaintiff — In order to succeed he must show his superior right of pre emption.)]

[**But see AIR 1921 Pat 150 (152) : 5 Pat LJ 715 (DB).**]

2. **AIR 1927 PC 42 (44) : 50 Mad 193. (Case under S. 123, T P Act.)**
3. **AIR 1925 Bom 210 (219, 227) : 49 Bom 388 (FB).** (Deed duly executed — Donor cannot revoke before registration — Per Marten, Fawcett and Kincaid JJ.) ** AIR 1957 Pat 238 (243) (DB). (Vendee selling house sought to be pre empted before institution of pre emption suit — Sale deed registered after suit — Doctrine of *lis pendens* not applicable.) ** AIR 1948 Pat 60 (61) (DB).

Section 52 — Note 30

1. AIR 1951 Mad 687 (691) (DB) ** AIR 1939 Nag 128 (129) ** AIR 1922 Mad 335 (336)

exercise of its statutory powers viz. under Land Acquisition Act, 1894, even though notifications concerning acquisitions were issued during the pendency of a suit(2). But a sale by the Official Receiver is a private sale and not a sale by operation of law and therefore is governed by this section(3). It has been held by the Nagpur High Court that the doctrine of *lis pendens* will apply to a person who perfects his title to property by adverse possession during the pendency of a suit(4). But it is doubtful if this view is correct.

30A. Effect of provision in tenancy laws.

Where tenancy proceedings under S. 29(2) of the Bombay Tenancy and Agricultural Lands Act was pending on day of purchase of suit property, the principle under S 52 would apply(1).

When the question of tenancy is in issue in a Civil Court, a party to that proceeding cannot by-pass the Court and seek to obtain redress from a Tribunal by filing a petition under S 72 of the Kerala Land Reforms Act. An attempt thus made to invite a decision on the question of tenancy by the Tribunal during the pendency of the suit cannot be encouraged or supported The Tribunal shall either wait till the Civil Court renders its decision, or if the Tribunal proceeds to enter any finding, on the tenancy, it will only be a tentative decision subject to the final decision of the Civil Court Section 72 postulates a decision on the status of the applicant as a cultivating tenant and a consequent order for transfer of the landlord's rights The first aspect is subject to the decision of a Civil Court which is already seized of the matter in the pending suit The second aspect which is consequential and directing transfer of the landlord's rights is the prerogative of the Land Tribunal The application of the doctrine of *lis pendens* in such a case therefore is not inconsistent with any provision of the Act The Land Tribunal is a creature of the statute controlled by its provisions While it cannot traverse outside its jurisdiction, it can function only subject to certain inherent limitations. It is as much bound by the principle of *lis pendens* just as it cannot flinch from the path of natural justice.(2)

There is no conflict between any provisions of the Karnataka Land Reforms Act and S 52 of the T P Act Even otherwise all that sub-s. (2) of S 3 of the Karnataka Act deals with is the overriding effect of the provisions of that Act so far as they relate to Chapter V of the T P Act Section 52 does not come under Chap. V.(3)

There is no conflict between S 52 and the provisions of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (1961).(4)

Where a person purchases agricultural land during pendency of the suit, the transaction is invalid and if he inducts a tenant in that land, the tenant cannot claim to be the cultivating tenant thereof and the occupancy right created in his favour would be hit by S 108 of the T P Act (5)

(DB) ** (1902) 25 Mad 406 (413, 423) (DB) (Official Receiver is not a 'voluntary purchaser.)

[See (1903) 26 Mad 230 (236) (DB).]

[See also AIR 1933 Mad 858 (859) (Official assignee held not bound by the decree passed in a suit instituted against the insolvent and his son.)]

2. (1983) 9 All LR 594 : 1983 All WC 419 (DB).
3. AIR 1945 Mad 350 (351).
4. AIR 1948 Nag 97 (99) : ILR (1947) Nag 719.

Section 52 — Note 30-A

1. 1999 AIHC 4469 (4474) : 2000 (1) ICC 229 (Bom).
2. AIR 1984 Ker 135 (138) : 1984 Ker LJ 164.
3. 1998 AIHC 4403 (4405) : 1998 (6) Kant LJ 47.
4. 1984 BBCJ 890 (894) (DB)
5. 1999 AIHC 1837 (1840) : 1999 (1) Kant LJ 682.

A civil suit for eviction of tenant was filed. During its pendency Kerala Rent Control Act was extended to the concerned locality. Suit premises were purchased by a co-operative society and it was added as plaintiff held that it could not be said that the sale to the co-operative society during pendency of the suit should be totally ignored in view of the provisions of S. 52 of the T. P. Act. Civil Suit was not barred in view of exemption granted to the co-operative society. The doctrine of *lis pendens* could not be involved for purpose of ousting the jurisdiction of the Civil Court which originally had the jurisdiction.(6)

The rights of Thika tenants were held to be hit by the principle of *lis pendens* since the right of the original lessee has come to an end of passing of decree for eviction (7)

The principles of *lis pendens* adumbrated under section 52 of the Transfer of Property Act would apply to the ejectment proceedings under Sec. 13 of the Tenancy Act, pending adjudication of the rights between landlord and the tenant, when the former grants any lease in favour of the third party in respect of which the tenants therein are claiming entitlement, the doctrine of *lis pendens* would apply and the lease is hit by the principle of *lis pendens*(8).

31. Transfer by or in execution of decree or order.

A transfer by way of a Court sale in execution of a decree or order, though involuntary, cannot be said to be a transfer by operation of law within the meaning of this Act, inasmuch as S. 2, Cl. (d) draws a distinction between a transfer by operation of law and a transfer by or in execution of a decree or order. This *section*, in terms does not apply to such transfers also(1). The general principle of the doctrine of *lis pendens* will, however, apply to such cases(2).

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6. AIR 1994 Ker 122 (126, 128) : 1994 (2) Rent CR 336
7. AIR 2001 Cal 78 (84)
8. 1984 LS (AP) 9 (18, 19)

Section 52 — Note 31

1. **AIR 1967 SC 1440 (1445) : (1968) 1 SCJ 68** ** 1998 AIHC 102 (105) ; 1997 (1) Kant LJ 415 ** (1972) 2 Andh WR 78 (DB) (Save as provided by S. 57.) ** AIR 1958 All 24 (25) ** AIR 1957 Pat 729 (731) ; 36 Pat 1139 (DB) ** ILR (1957) 3 Cal 642 (643) ** 1954 BLJR 356 (358, 359) ; AIR 1955 NUC 1597 ** AIR 1952 Orissa 64 (68) ; ILR 1952 Cut 277 (DB) ** ILR (1951) Trav-Co 570 (574) ; AIR 1955 NUC 1043 (DB) ** AIR 1950 Orissa 210 (211) ; ILR (1950) Cut 486 (DB) ** AIR 1930 Rang 132 (135) ; 7 Rang 734 (DB) ** (1901) 23 All 60 (62) (DB) (Sale in execution pending an appeal in a suit under O. 21, R. 63.)

   The contrary view expressed in the case below that the section applies to such cases is not correct.

   **** AIR 1931 All 466 (480) : 53 All 1023 (FB)** ** (1911) 9 Ind Cas 840 (840) (Cal) (Word, "therein", in S. 2, T. P. Act, interpreted.) ** AIR 1931 All 45 (46, 47) (DB) (Suit for partition.) ** AIR 1923 Cal 252 (256) (DB) ** AIR 1922 Nag 81 (82) ** AIR 1915 All 27 (28) (DB)

2. **AIR 1967 SC 1440 (1445) : (1968) 1 SCJ 68 ** AIR 1970 SC 1717 (1721, 1722) : 1971 BLJR 86 : (1969) 1 SCWR 74.** (Principle of *lis pendens* applies to involuntary alienations.) **** AIR 1946 Lah 322 (328) : ILR (1947) Lah 213 (FB) ** AIR 1922 Nag 89 (90, 92) (FB) ** (1896) 24 Cal 62 (74, 75) (FB) ** (1909) 32 Cal 891 (906) (SB)** ** (1989) 2 Ker LJ 668 (670) ** AIR 1988 Kant 59 (ILR (1986) 2 Kant 3776 **held obiter.**) ** (1988) 65 Cut LT 328 (334) ** 1986 HRR 39 (43) (P & H) (Doctrine applies to court auction sales and revenue sales.) ** AIR 1983 All 310 (317) (DB) (Where the auction sale was held during the pendency of suit for specific performance of contract, held, principle of *lis pendens* would be applicable to such auction sales.) ** AIR 1981 All 149 ** AIR 1981 Pat 27 ; 1980 BLJR 493 ** AIR 1978 NOC 270 ; (1978) 1 Mad LJ 146 ; AIR 1975 Raj 45 (47) ; 1974 Raj LW 220 ** 1970 Ker LR 582 ** AIR 1918 Mad 578 (579) ; 41 Mad 458 ** (1962) 2 Mad LJ 336 (337) ** AIR 1960 Cal 299 (302) (DB) (AIR 1939 Cal 709 Ap

proved. AIR 1946 Pat 134 and AIR 1935 Pat 230 **Dissented from.**) ** AIR 1959 Ker 133 (135) ILR (1958) Ker 480 (DB) (Sale in execution of money decree subsequent to mortgage suit.) ** AIR 1958 All 24 (25) ** (1958) 37 Pat 176 (193) (DB) ** (1957) ILR 3 Cal 642 (643) * AIR 1957 Pat 729 (731) 36 Pat 1139 (DB) ** AIR 1954 BLJR 356 (358 359) AIR 1955 NUC 1597 ** AIR 1954 Trav Co 299 (301) (DB) ** AIR 1954 Trav-Co 122 (123) (DB) ** AIR 1953 Pat 58 (59) 31 Pat 722 (DB) (Doctrine of *lis pendens* applies to purchase at auction sale in execution of a decree.) ** AIR 1952 Orissa 64 (68) ILR (1952) Cut 277 ** AIR 1952 Trav-Co 102 (103) 1950 Trav-Co LR 665 (DB) ** AIR 1951 Cal 481 (484) ILR (1949) 1 Cal 378 (DB) ** AIR 1951 Nag 194 (197) ILR (1951) Nag 241 (Principle enunciated in S. 52 applies to auction sales.) ** ILR (1951) Trav-Co 570 (574) AIR 1955 NUC 1043 (DB) ** AIR 1950 Orissa 210 (211) ILR (1956) Cut 486 (DB) ** AIR 1950 Orissa 36 (41) : ILR (1949) 1 Cut 559 (DB) (In applying the doctrine of *lis pendens* law does not make any difference between a transfer inter vivos and an involuntary transfer.) ** 1950 Trav Co LR 636 (640) (DB) (1 TLJ 28 and 16 TLJ 510 (FB), Relied on.) ** AIR 1949 Mad 207 (208) AIR 1949 Nag 114 (115) ILR (1948) Nag 573 ** ILR (1948) Nag 133 (139) (DB) ** AIR 1948 Pat 111 (112) ** (1945) 50 Mys HCR 258 (DB) (The language of T. P. Act is plain. The rule of *lis pendens* only applies to transfers by the plaintiff or defendant to their respective interests after the suit including transfers by Court sale in execution of money decrees against either party.) ** AIR 1944 Bom 191 (193) ILR (1944) Bom 274 (DB) ** AIR 1943 Bom 27 (30) (Doctrine of *lis pendens* applies to attachment before judgment.) ** 1943 Trav-Co LR 133 ** AIR 1939 Cal 709 (710) ILR (1939) 2 Cal 63 ** AIR 1939 Cal 655 (656) (DB) ** AIR 1939 Lah 146 (147) ** AIR 1937 Nag 400 (401) ILR (1937) Nag 452 ** AIR 1937 Oudh 159 (163) 12 Luck 540 (DB) ** AIR 1936 Cal 590 (592) ** AIR 1936 Lah 512 (513) ** AIR 1934 Nag 36 (38) 30 Nag LR 284 ** AIR 1933 Mad 838 (838) ** AIR 1933 Lah 30 (31) ** AIR 1933 Lah 171 (172) ** AIR 1930 Mad 570 (572) ** AIR 1930 Mad 824 (830 832) 54 Mad 132 (DB) ** AIR 1930 Rang 132 (133 135) 7 Rang 734 (DB) ** AIR 1929 All 601 (602) ** AIR 1929 Bom 200 (201) ** AIR 1927 Oudh 261 (263) 2 Luck 496 (DB) ** AIR 1925 Pat 462 (464) 4 Pat 619 (DB) ** AIR 1925 Oudh 496 497 498 29 Oudh Cas 37 (DB) ** AIR 1925 Oudh 30 (33) (Absence of notice is immaterial.) ** AIR 1924 Mad 307 (308) (DB) ** AIR 1924 Bom 467 (467) (DB) ** AIR 1923 Mad 442 (443) (DB) ** AIR 1922 Pat 542 (543) 1 Pat 287 (DB) ** AIR 1920 Mad 126 (129) 43 Mad 696 (DB) (Per Seshagiri Aiyar J. It applies when the purchaser knows the pendency of the litigation and purchases property deliberately ignoring the suit.) ** AIR 1918 Mad 1098 (1098) 40 Mad 955 (DB) (Per Napier J.) ** AIR 1917 Oudh 111 (112) ** AIR 1915 Oudh 1 (3) ** AIR 1915 Cal 536 (538) (DB) ** (1909) 3 Ind Cas 696 (699) (DB) (Cal) ** (1907) 11 Cal WN 828 (830) (DB) ** (1902) 27 Bom 266 (270) (DB) ** (1901) 28 Cal 23 26) (DB) ** (1901) 23 All 60 (64) (DB) ** (1926) 95 Ind Cas 213 (214) (Oudh) ** (1913) 16 Oudh Cas 148 (152) (DB) ** (1913) 18 Ind Cas 177 (179) (DB) (Cal) ** (1911) 11 Ind Cas 464 (465) (DB) (Cal) ** (1911) 9 Ind Cas 772 (773) (Low Bur) ** (1910) 6 Ind Cas 40 (41) (DB) (Cal) ** (1899) 3 Cal WN 323 (325) ** (1891) 14 Mad 491 (492) (DB) * (1888) 15 Cal 94 (97, 99) (DB) ** (1886) 12 Cal 299 (301) (DB) ** (1882) 6 Bom 567 (570) (DB) (This would be so even when the property sold in execution was attached before suit.) ** (1878) 4 Cal 789 (792) (DB) ** (1874) 7 Mad HCR 104 (111) (DB) ** (1874) 21 Suth WR 349 (351) (DB)

[**See also AIR 1952 Nag 341 (343) : ILR (1952) Nag 211 (FB).** (There is no force in the contention that S. 52 does not apply to involuntary sales.) ** AIR 1934 Mad 40 (43) 57 Mad 426 (Obiter.) ** **(1886) 12 Cal 414 (421) : 12 Ind App 171 (PC) ** AIR 1924 Mad 449 (450) (FB).** AIR 1930 All 638 (640) (DB) (Once a joint mortgage decree is passed against several items of property the mortgagee decree-holder is entitled to realise the entire amount from any part of these properties and he can also sell them in any order that he wishes to choose. Neither the judgment-debtor nor any transferee *pendente lite* from him is entitled to have the decretal amount split up and the liability apportioned.) ** ILR (1955) 1 All 673 (685) AIR 1955 NUC 1698 (Sale under S. 162 of U. P. Land Revenue Act for realisation of arrears of income tax — Sale taking place after preliminary mortgage decree and during pendency of mortgage suit. Doctrine of lis pendens will apply.)]

In *Moti Lal v Karrabuldin*(3), their Lordships of the Privy Council applied the doctrine of *lis pendens* to a transfer of property in execution of a decree pending a suit for declaration of title to that property. Their Lordships further stated that the transfer will be affected by *lis pendens* notwithstanding that the *attachment* under which the property was sold had been effected before the institution of the suit inasmuch as attachment did not confer any title on the attaching creditor(4).

There is, however, a difference of opinion on the question whether a sale in execution of a *mortgage* decree, the mortgage having been executed before the institution of the suit, is affected by the doctrine of *lis pendens*. In the undermentioned cases(5) it has been held that it is not affected, while a contrary view has been expressed in other cases(6). It is submitted that the latter view is correct. *Motilal's case*(7), referred to above, was one in which a sale in execution of a *mortgage* decree was held pending a suit for declaration and it was held that the doctrine of *lis pendens* will apply to the case. This decision has not been referred to in the cases holding that it is not affected.

It is settled law that doctrine of *lis pendens* does apply to auction sales held by the executing Court of any immovable property of judgment debtor which was subject of dispute in a pending

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[**See however** AIR 1946 Pat 134 (135) — 24 Pat 695 (DB). (Doctrine of lis pendens not extended in 1882 by judicial decisions to transfers in invitum.)]

[**But see** AIR 1935 Pat 230 (230) ** (1886) 10 Bom 400 (405, 406) ** (1900) 3 Oudh Cas 170 (171) ** 1878-1 All 588 (590) (DB) ** (1871) 15 Suth WR 308 (309) (DB).]

Also see Section 2, Note 6.

3. **(1898) 25 Cal 179 (185) : 24 Ind App 170 (PC).**

4. Also see the following cases:

(1906) 29 Cal 428 (431) (FB). (Attachment does not confer any title.) ** 1956 Trav Co LR 636 (640) (DB) ** AIR 1915 Oudh 1 (3) ** (1874) 21 Suth WR 349 (351) (DB).

5. **(1948) 53 Mys HCR 219 (240, 241) (FB).** (Sale of mortgaged property in execution of mortgage decree during pendency of maintenance suit is not hit by doctrine of *lis pendens* when mortgage is prior to maintenance suit and mortgagee is not made party to that suit.) ** 1958 Ker LT 836 (838, 839) ** AIR 1957 Ker 48 (50). ILR (1957) Ker 45 (DB) ** AIR 1950 Mad 189 (190). (The reason being that the title of such purchaser relates back to the date of the mortgage.) ** AIR 1950 Orissa 210 (211). ILR (1950) Cut 486 (DB) ** (1949) 27 Mys LJ 61 (69) (DB). (Suit on mortgage before suit for maintenance was instituted against mortgagor — Sale held in mortgage suit during pendency of maintenance suit is not affected by charge created in the maintenance suit.) ** AIR 1945 Mad 91 (92). ILR (1945) Mad 578 (DB). (AIR 1931 All 466 (FB). **Dissented from;** AIR 1932 Mad 566. **Approved.**) ** AIR 1945 Nag 86 (93). ILR (1944) Nag 852 (DB) ** AIR 1942 Cal 394 (401) (DB) ** AIR 1932 Mad 566 (573). 56 Mad 115 (DB). (**Dissented from** AIR 1917 Mad 751.) ** AIR 1926 All 480 (486) (DB) ** (1905) 32 Cal 871 (906) (DB). (Per Mitra J., Bret J., contra.) **Also see Note 7.**

6. **AIR 1922 Nag 89 (91) (FB) ** AIR 1931 All 466 (480, 481) : 53 All 1023 (FB).** (Per Mukerjee J., contra. — 25 Cal 179 (PC). Followed.) ** AIR 1962 Bom 191 (196). ILR (1961) Bom 977. (AIR 1950 Orissa 210 and AIR 1945 Mad 91 and AIR 1945 Nag 86. **Dissent from;** AIR 1931 All 466 (FB) and AIR 1958 All 24 and 24 Ind App 170 (PC). Reason.) ** AIR 1959 Punj 490 (495, 496) ** AIR 1938 Pat 111 (112). (Suits by prior and subsequent mortgagees without impleading each other. — Sale in execution of decree on prior mortgage during pendency of suit on subsequent mortgage — Is affected by *lis pendens* — AIR 1931 All 466 (FB). Foll.) ** AIR 1914 Sind 13 (132). 8 Sind LR 264 (DB).

[**See also** AIR 1921 Cal 792 (795) (DB). (Mortgage-decree — Suit to redemption — During pendency of litigation sale in execution of mortgage decree. — **Held** Court should not have ignored the event.)]

7. **(1898) 25 Cal 179 (185) : 24 Ind App 170 (PC).**

suit (**8**) A decree for specific performance of an agreement to sell immovable property was passed in favour of plaintiff During pendency of execution of the decree, the property was sold in auction in execution of another decree and possession was given to sanction purchaser Held that the principle of *lis pendens* applies to Court auction sale.(**9**)

Where a person purchases a mortgaged property in execution of the money decree during the pendency of mortgage suit, he has to be treated as the representative-in-interest of the judgment-debtor. Thus he is bound by the mortgage decree and is bound to give possession (**10**)

During the pendency of suit for enforcing rights under the equitable mortgage, the suit property was auctioned in execution of money decree obtained by another person The auction purchaser was, therefore bound by the decree passed in the pending suit in view of doctrine of *lis pendens*(**11**) Where after filing a suit on mortgage and during its pendency, the suit property was auctioned in execution of another decree and the auction purchaser subsequently sold that property to the appellant thereafter a charged decree was passed in the suit on mortgage and the respondent purchased the property in auction sale and delivery was affected, the Court sale and delivery to appellant in execution of the earlier decree is hit by S 52 He is not entitled to re-delivery of the property from the respondent (**12**) Where the symbolic possession of the property is handed over by a person to auction purchaser in execution of the decree, he could not have parted with possession of the party in favour of the third person and the third person could not acquire any right in the property in view of the principle of *lis pendens*.(**13**)

Section 52 of the Transfer of Property Act, which embodies the rule of *lis pendens* in relation to a suit for proceeding in which any right to immovable property is in question, specifically provides that the vice of that rule is not attracted where property is transferred or otherwise dealt with under authority of the competent Court The rationale of this exemption is that a purchaser in court-sale has a right to presume that the Court has properly investigated the rights of the parties before ordering the sale It is, therefore, of the greatest importance that sales made under the authority of the Court are not lightly set aside. This exception to the rule in S 52 has no application in respect of private alienations where parties deal with each other at arms length Significantly the rule in S 52 has application only in cases where right to immovable property is in question It has no application to a suit for money A sale in execution of a money decree, subject to the rule of restitution contained in S 144 of the CPC, is not affected by the subsequent reversal of the decree. No statutory bar is attracted to such a sale The decision cited on behalf of the appellants concerned court-sales in execution of money decrees The subsequent reversal of the decree in such a case did not affect the bona fide transferee without notice who is entitled to claim relaxation of the rule of restitution contained in S 144 of the C P C That principle has no application, whatever to a case which squarely falls within the mischief of S 52 of the Transfer of Property Act, 1882 The rule of *lis pendens* "affects not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending litigation, rights to the property in dispute, so as to prejudice the opposite party".

Where the suit related to a right of immovable property and the purchaser purchases the property, not in a Court-auction, but from the decree-holder in a private sale, such sale during the pendency of the application under O 9, R 13 of the C P. C is a transaction during the pendency of the "suit or proceeding" within the meaning of S 52 of the Transfer of Property Act, 1882 The

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8. AIR 1997 Kant 306 (308) : 1997 (3) Kant LJ 691
9. 1989 TLNJ 40 (41) (Mad)
10. 1987 TNLJ 206 (210) (Mad)
11. AIR 1988 Kant 59 ILR (1987) Kant 1242 (ILR (1966) 2 Kant 3776, **held obiter.**)
12. (1989) 2 Ker LJ 668 (670) (DB).
13. 1984 Rajasthan LR 437 (440).

prohibition contained in that Section provides for no exemption in favour of a bona fide purchaser without notice. Whether or not the purchasers are of such a category when they purchased the suit property by a private sale, and not by an involuntary sale ordered by the Court, the statutory prohibition, invalidated the sale.(14)

A transferee of land from a judgment debtor in a money decree cannot contend that the transfer was not attracted by mischief of *lis pendens* when the judgment debtor had brought a title suit to set aside the money decree and applied for stay of execution proceedings in which the suit land was sought to be sold to realise the decretal amount and the Court granted the stay after the judgment debtor's furnishing a security bond and consequently the said title suit was dismissed and land was sold in auction. Though a charge under S. 100, T. P. Act does not involve transfer of an interest to the immovable property, it creates a right to immovable property for the purpose of executing a decree and charge within the meaning of S. 100, T. P. Act is quite competent to attract the provisions of S. 52, moreover, although no question as to right to any property was directly and specifically raised at the inception of a suit or proceeding, it may at subsequent stage appear therein to fall within the ambit of S. 52.

Moreover by virtue of the provisions of S. 100, T. P. Act, the land in hand of the transferee can be pursued for realisation of the decretal dues unless the appellant can prove that he purchased the property without notice of the charge and for consideration.(15)

Where the properties are brought to sale in pursuance of the same decree, the principle of *lis pendens* has no application.(16)

A transferee *pendente lite* is bound by the decree just as much as he were a party to the suit. Such transferee puts himself in privity with the suit and must be treated not as a stranger to the suit but as a party to the suit and consequently bound by the terms of the decree in full. A decree based upon a compromise is just as much binding as a decree founded upon a decision on merits.(17)

The authorities while determination of excess land under the Urban Land (Ceiling and Regulation) Act, which was lying vacant, did not consider the choice of the landowner. Subsequently the land was transferred. The transferee filed an appeal against order declaring the land as excess and also objected to the non-consideration of choice of transferor by the authorities. The fact whether the transfer deed was valid or not in view of S. 27 of the 'Ceiling Act' was to be considered only after choice given by transferor was taken into consideration. The purchaser of land was certainly entitled to urge before the authorities, the objection taken by the transferor regarding choice given by her. The transferee to property is subject to provisions of S. 52 of T. P. Act. The transferee is entitled to take such plea which the transferor of such property had already taken the principles which is involved under O. 22, R. 10 read with S. 141 of C. P. C. will be applicable.(18)

32. Compulsory sales for recovery of Government dues.

A compulsory sale for the recovery of Government dues is sometimes *free of all incumbrances* under the particular law applicable to the case, and is sometimes subject to incumbrances like an ordinary sale in execution of a decree of a Civil Court, conveying only the right, title and interest of the judgment-debtor. In the former case the moment the sale takes place, the mortgage or other incumbrance is *extinguished*. Consequently, the sale, even though it takes place pending a suit or

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14. (1987) 2 Ker LT 401 (403)
15. AIR 1984 (NOC) 85 (Gau)
16. AIR 1953 Mad 692 (693) : ILR (1953) Mad 1009 (DB)
17. AIR 1985 All 163 (166)
18. AIR 1993 All 83 (84) : 1993 All LJ 464 · 1993 All CJ 1024

the mortgage or other encumbrance is not affected by *lis pendens*(1). In the latter case, the sale would be governed by the general doctrine of *lis pendens*(2).

Where a person claimed to be purchaser of suit property in Government auction held for recovery of debt due to Government and the liability of the Government had arisen prior to the suit for specific performance of agreement for sale filed by the plaintiff, the person who purchased the property in auction is entitled to be impleaded. Strictly speaking S. 52 would not be attracted. State debt has to be given precedence over private liabilities (3). Where the property which is the subject matter of a suit for specific performance is already attached and auctioned by the Government in order to recover State debt due to owner, the auction purchaser is entitled to be impleaded in the pending suit for specific performance. Strictly speaking provisions of S. 52 are not attracted in case of proceeding for recovery of State debt (4). See also the undermentioned cases (5).

Section 52 — Note 32

1. AIR 1954 Trav-Co 122 (123) (DB) (Compulsory sale for arrears of Jenmikarom under Travancore Jenmi and Kudivan Act (5 of 1071).) ** **AIR 1973 SC 569 (573, 574, 578, 579 to 581) : (1974) 4 Civ App J 154** (The liability of the land to be sold under Section 7(c) of the Land Improvement Loans Act 1883 was a pre-existing charge and that subsisted as **from the date of the loan. This was not affected by the institution of the suit for partition.** This charge could be enforced by the State notwithstanding the pendency of the partition suit. (1969) 2 Mad LJ 209, Affirmed.) ** **AIR 1952 Orissa 64 (68)**, ILR (1952) Cut 277 (Rent sale of tenancy holding subject to Orissa Tenancy Act pending execution of mortgage decree against holding. — Purchaser at rent sale is not affected by *lis pendens* by reason of provisions embodied in S. 220 of the Tenancy Act.) ** **AIR 1952 Trav-Co 230** (234) (DB) ** AIR 1952 Trav-Co 96 (97), ILR (1951) Trav-Co 554 (DB) ** **AIR 1952 Trav-Co 61 (62) : 1950 Trav-Co LR 333,** ** **ILR (1951) Trav-Co 570 (574)**. **AIR 1955** NUC 1043 (DB) (The prohibition is only against litigant parties dealing with properties in dispute and not against a paramount claim like that of State or a local body being enforced.) ** 1950 Ker LT 322 (327) ** AIR 1939 Mad 256 (256) (Sale of land by Collector for arrears of rent due from ryot to land-holder is not affected by doctrine of *lis pendens*.) ** AIR 1929 Rang 175 (176), 7 Rang 113 (DB) (Sale for arrears of property tax under the Rangoon Municipal Act. — Sale under that Act is free of encumbrances.)

   [See also (1958) 37 Pat 176 (193) (DB) (Disputed property given in security by K for loan taken from Government under Bihar and Orissa Natural Calamities Loans Act (1 of 1934). — Collector's right to put up disputed property to sale in proceedings for realisation of loan held to be paramount. — Purchaser at such sale acquired the property free from all **encumbrances.)]**

2. **ILR (1955) 1 All 673 (675)**, **AIR 1955 NUC 1698 (Sale under S. 162 of U. P. Land** Revenue Act (3 of 1901) for recovery of arrears of income-tax.) ** AIR 1982 Ker 222 (225, 226) (AIR 1967 SC 1440, AIR 1972 Ker 68, Foll.) ** AIR 1952 All 298 (299) (Revenue sale under S. 162 U. P. Land Revenue Act (1901). — Sale during pendency of **mortgage suit — Doctrine of *lis pendens* affects the sale — Purchaser's claim cannot** prevail over the claim for possession by purchaser in sale held in execution of mortgage decree.) ** AIR 1926 Mad 1161 (1163) (Sale for recovery of dues under Abkari Act.) ** (1899) 26 Cal 966 (970) (DB) (Property sold at a revenue sale under Ss. 13 and 54 of Act 11 of 1859.) ** (1908) 7 Cal LJ 1 (35) (DB) (**Reversed** on other grounds in 40 Cal 89 (PC).) ** AIR 1922 Pat 542 (544), 1 Pat 287 (DB) (15 Cal 546 Followed.) ** (1909) 4 Ind Cas 73, (731) (DB) (Cal) (Do.) ** (1903) 26 Mad 230 (236) (DB) (Sale for arrears of income tax.)

3. **2001 AIHC 1421 (1422) (Punj & Har)**

4. **2001 AIHC 1421 (1422) (Punj & Har).**

5. **AIR 1952 Nag 341 (347)**, **ILR (1952) Nag 211 (FB) ** (1884) 7 Mad 31 (37) (FB).** (A sale by a landlord of a tenant's interest in his holding for non-payment of rent under the provisions of S. 38 of the Rent Recovery Act (Madras Act 8 of 1865) does not defeat

33. Sale under Section 88 of the Criminal Procedure Code (1898).

Where after the institution of a suit for the specific performance of a contract to sell a particular property the same was sold under the provisions of Ss. 88 and 89 of the Code of Criminal Procedure (1898) in proceedings taken against the defendant it was held by the Bombay High Court that the doctrine of *lis pendens* will apply to such a sale(1). Now see Ss. 91 and 92 of the Code of 1973.

34. Transfer by permission of Court.

The doctrine of *lis pendens* will not apply to a transfer made pending a suit after obtaining the sanction of the Court *in which the suit is pending* for such transfer(1). The sanction by *another* Court for a transfer cannot except the transfer from the operation of *lis pendens*(2). Otherwise every sale in execution of a decree pending a suit will be valid and this as has been seen already is not the law. A sale by the Official Receiver on a Hindu father's insolvency pending a suit for partition by the son is not affected by *lis pendens* where the sale is held after an application by the son for an injunction against the Receiver to stay the sale has been refused. In such a case the sale must be deemed to be one which is held with the leave of the Court(3).

35. "So as to affect the rights of."

A transfer or dealing *pendente lite* by a party to a suit or proceeding is not *ipso facto* void it merely cannot affect the rights of any other party to the suit under any decree or order that may be made in the suit or proceeding(1), and it is only [illegible] at the instance of such

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existing encumbrances. 5 Mad 371, **Overruled.**) ** AIR 1971 Ker 192 (1970 Ker LT 290) (If a sale is for recovery of revenue charged on that property it may extinguish encumbrances over property. If, on the other hand, the revenue sale is not in enforcement of a charge on the very property which is sold, the subsisting encumbrances in the property would continue and a pending suit will not in any way be affected by the revenue sale held.) ** (1969) 2 Mad LJ 209 (Doctrine of *lis pendens* does not apply to revenue sales.) ** ILR (1959) Mys 242, 246 — Recovery proceedings under [illegible] Revenue Code for recovery of certain amount due to co-operative societies on certificate issued under S. 59(1)(b) of Bombay Co-operative Societies Act [illegible] — Continuance of pendency of such proceeding is not hit by doctrine of *lis pendens*.)

Section 52 — Note 33

1. AIR 1929 Bom 200 (201)

Section 52 — Note 34

1. AIR 1926 Pat 94 (98) (DB)
2. AIR 1917 Bom 151 (152) : 42 Bom 215 (DB) (Suit on mortgage pending in High Court — Sanction for transfer taken in District Court in Poona — Transfer held not excepted.)
3. AIR 1943 Nag 101 (109) : ILR (1943) Nag 390 (DB)

Section 52 — Note 35

1. AIR 1956 SC 593 (593, 602) : ILR (1956) Mys 152 ** AIR 1941 Lah 433 (442) : ILR (1942) Lah 155 (FB) ** AIR 1965 Punj 415 (420) : ILR (1965) 2 Punj 97 (FB) ** [illegible] All LJ 1273 (1276) : 1979 All CJ 412 ** 1978 Pun LJ 206 (207) (Obiter.) ** 1976 Tax LR 921 (922) : 81 Cal WN 1 (DB) ** (1978) 19 Guj LR 737 : (1978) 1 Ren CJ 82 (87) ** AIR 1971 Goa 42 (43, 44) ** ILR (1963) Madh Pra 702 (721) (Therefore, in each case it will have to be ascertained as to what rights are declared by the decree which would be binding on the transferees *pendente lite*. AIR 1956 SC 593 Followed.) ** AIR 1968 [illegible] (197[illegible]) : ILR (1961) Bom 977 ** AIR 1959 Andh Pra 286 (285) (Property [illegible] by transfer not affected by partition decree passed in suit pending at the time of transfer — Property allotted to plaintiff not from and out of properties covered by transfer — No charge for mesne profits created in partition decree — Doctrine of [illegible] traced.) ** 1959 Andh LT 436 (438) ** AIR 1959 Mad 225 (226) [illegible] 1959 [illegible] 58 Pat 380 (422, 423) (DB) ** AIR 195[illegible] Cal 106 (109) ** AIR 1957 Ker 21 (24) (DB) [illegible] AIR 1957 Pat 721 (731) : 36 Pat 1139 (DB) (AIR 1956 SC 593 Relied on.) [illegible] AIR 1956 Bom Co

party (2) In other words, the doctrine of *lis pendens* applies only to transfers and other dealings which are *inconsistent* with the rights declared by the decree or order in the suit or proceeding.(3) Under S 52 the transfer of property effected during pendency of the civil suit would be deemed to be non est for the purpose of *lis pendens* The transferor will be regarded as owner of the property notwithstanding that he has transferred it However, there is nothing in this Section which can lead to the conclusion that the transfer *pendente lite* cannot be held valid and operative as between the parties thereto This section does not wipe out the transaction altogether but makes it subservient to

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147 (151) ILR (1955) Trav Co 823 (DB) ** ILR (1954) Bom 322 (328) AIR 1955 NUC 912 ** AIR 1954 Hyd 185 (188, 190) ILR (1954) Hyd 250 (DB) (Per Ansari, J) — (Suit ending in compromise decree Defendant getting contingent interest in the property Condition precedent not fulfilled Vendee s right to possession is not affected) ** AIR 1951 Cal 481 (484 ILR (1949) 1 Cal 378 (DB)** ILR (1951) Trav Co 570 574) AIR 1955 NUC 1043 (DB) ** (1950) 55 Mys HCR 174 (180) (DB) ** AIR 1947 Mad 18 (30) (DB) ** AIR 1937 Bom 244 (251) (DB) (Misdescription of land in pleadings prevents operation of doctrine) ** AIR 1936 Nag 125 (126) ILR (1936 Nag 22 ** AIR 193, Oudh 157 158 DB) ** AIR 1928 Mad 635 (637) (DB) ** AIR 1925 Nag 341 342) ** AIR 1920 Mad 126 (128) 43 Mad 696 (DB) (Per Oldfield J) ** AIR 19,8 Mad 564 (2 (568 ** (1898) 2 Oudh Cas 330 (335) ** (1913) 16 Oudh Cas 148 (152) (DB) ** (907 9 Bom LR 1173 (1177) (DB) (The effect of the doctrine of *lis pendens* is not to annul the conveyance but only to render it subservient to the rights of the parties to the litigation) ** **AIR 1940 All 141 (142, 143). (Do)**

[**See** (1913) 37 Bom 427 (436, 441) (DB) (A partition between defendants *pendente lite* **affects the plaintiff's rights under his redemption decree)**]

[**See also AIR 1959 Ker 67 (71) : ILR (1958) Ker 1266 (FB).** (A transfer or other dealing with suit property *pendente lite* is void as against decree holder and he is entitled to ignore it) ** AIR 1964 Orissa 176 (182) ILR (1964) Cut 89 (DB) (The words 'so as to affect the rights of any other party' assume that the parties' right must first be established) ** AIR 1959 Bom 475 (477) ILR (1959) Bom 94 (Application of rule in S 52 has to be adjudged by reference to claim made in suit and decree passed and not on academic consideration as to what true state of law applicable to the dispute between parties is and whether the decree was properly passed) ** 1936 Mad WN 1069 (1069) (*Pendente lite* transfer does not confer any title on transferee against plaintiffs) ** AIR 1916 Sind 37 (42) 10 Sind LR 42 (Mortgage) ** AIR 1928 Mad 878 (879) (DB) (Assignment of a decree during the pendency of another suit to which the assignor was a party Assignee held bound by the decree passed in the suit) ** AIR 1928 Mad 612 (613) (DB) (Mortgage after maintenance decree had been passed — Mortgaged property held bound by the charge.)]

2. **AIR 1928 All 3 (5) : 50 All 290 (SB).** (Per Sulaiman J) ** AIR 1987 Orissa 142 (145) (1986) 2 Orissa LR 155 ** AIR 1959 Orissa 157 (159) ILR (1959) Cut 273 (DB) AIR 1957 Cal 106 (109) ** AIR 1954 Hyd 185 (188) ILR (1954) Hyd 250 ** AIR 1953 Nag 236 (236) ILR (1952) Nag 150 ** AIR 1945 Mad 454 (456) (A stranger to a suit cannot question transfer on ground of *lis pendens*.) ** **AIR 1940 All 141 (142, 143)**

3. **AIR 1956 SC 593 (602) : ILR (1956) Mys 152.** (The contention that a transferor *pendente lite* must for purposes of S 52 be treated as still retaining title to the properties cannot be accepted) ** **1976 Ker LT 919 (924) (FB)** ** AIR 1954 Hyd 185 (188) ILR (1954) Hyd 250 (DB) (Compromise decree held, not inconsistent with vendee s right) ** AIR 1948 Nag 316 (322) ILR (1947) Nag 912 (DB) (Where the only right which a party to suit had in the litigation was to have the property brought to sale in satisfaction of a first charge which, as such, obtains priority over all other charges, it was held that the creation of an encumbrance pending litigation did not affect that right) ** AIR 1943 Cal 577 (584) (The rule simply protects a certain class of rights It does not add to the potency of those rights If the rights are themselves wanting in certain potency the rule of *lis pendens* shall not fill them with it (Case relating to competing rights of prior and puisne mortgagees)) ** **AIR 1918 Mad 1015 (1097) : 40 Mad 955 (DB).**

the rights based on the decree in the suit **(4)** That this is the true legal effect of the provision will be clear from the latter part of the rule which states that the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein **(5)** Section 52 creates only a right to be enforced to avoid a transfer made *pendente lite* because such transfers are not void but voidable and that too at the option of the affected party to the proceeding pending which the transfer is effected. The right *ex hypothesi* accrues only to such parties and in such circumstances as are expressly envisaged under S 52 It would, therefore be reasonable to hold that one who claims the right must establish the same before he can enforce it The right contemplated under S 52 no doubt, can be used, both as a sword and a shield, depending on such facts as to what right or interest is transferred, who the affected party is and how and in what manner the transfer is likely to "affect" any party to the pending 'proceeding' It can be used as a shield in a subsequent stage of the same proceeding between the same parties or their representatives-in-interest For no need or occasion to establish the right arises in such a case as acts of parties bind them and their representatives-in-interest. Any person who would like to use it as a sword must, however first establish his right to do so when, in any subsequent proceeding, objection is taken to his claim to do so Indeed if the transfer was not avoided by any of the parties to the earlier proceedings likely to be affected by such transfer, the transferee is not prevented from claiming that the right to avoid transfer was lost and nothing survived to be enforced **(6)** Alienee of an alienee cannot seek equities and his right is subordinate to the decree/order passed in a suit Immediate purchaser or successive purchaser are bound by the result of the litigation **(7)** Rights not embodied in the decree or order are not protected **by this section.(8)**

The alienation of property made by the defendant during pendency of suit for declaration of title and in violation of the order of interim injunction is only voidable and not void **(9)**

By reason of the provision of Section 52 of the Transfer of Property Act a transfer made during the pendency of the suit does not become illegal and in-operative But Section 52 of the said Act prevents any prejudice being caused to the other litigating party A lis may come to an end only by a reason of positive action on the part of the party to the suit and not by mere inaction The consequence for not taking steps in a suit would fall in terms of mere inaction The consequence to not taking steps in a suit would fall in terms of the provisions of the Code of Civil Procedure but it cannot be said that 'lis' itself comes to an end or for that matter the inaction on the part of the substituted heirs of Demini Mandalin rendered abandonment of the defence itself The aforementioned conclusion is based on the fact that an ex parte decree unless the same is set aside is as good as a contested decree and only because a defendant does not appear in a suit it does not mean that there was no lis by and between the plaintiff abandons his defence if any inasmuch as even an even in such a case the plaintiff will have to, in order to obtain an ex parte decree prove his case to the satisfaction of the Court There is no doubt that in such an event the Court shall be deprived of having assistance from the other litigating party but for that only the absenting party is to be blamed.**(10)**

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4. AIR 1990 Punj & Har 347 (349) 1990 (1) 97 Pun LR 252 ** AIR 1994 Ker 122 (126) 1994 (2) Ren CR 336
5. AIR 1994 Ker 122 (126) : 1994 (2) Ren CR 336
6. AIR 1987 Madh Pra 78 (81) : 1987 MPRCJ 49
7. 1997 (4) Andh LD 310 (315, 317)
8. AIR 1959 Andh Pra 280 (285 286, (DB) ** AIR 1945 Nag 281 (283 284) ILR (1945) Nag 651 (**Held,** rule of *lis pendens* did not apply because rights which defendants claimed did not arise under decree or order but arose under Land Revenue Act read with Rule 3 of Rules made under Co-operative Societies Act (1912 and were confined to recovery of sum of money and not recovery of property under award) ** AIR 1919 Low Bur 99 (103 104) : 10 Low Bur Rul 43 (DB).
9. AIR 1989 Orissa 148 (150) : (1988) 2 Orissa LR 521
10. 1988 Pat LJR (HC) 190.

Illustrations

(1) Where the plaintiff's suit is 'dismissed' a transfer by the defendant *pendente lite* cannot be said to affect the plaintiff's rights under the decree. The transfer is, therefore not vitiated by *lis pendens* **(11)**.

(2) Where in a suit on a mortgage only a *money* decree is passed a transfer *pendente lite* by the defendant of the mortgaged property cannot be said to affect the rights of the plaintiff under the decree **(12)**.

(3) During the pendency of a mortgage suit, the defendant executed a lease of the mortgaged property to a third party. But after the mortgagee obtained a decree in his suit he purchased by *private sale* from the mortgagor, the mortgaged property in full discharge of his decree. It was held that the decree having been satisfied, the lease could not be said to affect the rights of the mortgagee under his decree and was therefore not invalid **(13)**.

(4) *A* having purchased the equity of redemption in certain property from the guardian of *B* sued *C* the mortgagee for redemption. Pending that suit *B* filed a suit against *A* for setting aside the sale by the guardian and the suit was compromised to the effect that both *A* and *B* should be entitled to the equity of redemption in certain shares. *B* was made a co-plaintiff in the redemption suit. It was held that the compromise did not affect the rights of *C* the mortgagee **(14)**.

(5) Where the defendant in a mortgage suit mortgaged the property *pendente lite* and with that money paid off the mortgage in suit it was held that the subsequent mortgage was not one which affected the rights of the mortgagee-plaintiff and was not vitiated **(15)**. Similarly where during the pendency of a suit upon a later mortgage the property in suit is sold to a third person who covenants to pay off an earlier mortgage and does so the fact that the purchaser becomes unavailable by virtue of this section as against the person who filed his suit prior to the sale is not a ground for excluding the purchaser's right of subrogation.**(16)**.

(6) On 6th October 1888 *W* sued *D* for maintenance and alleged that a mortgage which had been made by *D* in favour of *V* could not affect the charge for maintenance on the property. A decree was passed on 22nd August 1890 for maintenance against *D*'s interests in the properties but *subject to the right of V*. In execution of a decree which *V* had obtained against *D* on his mortgage before 6th October 1888 *V* purchased the property in 1889. In execution of the maintenance decree the properties were sold to *M* in 1920. It was held that *V*'s purchase did not affect the rights of the plaintiff in the maintenance suit inasmuch as *V*'s rights were expressly saved from its operation **(17)**.

(7) Where pending a suit by a legatee to establish his rights to represent the deceased person, a creditor sold the property of the deceased in execution of a decree obtained by him against the widow as the legal representative of the deceased person, it was held that inasmuch as the plaintiff claimed only to represent the deceased, and as the widow was also a legal representative and the decree was against her as such the plaintiff was not affected by the transfer **(18)**

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11. AIR 1938 Nag 30 (34, 35) : ILR (1940) Nag 94 (DB) (Application to leave to sue in *forma pauperis* in respect of certain lands dismissed.)

12. See 1880 Pun Re No 143 p 276 (279, 280) (DB) (Suit against heirs of mortgagor for recovery of money due on the bond without making reference to collateral security.) ** AIR 1936 Pat 571 (572) (Plaint in a simple money suit for contribution containing prayer that decree to be passed may be declared to be charge on defendant's share of property. **Held** that plaint was not one involving a claim against immovable property. — Purchase of defendant's property during pendency of the suit held not affected by the doctrine of *lis pendens*.)

Also see Note 14

13. AIR 1939 All 611 (612) : ILR (1939) All 809

14. AIR 1929 Bom 337 (339) (DB).

15. AIR 1925 Nag 21 (24).

16. AIR 1947 Mad 18 (30) (DB). (21 Mad 143, Rel on.)

17. AIR 1924 Mad 449 (450) (FB).

18. AIR 1930 Mad 930 (938) : 54 Mad 212

(8) The landowner entered into an agreement with 'A' to sell his land and received earnest money but without executing sale deed he entered into another agreement to sell the same land to 'B' who were leaseholders of the land. 'A' filed suit for specific performance of contract which was decreed in his favour. The claim of 'A' for actual possession of suit land was objected by 'B' on ground that they were in possession as tenants before they entered into an agreement of sale with the landowner and that 'A' was not entitled to actual physical possession of the suit land.

Held, that the sale made by the landowner in favour of 'B' was valid as between them and the effect of this sale was that the leasehold rights of 'B' merged with the ownership rights as 'B' could not at the sale time be both landord and tenant and 'B' could not claim that they were still tenants on the suit land and defeat the claim of 'A' for recovering actual physical possession in execution of the decree for specific performance.(19)

(9) Where the suit property is sold during pendency of the execution suit, the suit proceeds in the name of original landlord. The decree will be binding on the subsequent transferee, though he was not a party to the suit.(20)

See also undermentioned cases.(21)

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19. AIR 1990 Punj & Har 347 (349) : 1990 (1) 97 Pun LR 252

20. 1992 All LJ 285 (287) : 1991 All WC 1216

21. AIR 1959 Ker 67 (72) : ILR (1958) Ker 1266 (FB) (Decree in respect of karnom property against karnavan — Partition during pendency of suit in appellate Court — After dismissal of appeal, possession of property [illegible] Application under O. 21 R. 100 for re-delivery filed by sharers — Property right [illegible] would not be defeated.) ** AIR 1982 All 317 (318) : (1982) 8 All LR 357 (The attachment of property before judgment comes to an end after the dismissal of the suit and the sale made during attachment must be deemed to have been made as if there was no attachment and therefore would be valid.) ** 1978 Cut WR 52 (55) (Which a compromise was entered into by a party to the suit subsequent to the transfer of his interest in [illegible] with a view to defraud that stranger — transferee, the compromise [illegible] of the transferee and the decree passed on such compromise will [illegible] that is to say the principle of *lis pendens* will not apply to such a case.) AIR 1952 Trav-Co 309 Foll.) ** 1977 Sim LC 365 (372) : ILR (1977) Him Pra 176 (Application of tenant under S. 11(c) of H.P. Abolition of Big Landed Estates and Land Reform Act governed by the doctrine of *lis pendens*.) ** (1973) 2 Mys LJ 6 (DB) (In order to decide whether a decree or order is one which may be made in a suit or proceeding within meaning of Section 52 the test that should be applied is whether the decree or order which is ultimately passed is entirely wrapped up in the issue raised between the parties in the suit, bearing, though not directly on the relief claimed, the nature of the suit, character of the intended and scope of the suit.) ** 1968 All LJ 177 : 1968 All WR (HC) 156 (Dispute regarding possession of land — Pendency of appeal — Hearing of appeal [illegible] — Application of consolidation proceedings in respect of suit land — Transfer of land during pendency of appeal — Transfer is not void but subject to decision in appeal and can be recognised for purpose of consolidation proceedings.) ** AIR 1966 Orissa 98 (102) (DB) (Partition suit filed by mother against her sons A and B — During pendency of appeal filed by A, plaintiff making gift of her share in favour of B — Transfer is hit by rule of *lis pendens* but does not affect rights of appellant A who will be entitled to his legitimate share.) ** AIR 1965 Mad 497 (501) : ILR (1966) 1 Mad 326 (Suit filed in 1958 by reversioner for declaration that alienation made in 1948 by widow would not be binding on him after death of widow — Reconveyance of property by alienee during pendency of suit — Widow becomes absolute owner of property under S. 14 of Hindu Succession Act (1956). — Doctrine of *lis pendens* would not confer upon reversioner any rights higher than what he had on date of suit — **Held,** suit became infructuous.) ** AIR 1946 Mad 51 (52) (Maintainability of decree charging properties — Sale in execution — Mortgage subsequent to decree and before sale — Right to pay off decree and redeem — Mortgagee is not barred by *lis pendens* from redeeming and paying off charge decree-holder so long as execution [illegible] charge

Where a party *assents* to a transfer by the other party *pendente lite* it cannot be said that his rights under the decree are affected by the transfer, consequently he cannot object to the transfer on the ground of *lis pendens*(**22**). In *Mangal Rai v Duli Chand*(**23**) *A* obtained a decree against *B* and in execution thereof purchased *B*'s property The sale was set aside and *A* filed an appeal. Thereafter *B* sold the property to *C* who deposited the decree amount into Court and the same was withdrawn by *A* in full satisfaction of the decree Nevertheless the appeal was continued and ended in favour of *A* It was held that having withdrawn the money from Court *A* could not be allowed to invoke S 52 in order to impeach the sale by *B* to *C* A brought a suit to enforce the contract for sale in his favour When the suit was pending *B* brought a suit for redemption on the basis of purchase of the property from the original mortgagor during the pendency of the suit of *A* *A* filed his written statement in it but did not make *B* a party to his suit He proceeded against his vendor and obtained an *ex parte* decree It was held that when *A* filed a written statement in *B*'s suit clearly he knew what *B* was claiming and as he did not make *B* a party to his suit he could not later on say that he was entitled to defeat the claim of *B* on the doctrine of *lis pendens*(**24**). Where certain property was sold under a mortgage-decree but the decree-holder had not disclosed, in the sale proclamation, the existence of another incumbrance on the property in his favour, it was held that he was estopped from contending that the purchase having been made during the pendency of the suit on that other mortgage was affected by *lis pendens*(**25**).

Where in a suit on behalf of a minor plaintiff the next friend on behalf of the plaintiff and the defendant compromise the suit, under which certain property is transferred by the defendant to the minor plaintiff it cannot be said that the compromise is vitiated by *lis pendens* though if it is not for the benefit of the minor it may not be binding on the minor (**26**)

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decree had not been confirmed) ** AIR 1945 Bom 409 (413) (DB) (Mortgage decree — One of co-mortgagors *A* transferring his share during execution to *B* — Subsequent sale of mortgaged property in execution of decree held void so far as it affected A's share — *B* held not in worse position than *A* and not affected by doctrine of *lis pendens*) ** AIR 1921 Nag 69 (70) 17 Nag LR 33 (First mortgagee *X* foreclosing without impleading second mortgagee *Y* - *Y* obstructing delivery of possession to *X* — *X* applying under O 21 R 100 C PC — *Y* transferring his right to *Z* pending the proceedings — *Z* then suing for redemption of mortgage in favour of *X* **Held**, the order for restoration of possession does not affect the right of redemption which Z had obtained from *Y* and as part of such right to obtain possession from *X*) ** AIR 1918 Oudh 318 (319) (Mortgagee purchasing share of co-mortgagor pending redemption suit by another mortgagor — Latter's right to redeem his share not affected) ** (1912) 16 Ind Cas 102 (103) (DB) (All) (Mortgage-decree - Subsequent lease — Sale thereafter to discharge mortgage decree and decree discharged Lease is not void against private purchaser) ** (1911, 10 Ind Cas 16 (18) (DB) (Oudh) (In 1880 one *C* mortgaged certain share to *R* and *S* with possession — Three deeds of further charges were also executed One *B* became entitled to a one fourth of the interest of the mortgage executed by *C* — In 1896 *B* sub mortgaged that one-fourth share to the appellant undertaking to put him in possession — In 1905 the appellant sued for possession and summons was served upon *C* on 22nd January 1905 — On February 16 1905 *C* mortgaged his share to the respondents who subsequently redeemed the four mortgages of *C* — The appellant got a decree for possession — In a suit by the respondents for possession of the said share against appellant it was held that under S 52 the respondent could not take a valid mortgage and that he could get possession only by paying one-fourth of the total mortgage share to appellant)

22. AIR 1926 Cal 204 (207) (DB) (Alienation by Receiver Party and Receiver taking advantage — **Held** that S 52 did not apply) ** AIR 1918 Pat 299 (300) (DB)

23. AIR 1933 All 579 (581) : 55 All 735 (DB).

24. (1955) 34 Pat 156 (163) : AIR 1955 NUC 1095.

25. AIR 1953 Pat 58 (60) 31 Pat 722 (DB) (A 1933 All 577 Foll)

26. AIR 1935 Bom 54 (64) (DB).

Similarly, where pending a suit for partition, both the plaintiff and the defendant transfer their respective shares to the same person the doctrine of *lis pendens* cannot come into play(**27**).

36. "Any party."

The doctrine of *lis pendens* cannot obviously apply to any alienation or other dealings made by a person who is not a *party* to the suit (**1**). Thus, an assignment by a puisne mortgagee of his rights pending a suit to which he is not a party is not affected by *lis pendens*(**2**). A person who is represented by an actual party to the suit is also a party to the suit for the purpose of this section. Thus where one of several legal representatives of a deceased mortgagor was made a defendant to a suit on the mortgage, it was held that he sufficiently represented the other heirs, and that a transfer, pending the suit, by another heir who, though not an actual party, was represented by the defendant, was affected by *lis pendens*(**3**). See also the undermentioned cases (**4**).

Where the defendant to a suit dies, the *lis* continues against his legal representative even before he is brought on the record. Hence, an alienation made by the legal representative after the original defendant's death and before such legal representative is brought on the record is liable to be affected by the provisions of this section.(**5**)

37. "Any other party" — Co-defendants.

The words "any other party" obviously mean a party other than the *transferor* himself. The transferor himself and his representatives in interest cannot invoke the doctrine as against the transferee.(**1**)

Illustrations

(1) *T* sued *D* for possession of certain property, and pending it he executed a mortgage of the property in favour of *W*. The suit was subsequently compromised to the effect that *T* and *D* should each take half the property. *D* was to pay off *W*'s mortgage and *T* was not to be liable for it. *W* then sued *T* on his

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27. AIR 1929 Cal 697 (699) : 57 Cal 597 (DB).

Section 52 — Note 36

1 (1958) 37 Pat 176 (193) (DB) ** (1973) 3 Sim LJ (HP) 229 (DB) ** 1971 Ker LT 579 (DB) ** AIR 1957 Pat 408 (414) (DB) ** ILR (1954) Nag 505 (510) AIR 1955 NUC 1236 ** AIR 1953 Trav Co 12 (13) ** AIR 1925 Bom 176 (177) (DB) (Suit by a person who was subsequently brought on record as legal representative of original defendant.)

[See also AIR 1949 Mad 886 (892) ILR (1949) Mad 904 (DB).]

2. AIR 1932 Pat 270 (271) : 11 Pat 415 (DB)

3. (1903) 26 Mad 230 (234) (DB)

4 AIR 1968 Orissa 36 (38) 33 Cut LT 974 1968 Cr LT 336 (Proceedings under Orissa Tenants Protection Act pending between landlord and defendants — [illegible] defendant 4 in proceedings purchasing the disputed lands from the landlord during the pendency of proceedings and inducting *B* as tenant — Revenue Board decreed in favour of defendants 1 to 3 and holding that they cannot be evicted by the [illegible] of *A* or *B* — [illegible] B was not a party to proceedings he was bound by doctrine of *lis pendens* being applicable — ** **AIR 1981 SC 981 : 1981 UJ (SC) 641** (S 52 in clear terms speaks of [illegible] the suit or proceeding.) ** (1967) 69 Bom LR 739 (Compromise decree with regard to easements of light and air between owners of adjacent houses — It is not [illegible] — Such decree cannot be executed against third party purchasing house after decree although decree provided that it shall bind assigns of parties — Such provision not valid under law of execution.)

5. AIR 1945 Mad 219 (221)

Section 52 — Note 37

1. AIR 1928 Oudh 1 (7) ** 1981 All LJ NOC 98 (1981) 7 All LR 578 ** AIR 1921 Cal 150 (160) : 74 Cal WN 962

See also the illustrations

mortgage It was held that *T* could not invoke the doctrine of *lis pendens* as against his transferee *W* and claim that *W* should not enforce the mortgage against the property in his hands (2)

(2) *X* obtained a money decree against *Y* and got his property attached in execution Subsequently *Y* mortgaged the property to *Z*, and still later, sold the property to *M* with the leave of the Court under O 21, R 83 of the Civil Procedure Code, and paid off the decree *Z* then sued *M* on the mortgage It was held that *M* merely stood in the shoes of *Y* the transferor, and could not invoke the doctrine of *lis pendens* as against *Z* (3)

(3) *A* conveyed certain property to *B* by a Kobala. By a separate agreement *B* agreed to reconvey the property to *A* *A* filed suit against *B* to enforce the agreement of reconveyance During the pendency of that suit *A's* right, title and interest under the agreement of reconveyance was attached and sold in execution of money decree and purchased by *B* It was held that the purchase by *B* was not hit by rule of *lis pendens* in S. 52 (4)

See also the undermentioned cases for other illustrations (5)

In the undermentioned cases,(6) the Court *auction-purchaser* in execution of a mortgage decree was held to be a party to an order which might be made in the suit and could therefore impeach a transfer made by the mortgagor pending suit on the ground of *lis pendens*.

The doctrine cannot be applied between parties to a suit who are arrayed on the same side and between whom there is no dispute to be adjudicated.(7)

Does the doctrine of *lis pendens* apply to *co-defendants* in the same suit? In other words, can one defendant question the alienation made *pendente lite* by another defendant in the suit? The answer will depend upon, whether the former can be said to be "*any other party* to the decree or order" which may be made in the suit.

In *Bellamy v. Sabine*(8) Lord Justice Turner stated that an alienee from a co-defendant pending a suit in which 'no decree could be made between the co-defendants' was exactly in the position of an alienee from a stranger to the suit and was not affected by *lis pendens* He observed :

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2. **AIR 1928 All 3 (5, 9) : 50 All 290 (SB).** (Transferee is bound by the decree so far as it goes agaisnt his transferor.)

3. **AIR 1941 Mad 208 (214) (DB).**

4. **ILR (1957) 3 Cal 642 (645).**

5. (1971) 75 Cal WN 502 (DB) (Where pending a suit for eviction and possession of premises by co-sharers *A* and *B* against *C* *D* purchases *B* s share and is substituted for *B* and transposed as *pro forma* defendant the plaintiff is entitled to a decree for eviction against *C* alone and for joint possession of the premises with *D* the plaintiff being left to work out his further rights in separate suit) ** **AIR 1971 Bom 151 (156, 157) : 73 Bom LR 293 (FB).** (Where a decree in a pre emption suit passed in favour of the pre emptor s subject to the rights of the maintenance holder in possession to lease out the property, and the maintenance holder who was a party to the suit, leased out the property after the decree but before its execution : (assuming that the suit is considered to be pending) the doctrine of *lis pendens* has no application) ** AIR 1976 Mad 70 (1976) 1 Mad LJ 96 (DB) (Suit for partition of joint family property – Agreement by some of coparceners to sell their shares executed pending suit — Suit ending in compromise decree — Other coparceners allottees cannot be regarded as claiming under coparceners who had executed agreements)

6. (1898) 20 All 349 (351) (Lease) ** 1982 Rev LR 193 (195) (Punj) (Where the applicants had acquired the rights during the pendency of the suit in auction sale and the sale could not be confirmed in their favour because of the ad interim injunction passed by the trial Court they cannot claim themselves to be impleaded as parties to the suit under O 1, R 10, C P C.)

7. 1950 Trav-Co LR 23 (28) (DB) ** AIR 1953 Pat 58 (59) 31 Pat 722 (DB) ** (1958) 37 Pat 176 (193) (DB)

8. (1857) 44 ER 842 (850) : 26 LJ Ch 797.

"Generally speaking between co-defendants there can be no decree — is it to be said that there is a *lis pendens* between them? Leaving out of consideration the cases in which decrees can be made between co defendants (which are rare and for the most part go no further than where it is necessary for the purpose of the plaintiff to adjudicate between the defendants) upon what ground is the case of a co-defendant to stand in a different position from that of a stranger?"

But in *Tyler v Thomas*(**9**) it was held that in certain cases the doctrine of *lis pendens* would apply even though the plaintiff may have no interest at all and the contest is between co-defendants only such as *interpleader* suits and *administration* suits. An alienation made by a defendant pending such a suit would be bound by the decree made against him in favour of the other defendant in the suit. In a suit instituted by creditors for the administration of a testator's estate the deficiency of the personal estate for the payment of the debts was payable out of two real estates devised separately to *A* and *B*. In 1846, the debts were ordered to be paid out of *A*'s estate alone without prejudice to his right of contribution against *B*'s estate. In 1852 the suit was registered as a *lis pendens*(**10**), and two months afterwards *B* mortgaged his estate to *C* who had no notice of *A*'s rights. It was held that there was a *lis pendens* as regards *A*'s rights and that *C*'s mortgage must be postponed to *A*'s claims.

It is, however, necessary that there should be an *issue to be decided* between the co defendants even though the decision of such issue may not be necessary to give relief to the plaintiff in the suit (**11**). Where there is no such issue one defendant cannot invoke the doctrine of *lis pendens* as against the acts of another. Where therefore *M* sued *X* and *Y* for declarations that a sale deed executed by *M* in favour of *X* and a subsequent mortgage executed by *X* of that property in favour of *Y* were not binding on him and, pending that suit, *Z*, in execution of a decree obtained by him against X purchased the property it was held in a suit by *Y* upon his mortgage against *X* and *Z* that *Z* was not precluded from questioning the validity of the mortgage by the doctrine of *lis pendens*. In the suit by *M* against *X* and *Y* there was no contest between *X* and *Y* as to the validity of the mortgage at all, and the result of *M*'s suit simply upheld the title of *X* to the property and his right to mortgage it to *Y*.(**12**)

Legal representatives of the same deceased person — Where a person is suing in his capacity as the legal representative of a deceased person he is not "any other party" vis a vis a person who is another legal representative of the same deceased person. Thus suppose, a decree is passed against *A* as representing the estate of a deceased person *B* another legal representative of the same deceased person and claiming to represent the same estate sues to have the decree passed against *A* set aside. Pending this suit, a certain property belonging to the estate is sold in execution of the decree against *A*. The sale is not affected by the provisions of this section as *B* cannot be said to be "any other party" within the meaning of this section.(**13**)

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9. (1858) 53 ER 553 (556) : 19 RR 325.

10. For the understanding of the procedure of registration of a suit as a *lis pendens* see Note 43.

11. 1950 Trav Co LR 23 (28) (DB) ** **AIR 1918 Mad 578 (579, 580) : 41 Mad 458 (SB)** ** AIR 1938 Pat 487 (493) (DB). (Obiter.)

[**See also** (1950) 55 Mys HCR 174 (184) (DB) (The words "other party" are to be understood not as applying to a party other than or apart from or besides the transferor but a party between whom and the transferor there is a contest which would be affected by the alienation. It is not any party to a suit under any decree passed in his favour who can invoke it) ** (1945) 50 Mys HCR 113 (DB) (When one co defendant claims contribution from another in respect of a payment which he has made to save the properties of the suit and the other from a threatened sale in execution of a decree affecting all the properties the party claiming contribution cannot rely on the doctrine of *lis pendens* to make the property of the other co defendant liable for his claim to contribution.)

12. **AIR 1918 Mad 578 (579, 580) : 41 Mad 458 (SB).**

13. AIR 1947 Sind 181 (184) (DB)

38. "Any decree or order."

These words will include a decree or order made on a compromise between the parties to the suit, provided that such compromise is not tainted by fraud or collusion (1). The decree will be binding on the transferee (2) He cannot question it on the ground that it was *wrongly* passed.(3) though he can question it on the ground of *fraud*(4).

The words "decree or order" will also include a decree or order passed *ex parte* in the absence of any fraud or collusion.(5)

The words "under a decree or order therein" imply that the right to the property must be the outcome of the decree i e , it should be the result of an affirmation or adjudication by the decree In

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Section 52 — Note 38

1. **AIR 1948 PC 147 (149) : ILR (1949) 1 Cal 234.** (Though S 52 may not contemplate a decree or order which is entirely alien to the issues raised between the parties it applies to a compromise decree. AIR 1943 Cal 227 **Affirmed.**) ** **AIR 1928 All 3 (7) : 50 All 290 (SB)** ** **AIR 1920 Mad 391 (394) : 43 Mad 37 (SB)** ** **(1906) 28 Mad 426 (430, 433) (FB)** ** AIR 1982 NOC 25 (1981 BLJR 462 ** AIR 1955 Trav Co 5 (5) (ILR (1954) Trav Co 794 (DB) ** AIR 1954 Mad 592 (593) (ILR (1955) Mad 519 (DB) ** (1950) 55 Mys HCR 174 (179) (DB) ** AIR 1949 Bom 367 (372) (ILR (1949) Bom 480 ** AIR 1943 Cal 227 (230) (DB) (It is immaterial how the decree is obtained in that suit whether after contest or by compromise It is immaterial whether the decree in that suit is right or wrong It is beyond the competence of the Court invited to apply the doctrine of *lis pendens* to sit in judgment on the previous decree) ** AIR 1946 Bom 462 (464) (ILR (1946) Bom 462 ** AIR 1926 Mad 50 (50) ** AIR 1924 Mad 359 (360) ** AIR 1919 Low Bur 103 (103) : 10 Low Bur Rule 43 (DB).

   [**See also** AIR 1952 Trav-Co 309 (310) (DB) (Compromise entered into with a view to defraud stranger transferee — Compromise will not affect interests of transferee Principle of *lis pendens* will not apply) ** AIR 1944 Bom 191 (193) (ILR (1944) Bom 274 (DB) (Suit for maintenance — Compromise decree creating charge over property — Transferee of property during pendency of suit held bound by the decree) ** (1910) 6 Ind Cas 168 (169) (DB) (All) ** 1982 All LJ (NOC) 109 (1982) 8 All LR 722 (Where during the pendency of the appeal against the order of dismissal of suit for declaration under S 229B U P Z A and L R Act 1951 the defendant had sold the land in dispute and the appeal was decided in the terms of the compromise entered into by the parties and the compromise was found to be collusive in nature the principle of *lis pendens* would not be applicable.)]

2. **AIR 1954 Mad 592 (593) : ILR (1955) Mad 519 (DB)**

   [**See** (1907) 31 Bom 393 (400) (Hardship to the purchaser cannot affect the decision of the case.)]

   See also Note 28

3. AIR 1955 NUC 231 (1958) 32 Pat 903 (918, 919) ** (1910) 13 Oudh Cas 50 (52) (DB)

   [**See also AIR 1948 PC 147 (149) : ILR (1949) 1 Cal 234.** (Applicability of Section cannot depend on matters of proof or strength or weakness of case on one side or other — Suit based on instrument requiring registration but not registered — Suit ending in compromise decree in favour of plaintiff — Transfer of property by defendant pending suit — Transferee is bound by decree — The non-registration of the instrument is no answer to plea of *lis pendens*.)]

4. AIR 1954 Mad 592 (593) (ILR (1955) Mad 519 (DB) ** AIR 1946 Bom 462 (464) (ILR (1946) Bom 462 (If the final decision in the pending litigation is brought about by fraud or collusion it cannot be said that *lis pendens* was fairly decided, and that decision cannot affect the rights of the transferee *pendente lite* ** AIR 1919 Oudh 317 (319) (22 Oudh Cas 171

5. **AIR 1949 Bom 367 (372) : ILR (1946) Bom 480 (DB).**

[illegible] (6).

[illegible] of a decree to filed. For the meaning of the expression [illegible]

[illegible] (9).

39. Lease pendente lite.

[illegible]

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6. AIR 1963 Mad 361 (362) ILR (1963) Mad 542 (DB).
7. AIR 1945 Nag 291 (292) ILR (1945) Nag 651.
8. [illegible]
9. [illegible] Held [illegible] and stand on private agreement [illegible] AIR 1930 Cal 556 [illegible] (DB); [illegible] AIR [illegible] Cal 158 [illegible] 49 Cal 236 (DB).

Section 52 — Note 39

1. [illegible] AIR 1956 SC 1810 1812 [illegible] 1 SCJ 159 [illegible] Reversed [illegible] AIR 1953 Bom 75 81 [illegible] 54 Bom LR 666 FB [illegible] Distinguished from [illegible] Overruled [illegible] AIR 1935 Mad 875 878; [illegible] AIR [illegible] 209 [illegible] AIR 1927 Nag 299 [illegible] stated — Hence [illegible] AIR [illegible] Nag [illegible] AIR 1927 Nag 294 [illegible] AIR [illegible] Nag 224 [illegible] AIR [illegible] Cal [illegible] AIR [illegible] Mad 321, 324 [illegible] 39 Mad 281 [illegible] Mad [illegible] Mad [illegible] (DB) [illegible] during the pendency of partition proceedings.)

   See also [illegible] Held [illegible]

2. [illegible]

under Bombay Rent Act) ** **AIR 1941 Pat 577 (580) : 26 Pat 346 (SB) ** AIR 1917 Mad 128 (130, 131) (SB).** (Per Seshagiri Aiyer J) ** AIR 1976 All 250 (1976) 2 A I LR 35 ** AIR 1974 All 82 (85 86) (Provisions of U P Z A and L R Act do not override provisions of S 52) ** 1970 All LJ 420 1970 All WR (HC) 263 (DB) ** 1970 WLN (Part 1) 755 1971 Ren CR 695 (Raj) ** AIR 1969 Ker 121 (124) (DB) (Rule of *lis pendens* is not entirely abrogated by S 7 and S 19 of Kerala Land Reforms Act) ** AIR 1968 Guj 193 9 Guj LR 161 (DB) ** 1967 Ker LT 1060 (Recovery of possession of land from tenant — Suit for redemption decreed Mortgagee making a lease *pendente lite* — Application by mortgagor decree holder under Order 21, R 97, C P Code, against obstruction by tenant Dispossession of tenant is not eviction under Section 2(12) — Tenant is not entitled to protection under Section 106 Tenant s claim is not lawful under Section 52 T P Act and Order 21 Rule 102 C P Code) ** 1966) 70 Cal WN 1027 ** AIR 1961 Ker 335 (335 336 (Tenant inducted by party during pendency of partition suit is bound by decree) ** 1961 Ker LT 639 (641) (Kerala Agrarian Relations Act (4 of 1961) does not override provisions of S 52 T P Act) ** AIR 1957 Bom 117 (119) (DB) (Lessees *pendente lite* must be treated as representative in interest under S 52 and as such bound by the result of the suit) ** (1950) 85 Cal LJ 81 (88) (Tenant subletting pending suit for his ejectment — Sub-letting cannot prevail against decree for possession which the landlord may subsequently obtain) ** AIR 1957 Trav-Co 292 (293) ILR (1956) Trav Co 716 ** AIR 1943 Cal 577 (585, 586) (During pendency of the suit by puisne mortgagee prior mortgagee caused the property to be sold in execution of his decree and purchased it — Puisne mortgagee was not made a party to suit by prior mortgagee — After purchase in execution prior mortgagee granting lease of the property — Lease held was affected by *lis pendens* — The power given under S 65 A will not affect the doctrine of *lis pendens*) ** AIR 1936 All 661 (662)(DB) ** AIR 1936 Mad 942 942) (Even under S 65 A the doctrine of *lis pendens* is not inapplicable) ** AIR 1936 Mad 887 (891) ILR (1937) Mad 66 (DB) (Grant of permanent occupancy rights in a home farm land , e , land cultivated by the zamindar himself held not binding being made during the pendency of partition suit) ** AIR 1935 Oudh 462 (464) 11 Luck 283 (DB) ** (1833) 142 Ind Cas 188 (189) (Cochin) (DB) (Though while a mortgage suit is pending the mortgagor may have power in the ordinary course of management of his property to grant leases, he cannot effect transfers by way of leases to enure beyond the time when the property passed by sale to his mortgagee) ** AIR 1931 Bom 539 (542) (Lease must to some extent affect the rights of the other party) ** AIR 1927 All 657 (658) 50 All 202 (DB) (Although a defendant mortgagor in a mortgage suit has power so long as he retains his possession to grant leases in the ordinary course of management of his property, he canot make transfers to enure beyond the time when the property passes by sale to his mortgagees) ** AIR 1927 Oudh 602 (604) 2 Luck 659 ** AIR 1925 Cal 251 (252) ** AIR 1924 Nag 211 (215) ** AIR 1923 Oudh 1(3) ** AIR 1918 Nag 218 (219) : 14 Nag LR 133 (15 CPLR 6, Followed) ** AIR 1915 Nag 89 (90) 11 Nag LR 21 ** (1902) 15 CPLR 6 (7) ** (1898) 20 All 349 (351) (A lease whatever its object cannot but have the effect of defeating to some extent the rights of the auction purchaser under the decree) ** (1894) 21 Cal 340 (343) (DB) (Tenant *pendente lite* is liable to be removed in restitution proceedings) ** (1888) 1 CPLR 19 (23) (Lease granted after suit for foreclosure was dismissed but before appeal was filed Lessee held bound by the foreclosure decree) ** (1936) 19 Nag LJ 316 (318) (Suit on mortgage — Lease by mortgagor *pendente lite* taking premium or nazurana.) ** (1931) 15 RD 589 (592) ** 1862 Marsh 122 (123) ** (1912) 17 Ind Cas 1 (2) (DB) (Cal) (Lease pending a mortgage suit Purchaser of property in execution of mortgage decree can eject lessee.) ** (1910) 6 Nag LR 140 (143).

[**See also** (1963) 4 Guj LR 681 (684) (DB) (Tenancy *pendente lite* can subsist subject to the result of suit Tenant of mortgagee became tenant of mortgagor on redemption of mortgage under S 4, Bombay Tenancy and Agricultural Lands Act (67 of 1948)) ** AIR 1918 Cal 277 (278, (DB) (A filed a suit against B to recover khas possession of her ijara share in certain land During the pendency of that suit B made settlement of those lands on rayats — Rayats held were liable to be ejected.)]

passed in the suit or proceeding **(3)** It is submitted that the second of the views expressed above is correct This view appears to have the support of Supreme Court decision in *Anand Nivas v. Anandji* **(4)** where a decree passed in a suit for ejectment and arrears of rent against the statutory tenant was held binding on the sub-lessee who had taken the sub lease pending the institution of the suit Before suit, the owner of the property can certainly lease out his properties in the ordinary course of management. A *mortgagor* can, under S 65-A lease out the mortgaged property in the ordinary course of management and such lease will, after the mortgage but before a suit on the mortgage is filed, be binding on the mortgagee **(5)** A mortgagee in possession may also under S 76, cl (a) lease out the mortgaged property in the ordinary course of management and such a lease, if made before any suit is filed for redemption, will be binding on the mortgagor But where a *suit is filed* no party to the suit can prejudice the rights of the other party to any extent by the execution of a lease or any other kind of transfer even though he may have the power to make a lease of the propety in the ordinary course of management and at a time when there is no suit pending The question of ordinary management does not arise under S 52**(6)** and it does not seem to be permissible to create exceptions to the applicability of the section which is very wide by saying that a lease in the ordinary course of management cannot be said to affect the rights of the other party under any circumstances Thus it has been held that in spite of the provisions of S 65-A, the mortgagor cannot lease out the mortgaged property during the pendency of the suit for redemption or a suit on the mortgage to the prejudice of the mortgagee's or auction-purchaser's right The mortgagor cannot for the same reason accept any advance rent If the tenant makes any payment to the mortgagor during the pendency of the suit he does so at his own risk He cannot claim protection under S 50.**(7)**

The word 'transfer' in S 52 includes the grant of lease Therefore lease of property during pendency of suit or proceedings relating thereto would be hit by the rule of *lis pendens* **(8)** Grant of lease *pendente lite* amounts to otherwise dealing with the property within the meaning of Section 52 If any rights are created by the vendor in suit for specific performance during the pendency of the suit, those could not outlast the pendency of suit Even if any tenancy rights in favour of a third party had been created, they must come to an end on suit being decreed in favour of the plaintiff

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3. AIR 1937 All 9 (9 10) (DB) (Mortgage decree pending execution — Permanent leases granted by mortgagor — Not binding — ** AIR 1932 All 480 (481) (DB) (Lease for 20 years) ** (1884) 7 Mad 96 (99) (DB) (Permanent lease) ** 1939 All WR (BR) 37 (38) (A permanent lease during the pendency of a mortgage suit is not in the ordinary course of management of zamindari property and hence is a nullity under S 52 of the T P Act)

4. **AIR 1965 SC 414 (426, 427).** (Per Majority Sarkar J contra A sub-lessee from a statutory tenant under Bombay Rents Hotel and Lodging House Rates Control Act (57 of 1947) **acquires no right of a tenant in the premises occupied by him.)**

5. **AIR 1973 Bom 75 (79) : 74 Bom LR 666 (FB).** (AIR 1968 Guj 193 Rel on)

   [**See** (1970) 1 Mad LJ 11 (As long as lease created by mortgagor in possession is in conformity with provisions of Section 65A it would hold good against mortgagee even though **it was created during pendency of suit by mortgagee**)]

6. (1910) 6 Nag LR 140 (143)

7. AIR 1957 Trav Co 292 (293) ILR (1956) Trav-Co 716 (Suit on simple mortgage) ** AIR 1954 Sau 82 (84).

   [**See also** (1978) 2 Mad LJ 393 (397) (DB) (Second defendant had executed a lease deed in favour of plaintiff during the pendency of mortgage suit The first defendant who was the successful bidder in auction had made attempt to take possession of the land — **Held**, that plaintiff would be entitled to protection under the T N Cultivating Tenants Protection Act 1955.)]

8. 1986 All LJ 965 (969) ** ILR (1984) 1 Delhi 913

The lessee therefore could not claim any right to remain in possession of property beyond that period or to resist dispossession on that ground.**(9)**

Where an ex parte decree was passed in a suit and possession of premises was obtained in execution of the ex parte decree and thereafter, tenants were inducted therein, then on the ex parte decree being ultimately set aside, the creation of tenancy in favour of the tenants would be hit by S 52.**(10)**

A transferee, even a *bona fide* tenant cannot resist an order of restitution under S 144 CPC having regard to the Rule of *lis pendens* enunciated in S 52 of the T P Act Section 52 embodies the maxim *pendente lite* fulfil innovetur pending litigation nothing new should be introduced **(11)**

In a money suit the plaintiff had filed an application for attachment before judgment of the defendant's property The defendant gave undertaking to the Court that he will not alienate the property till disposal of suit and therefore application for attachment was dismissed However, the defendant inducted a tenant in that property Ultimately decree was passed in favour of the plaintiff The property was attached and the decree-holder purchased it in auction sale in the circumstances it was held that though S 52 is not applicable to money decree on the principles contained therein the judgment-debtor was not entitled to violate the undertaking given by him Consequently the tenant could not resist delivery of possession of the property to the decree-holder on ground that he is entitled to protection under the Rent Control law The rule of *lis pendens* is based on public policy which is an entirely different field from Rent Control Legislation The *non-obstante* clause in the Rent Control Act should not be extended to other laws evicted on the basis of public policy meant for finality of pronouncements of Courts which have nothing to do with the object and purpose sought to be achieved by the Rent Control Act.**(12)**

In the undermentioned Supreme Court case it has been held that where a theatre was attached in execution of a decree against the owner of the theatre, a lease of the theatre executed in favour of another during the attachment was struck by the doctrine of *lis pendens* and also by the provisions of Section 64, C P Code.**(13)**

Where a tenant is inducted as a tenant in suit premises much after the suit for possession was filed by the decree holder the tenant has no locus standi to resist execution in view of O 21, R 102, C. P C. Section 52 would also be attracted.**(14)**

It is, however, only *to the extent* to which it prejudices the other party under the decree or order that the lease is bad Where pending a suit for redemption of a usufructuary mortgage the mortgagee leased out the property it was held in the undermentioned case **(15)** that the lessee could go on cultivating the land under his lease till the mortgage was actually redeemed and if by the operation of S 21 of the Bengal Tenancy Act the lessee, obtained an occupancy right by reason of such possession, the mortgagor would be bound by the right of occupancy so acquired, though the lease, as a lease, would not have been binding upon him after redemption

The principle of this section applies to agricultural leases also **(16)**

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9. 1989 (1) All Rent Cas 427 (430)

10. (1991) 2 Ren CJ 148 (152) (Cal)

11. AIR 1993 Kant 338 (343) : 1993 (2) Kant LJ 638

12. 1987 Ker LJ 1144 (1151, 1152) (DB).

13. AIR 1975 SC 1810 (1813, 1814) : 1975 UJ (SC) 631.

[See 1978 MPLJ 302 (308) (AIR 1975 SC 1810 and AIR 1968 Guj 193 Foll)]

14. 1994 (1) Ren CR 394 (397) (Delhi).

15. AIR 1937 Cal 763 (764) : ILR (1937) 2 Cal 181 (DB)

16. AIR 1955 NUC 3706 ILR (1955) Madh B 416 (420) ** (1976) 2 Mad LJ 349 (352) (Where the lease, is granted by the defendants in the suit for specific performance during

A landlord filed a suit in Civil Court for eviction of tenant. On the date of filing the suit the Civil Court had jurisdiction to enter the suit, during pendency of the suit the Rent Act came into force and the landlord sold the suit property to a co-operative society. In the circumstances it was held that it was strange and inappropriate for the tenant to have invoked the doctrine of *lis pendens* for the purpose of taking the plea of ouster of Civil Court's jurisdiction (17).

40. Transferee pending suit is representative of transferor — If entitled to be made party to suit.

A transferee, *pendente lite* from a party to a suit will be bound by the decree or order passed in the suit even if he is not made a party to the suit (1). The effect of S. 52 is that a *lis pendens* transferee is bound by the decree whether on contest, ex parte or on compromise (2). He must be regarded as a representative in interest of the party in the property in suit for the purposes of S. 47 of the Code of Civil Procedure (3). Thus, if the suit is for foreclosure of a mortgage and the pur

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the pendency of the suit it is hit by S. 52.) ** AIR 1970 Ker 188 (189 to 191) : 1969 Ker LT 326 (DB). (Pendency of suit for partition of tarward — Lease during pendency — Lessee is not entitled to benefits under Kerala Land Reforms Act (1 of 1964) or Kerala Compensation for Tenant's Improvement Act (XXIX of 1958).) ** AIR 1989 Ker 12 (DB). (Provisions in Kerala Land Reforms Act do not abrogate rule of *lis pendens*.) ** AIR 1949 All 257 (260) : ILR (1949) All 449.

17. AIR 1994 Ker 122 (126) : 1994 (2) Ren CR 336.

Section 52 — Note 40

1. **AIR 1958 SC 394 (398).** (Where a purchaser *pendente lite* is vitally interested in the determination of substantial questions arising in the appeal, he should be brought on record as an additional appellant.) ** **AIR 1937 PC 260 (261) : 31 Sind LR 652 ** AIR 1959 Ker 67 (72) : ILR (1958) Ker 1266 (FB) ** AIR 1956 Trav-Co 147 (151) : ILR (1955) Trav-Co 823 (FB).** ** (1964) 66 Pun LR 625 (636) ** ILR (1964) 2 Raj 828 (836). (Plaintiff relying upon doctrine of *lis pendens* not obliged to bring on record transferee *pendente lite*.) ** AIR 1961 Bom 288 (291) : ILR (1961) Bom 649. (Tenant inducted *pendente lite* — Liable to be evicted in restitution proceedings.) ** AIR 1961 Madh Pradesh [illegible] AIR 1957 Bom 117 (119) (DB) ** AIR 1956 Assam 116 (117) : ILR (1956) 8 Assam 137 ** AIR 1949 Bom 367 (371) : ILR (1949) Bom 186 (DB) ** AIR 1947 [illegible] 1130 (DB) ** AIR 1923 Cal 252 (256) (DB) ** AIR 1915 Oudh 300 (303) (DB) ** [illegible] 36 Cal 675 (689) (DB) ** (1908) 30 All 233 (234) (DB) ** (1901) 23 All 331 (335) (DB). (Transferee not made party to appeal — Result of appeal is binding on him.) ** (1901) 28 Cal 23 (26) (DB) ** (1894) 21 Cal 340 (343) (DB). (Property [illegible] removed in restitution proceeding.) ** (1884) 6 All 506 (509) (DB) ** (1875) 24 Suth WR 359 (361) (DB) ** (1875) 23 Suth WR 329 (330) (DB) ** (1868) 10 Suth WR 169 (170) (DB) ** (1867) 7 Suth WR 225 (226) (DB) ** (1867) 7 Suth WR [illegible] (DB) ** (1912) 13 Ind Cas 641 (641, 642) (All) ** (1862-63) 1 Hyd 160 (167).

[**See also** AIR 1953 Trav-Co 364 (366) (DB) ** AIR 1921 Cal 801 (803) (DB). (A prior mortgagee is in no way bound or affected either by the attachment of the subsequent encumbrance created *pendente lite*.)]

[**But see** (1904) 31 Cal 658 (662) (DB).]

2. **AIR 1992 Orissa 47 : 1992 SCFBRC 199 (FB).**

3. **AIR 1937 PC 260 (261) : 31 Sind LR 652 ** AIR 1983 SC 124 (125) : (1983) 1 SCC 18 : 1983 UJ (SC) 20.** (A transferee *pendente lite* of an interest in an immovable property which is the subject-matter of a suit from any of the parties to the suit will be bound in so far as that interest is concerned by the proceedings in the suit.) ** **AIR 1946 Lah 142 (146) : ILR (1946) Lah 476 (FB) ** AIR 1956 Trav-Co 147 (151) : ILR (1955) Trav-Co 823 (FB).** ** 2002 (2) Bom LR 311 (317) ** AIR 1983 Raj 61 (66) : 1982 WLN 6. (When a larger interest in immovable property that is possessed by the [illegible]

chaser *pendente lite* has obtained possession, and a final decree is passed for foreclosure in the suit, the mortgagee decree-holder can in *execution proceedings* recover the property from the purchaser **(4)** Even an auction-purchaser of the property pending a suit in respect of the property is a representative of the judgment-debtor in the latter suit within the meaning of S 47 of the Civil Procedure Code **(5)** The presence of third party auction purchaser is not at all necessary in pending suit but he would be bound by the principle.**(6)**

The consequence of the view that the purchaser *pendente lite* is the representative in interest of the party from whom he obtained the transfer is that where the property has been decreed to be given possession of to the plaintiff or the property is sold in execution of the decree, the transferee *pendente lite* cannot resist delivery of possession to the decree-holder or the auction-purchaser as the case may be **(7)** This is recognised in O 21, R. 102 of the Code of Civil Procedure Where mutation entry is made in revenue records during pendency in the suit, it would be hit by S 52 of the T. P. Act.**(8)**

Further, pending the suit the transferee is not entitled as of right to be made a party to the suit though the Court has a discretion to make him a party **(9)** A transferee *pendente lite* may not be a

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to be transferred by him the transfer would be affected by the principle of *lis pendens* and, such a transferee would still be a representative-in-interest of the judgment-debtor in execution of decree passed against the predecessor in interest of the transferor ** AIR 1962 Bom 191 (196) ILR (1961) Bom 977 ** (1962) 2 Mad LJ 336 (337) ** AIR 1959 Ker 133 (136) ILR (1958) Ker 480 (DB) (Sale in execution of money decree pending mortgage suit — Execution of mortgage decree — Purchaser given symbolical possession — Suit for recovery of property from purchaser *pendente lite* in execution of money decree is not barred) ** AIR 1958 Ker 309 (310) (DB) ** AIR 1957 Bom 117 (119) (DB) ** AIR 1953 Nag 236 (236) ILR (1952) Nag 150 (Remedy of plaintiff who has, in execution of his decree against defendant, purchased property is to proceed against purchaser under S 47 Civil P C and not by separate suit) ** AIR 1951 Orissa 306 (310) ILR (1949) 1 Cut 336 (DB) ** AIR 1951 Trav-Co 187 (188) (DB) ** AIR 1949 Mad 207 (208) ** AIR 1945 Nag 86 (88) 1944 Nag 852 (DB) ** 1943 Trav LR 133 ** AIR 1947 Lah 175 (176) ** AIR 1936 All 479 (480) (DB) (Subsequent mortgage taking mortgage during pendency of suit on first mortgage is a representative of mortgagor) ** AIR 1931 Bom 280 (283) (DB) ** AIR 1927 Bom 93 (95) 51 Bom 37 (DB) ** **(1904) 26 All 447 (458, 463) (FB)** ** (1901) 28 Cal 492 (497) (DB) ** (1900) 22 All 243 (246) (DB) (Subsequent mortgagee who takes a mortgage during the pendency of suit on the prior mortgage is a representative of the mortgagor) ** (1894) 16 All 286 (291) (DB) ** (1897) 19 All 332 (333) (DB)

[See also AIR 1914 Cal 828 (829) : 41 Cal 418 (DB).]

[**But see** AIR 1921 Mad 559 (561) (In view of the Privy Council decision in AIR 1937 PC 260 this view is **No longer good law.**) ** AIR 1928 Bom 65 (66) 52 Bom 208 (DB (Doubted)]

4. **AIR 1937 PC 260 (261) : 31 Sind LR 652** ** AIR 1956 Orissa 165 (171) (DB)

5. **(1904) 26 All 447 (460) (FB) ** (1896) 24 Cal 62 (76) (FB). (Overruling** 16 Cal 355) ** **AIR 1936 All 479 (481) (DB)**

6. 2001 (91) Delhi LT 756 (763).

7. ILR (1964) 14 Raj 1120 (1121) ** AIR 1959 Bom 269 (271) ILR (1959) Bom 256 ** AIR 1952 Assam 111 (114) (1952) 4 Assam 247 ** AIR 1952 Trav Co 102 (103) 1950 Trav-Co LR 665 (DB) ** AIR 1925 Cal 1243 (1244) ** (1911) 39 Cal 220 (225, 226) (DB)

8. **1998 (7) SCC 486 (489).**

9. **AIR 1958 SC 394 (398).** (Appellant to be brought on record in appeal) ** **AIR 1959 Ker 67 (74) : ILR (1958) Ker 1266 (FB).** (Decree for redemption of Kanom property against Karnavan — Delivery taken — Partition during pendency of suit — Plaintiff not bound to implead sharers in execution of decree) ** **AIR 1956 Trav-Co 147 (152); ILR (1955) Trav-Co 823 (FB)** (Right of decree-holder to proceed against person with his legal repre-

necessary party as he would be bound by the decree passed in the suit on account of the doctrine of *lis pendens*. But the transferee *pendente lite* can be added as a proper party if his interest in the subject matter of the suit is substantial and not just peripheral. (**10**) A transferee *pendente lite* to the extent he has acquired interest from the defendant is vitally interested in the litigation, whether the transfer is of the entire interest of the defendant, the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a *lis pendens* transferee a party, under Order 22, Rule 10 an alienee *pendente lite* may be joined as party. The plaintiff is not bound to make him a party. But the Court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. Even if a *lis pendens* transferee is not a necessary party and the plaintiff can ignore the transfer even if he has notice thereof and a decree or order obtained by him would be binding on the *lis pendens* transferee, when a motion is made by the *lis pendens* transferee to be impleaded as a party, the Court may, in exercise of its discretion judicially, add him as a proper party to prevent multiplicity of suits. Assuming that he is not a proper party, he may be impleaded as an assignee under the provisions of Order 22, Rule 10(1). Even if an application has been filed under Order 1, Rule 10, labelling of the application being misconceived, the Court should ignore the labelling of the application as one under O. 1, R. 10 and treat the same as one filed under O. 22, R. 10(1), C. P. C., if the ingredients thereof are satisfied. (**11**)

In case of any assignment or creation of any interest during the pendency of suit, under O. 22, R. 10, the suit may, with leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved. The rule is an enabling one and permissive in nature. In spite of devolution of interest having taken place during the pendency of litigation, the same can continue. It is for the assignee to appear in the suit at any stage and defend himself with the leave of the Court, but he cannot seek to be brought on record as of right, the discretion vests in the Court. Ordinarily leave will not be refused, but it is within Court's discretion. Such assignment or devolution of right during the pendency of litigation does not arrest the progress of litigation. The only exception is when the transfer of property forming the subject matter of the suit *pendente lite* results in wiping out the cause of action itself or deprives the transferee of the right to decree, such as where the cause of action was personal to the original plaintiff. Otherwise, the only result is that

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sentatives on record after his death will not be affected by transfer *pendente lite*.) ** 1998 AIHC 1480 (1484) (Raj). (The rights obtained by way of transfer of the property during the pendency of the suit by any party to the suit are subservient to the rights of the transferee and the same binds the transferee in the same manner in which the transferor himself is. This does not necessitate impleadment of the subsequent purchaser or transferee of the suit property during the pendency of the suit as a necessary party.) ** ILR (1964) 14 R. 878 (883). (Permission to be heard in appeal.) ** AIR 1962 Orissa 71 (72) ** AIR 1956 Assam 116 (117). ILR (1956) 8 Assam 137 ** AIR 1948 Nag 97 (99). ILR (1947) Nag 179 ** AIR 1939 Nag 128 (129) ** AIR 1937 Bom 244 (253) (DB). (Notice of suit to purchaser *pendente lite* is immaterial.) ** (1898) 21 All 149 (151) (DB). (Mortgagee during the pendency of a suit on a prior mortgage need not be joined as a party.) ** 1889 All WN 91 (92) (Do.) ** (1884) 8 Bom 323 (337). (It is the practice in this country as well as in England to admit assignees *pendente lite* as parties to the suit.) ** AIR 1924 Cal 188 (189) (DB). (But discretion must be judicially exercised.)

[**See also 1996 (5) SCC 538 (542).** (During pendency of a suit for declaration that the plaintiff is the owner of the suit property on the basis of a registered will, the defendant sold the suit property. The same being hit by *lis pendens*, the purchaser could not claim to get impleaded in the suit, he being neither necessary not proper party.)]

10. AIR 1990 Delhi 13 (18). (1989) 37 DLT 114 ** 1985 Pun LJ 332, 345. 1983 Rev LR 193. **Not followed** in view of 1959 PLR 8 and 1973 PLJ 154.)

11. AIR 1992 Orissa 47. 1992 SCFBR 199 (FB). (AIR 1989 Orissa 148. **Overruled.** AIR 1959 Kar 67 (FB). **Dissented from.**)

such transferee steps into the shoes of his predecessor-in-interest and remains bound by the result of the suit and would not, at a later stage be permitted to raise the plea that he was not bound by the result of the litigation because he was not brought on record of the suit and impleaded as a party(**12**). Transferee of suit property *pendente lite* is entitled to be joined as a party, when the suit is for partition and the possibility of collusiveness or amicable settlement in the suit cannot be ruled out (**13**) A transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest He is entitled be impleaded in the suit but all orders passed till date of order to implead him shall be binding on him and shall not be re-opened (**14**) There is no scope for a purchaser of property *pendente lite* to plead that he is a bona fide purchaser for value without notice or to say that he was not aware of the proceedings and had no notice of the pendency of the proceedings (**15**) See O 22, R 10 of the Civil Procedure Code In the undermentioned case (**16**) however, it is held that a bona fide purchaser who had no knowledge of the pending suit is a necessary party and he has a right to be impleaded as a party to the suit and to be heard before any order affecting his vital interest is passed in the suit

Where the transferee *pendente lite* is made a party to the pending litigation, he is entitled to be heard on the merits of the case (**17**) He can also prefer an appeal against the decree or order passed in the pending proceeding even if his transferor does not appeal (**18**). But he cannot take any plea which was not open to his assignor (**19**) Nor can he plead that the suit is barred by limitation on the ground that the suit must be deemed to have been instituted against him on the date on which he was impleaded as a party (**20**).

Rule 98 of Order 21 CPC is not applicable in case of a transferee *pendente lite* within meaning of S 52 No enquiry under R 98 is necessary in such case (**21**). In view of the provisions of R 102, O 21 CPC, the defence under Rr 100, 101 O. 21, CPC is not available to transferee *pendente lite* for purpose of raising objection to execution of decree passed against the transferor/judgment debtor (**22**) Where purchase of property by a person is hit by *lis pendens*, his objection raised in execution proceedings can be summarily dismissed (**23**) Though several opportunities were given, no evidence was adduced by the defendant A statement was made that the defendant did not want to read any evidence Court passed order foreclosing evidence of defendant The plaintiff had sought for a relief of injunction against alienation of suit property yet alienation came to be made The transferee was impleaded and he filed application for adducing evidence Held that apart from the doctrine of *lis pendens*, the subsequent purchaser could not be allowed to lead evidence as he stepped in the shoes of the defendant. (**24**)

Where the right, title and interest of the defendants have vested with the auction purchaser legal representatives of the defendants cannot contend that it is a pending suit S 52 may not have

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12. 2001 (10) SCC 715 (720).

13. 1982 Jab LJ 132 (134) (Madh Pra).

14. 1999 (3) Mad LW 888 (890)

15. 2000 (1) Mad LJ 349 (356)

16. 2000 HRR 773 (774)(Punj & Har) ** 2000 (1) RCR 423 (425) (Punj & Har)

17. (1976) 42 Cut LT 330 (333, 334) ** **AIR 1920 Mad 391 (395, 396) : 43 Mad 37 (SB).** (But he cannot raise a defence not open to his transferor.)

18. AIR 1935 Lah 640 (640) (DB)

19. (1901) 23 All 331 (336) (DB)

20. AIR 1930 All 597 (599) (DB)

21. 1984 Rajasthan LR 44.

22. 2002 (1) Andh LT 67 (72)

23. 2002 (2) Pun LR 439 : 2002 (2) Rec Civ Rep 323 (325).

24. AIR 1997 SC 3720 (3721) : 1997 AIR SCW 2590 , 1997 (5) SCC 476.

any application in such cases. Only as against successful party the principle is made applicable. As between the transferor and transferee and their legal representatives, the principle of S. 52 is not applicable. **(25)**

Where the demised premises are sold by the landlord during eviction suit, the suit would proceed in the name of the original landlord and would not be barred by S. 52. However the decree would be binding on the vendee, even though he is not made party to the suit. **(26)**

The landowner had raised objection before the authorities under the Urban Land Ceiling Act that her choice was not considered. Subsequently a portion of the land was sold. Held that the purchaser was entitled to urge before the Authority concerned the objection taken by the landowner regarding the choice given by her. **(27)**

During the pendency of the suit against a municipality, the suit property was transferred by Municipality to Housing Board without authority of the Court. The Board was also impleaded. Held that the principle of *lis pendens* would apply. The Board could not take the plea that in the absence of contract between the Board and the plaintiff the contract with the Municipality could not be binding on the Board. **(28)**

Where a sale deed was executed in favour of third person during pendency of suit and the fact of giving possession was recited therein, the said the third person could not claim to be in possession on basis of mortgage deed alleged to have executed prior to filing of suit when there was no reference to the said mortgage in the subsequent sale deed. **(29)**

Objection by a third party to delivery of possession to the decree holder is not maintainable when that third person is claiming right and title to the property on basis that he purchased the property during pendency of suit and without filing the sale deed. **(30)**

Where property of judgment-debtor is attached during execution proceedings and subsequently relatives of JD claim share in that property and sell that property during execution proceedings, the sale would be hit by *lis pendens*. **(31)**

See also the undermentioned cases. **(32)**

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25. 1999 (1) Mad LJ 360 (366)

26. 1992 All LJ 285 (287)

27. AIR 1993 All 83 (85)· 1993 All LJ 464 · 1993 All CJ 1024

28. 2000 (3) Rajasthan LR 157 (160)

29. AIR 2000 Punj & Har 271 (275).

30. AIR 2002 (NOC) 45 : 2001 AIHC 4220 · 2001 (5) Andh LT 8 (14).

31. AIR 2002 Guj 209 (216, 217) . 2002 (1) Guj LH 588

32. AIR 1967 Andh Pra 227 (229) (DB) ** AIR 1977 (NOC) [illegible] 1976 All LJ 694 · 1976 All WC 423 (Restitution — Claim against bona fide stranger purchaser for value — Doctrine of *lis pendens* applies — S. 144 will be attracted when an order under S. 47 was set aside in appeal or revision.) ** AIR 1977 Delhi 2[illegible] 79 Pun LR (D) 234 (Ex parte decree — Execution of — Possession of immovable property delivered to decree holder — Transfer by D. H. — Reversal of ex parte decree — Power of Court to restore possession to judgment debtor — Penal provision under O. 21 R. 98 when can be invoked — Doctrine of *lis pendens* applies.) ** AIR 1964 All 300 (301) (Suit dismissed for default under O. 9 R. 3 — Fresh suit for same relief not barred — Transferee *pendente lite* from plaintiff also entitled to bring fresh suit.) ** AIR 1952 Orissa 64 (68, 72) (II R. 1953) Cut 222 (DB) (Tenancy holding subject to Orissa Tenancy Act sold at rent sale — Purchaser is not within the meaning of S. 47 Civil P. C. the representative of tenant whose holding [illegible] takes it free of all encumbrances by reason of S. 220 of Act — Consequently *lis pendens* does not apply to sale.)

41. Injunction on party to suit not to transfer.

In *Turner v. Wright* (1) it was held that since a transferee *pendente lite* from a party would be bound by the result of the suit, no injunction will be granted against a party that he should not make any alienation of the property in suit.

In *Hadley v. London Bank* (2) however, it was held that where there is a clear valid contract for sale and the suit is for specific performance of that contract, the Court will issue an injunction not to transfer *pendente lite*, but that where the result of the suit is open to serious doubt the Court will not grant an injunction. In this country it has been held that the fact that a party is protected by *lis pendens* is no ground why he should not also be further protected by an injunction restraining the other party from alienating the property. (3) Prayer for temporary injunction under O. 39, R. 1 Civil PC cannot be rejected simply on ground that doctrine of *lis pendens* is available to parties. The doctrine may not always be good enough to take full care of the plaintiff's interest vis-a-vis transfer of suit property pending suit. In view of this in-built legal proposition, it may not always be desirable for a Court of law to reject the prayer for interim injunction outright on ground of *lis pendens*. (4) A party is, however, not bound to apply for an injunction, nor, even if he applies, is the Court bound to grant. (5) The interest of the parties pending litigation is always governed by the principle of *lis pendens*. (6) Where the party applying for issue of an *ad interim* injunction was not prepared to furnish security to compensation the opposite patrty in case the latter was restrained from selling the property during the pendency of the suit and sustained loss, the Court refused to issue the *ad interim* injunction. (7)

Perpetual injunction restraining the judgtment debtor from interfering with the property of the decree holder was passed, legal representatives of the judgment debtor violated the injunction. Held that the decree could be executed against the legal representatives in view of the provisions of Ss. 11 and 146 of the Civil PC and S. 52 of the T.P. Act. (8) A transferee by virtue of the so-called transfer in vilolation of injunction order acquires no title and such transfer is to be treated as non-existent, since it would defeat the ends of justice and prevelent public policy. However, although a transfer in violation of injunction order is a void one, an agreement to make transfer of property is not void even though at the time of execution of agreement there was an order prohibiting transfer. (9)

Even if injunction prohibiting transfer is refused by Court and its order has become final, that does not stand in the way of the plaintiff by putting a board on the suit property that the property being under litigation nobody should purchase it. (10)

Section 52 — Note 41

1. (1841) 49 ER 252 (252) : 55 RR 9.
2. (1865) 46 ER 562 (565) : 142 RR 26 (30, 31).
3. (1909) 2 Ind Cas 266 (267) (DB) (Cal) ** (1912) 16 Ind Cas 359 (361) (DB) (Cal)
4. 1997 (2) Cal HN 510 (512)
5. (1900) 23 All 60 (65) (DB).
6. 2002 (3) MPLJ 576 (578)
7. AIR 1950 Ajmer 29 (29).
8. AIR 1997 Ker 315 (317) 1997 (1) Ker LT 748 ** 1999 AIHC 4469 (4476) 2000 (1) ICC 229 (Bom).
9. 1999 (2) Cal HN 704 (706).
10. 2000 AIHC 1589 (1590) (Kant)

42. Subsequent reversal or modification of decree or order, how far affects sale in execution of such decree, or the assignment of such decree.

It has been held that the doctrine of *lis pendens* has no application to cases where a property has been sold in execution of a money decree, but subsequently the decree is varied or reversed on appeal or otherwise (1). A *bona fide* purchaser at such a sale will get a good title to the property notwithstanding the subsequent variation or reversal of the decree and the person in whose favour the variation or reversal is made can only claim restitution from the other party to the suit (2).

Where a person is put in possession of properties under a decree of a Court and the decree is subsequently reversed, the person in possession is not entitled to claim value of improvements made by him while in possession and put the same as a condition for re-delivery of possession under S 144, CPC to the person in whose favour the decree is ultimately passed. The adjustment of equities or rights of parties should not have the effect of undermining the very executability of the decree passed in favour of a party and that is why the provisions of S 52 are enacted (3).

It has been held in the undermentioned case (4) that where a decree is assigned to a third party and appeal is thereafter filed against it, the assignment is affected by the doctrine of *lis pendens*. This, it is submitted, is not correct. The final appellate decree is no doubt binding on the assignee but it is not so on the ground of the doctrine of *lis pendens*. The *decree* cannot be said to be the subject-matter of the litigation.

43. Registration of *lis pendens*.

As has been seen in Note 1 the doctrine of *lis pendens* does not depend upon any doctrine of *notice* to the transferee. In England the difficulty arising out of the rule was removed by the Judgments Act, 1839, providing for the registration of every *lis pendens* and providing that no *lis pendens* should bind a purchaser or mortgagee without express notice thereof unless and until it was duly registered. The provisions have now been re enacted in Ss 1, 2 and 3 of the Land Charges Act 1925 (15 Geo. V, Ch. 22).

There is no general provision for registration of *lis pendens* in this country. But by Bombay Act XIV of 1939, provision has been made in the Registration Act for the registration of notices pending suits and proceedings and S 52 has been amended by providing that a transfer will be affected by *lis pendens* only, if it is made after the registration of the notice of the suit or proceeding(1).

The effect of S 52 as amended by Bombay Act of 1939 is that when the notice of pendency of the suit or proceedings is registered, the public gets notice of pendency of litigation and persons desirous of dealing with the land cannot claim the benefit of *bona fide* purchaser for value without notice.(2)

Section 52 as amended by Bombay State in 1939 and 1959 is not applicable unless and until

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Section 52 — Note 42

1. **(1905) 29 Bom 435 (448) (FB).**

2. AIR 1916 All 159 (160) : 38 All 240 (DB) ** **(1887) 10 All 166 (172) : 15 Ind App 12 (PC)** ** (1913) 16 Oudh Cas 225 (231) (DB) (Provided the Court executing the decree had jurisdiction to sell the property) ** (1886) 9 Mad 130 (133) (DB) (Order)

   [But see (1873) 19 Suth WR 197 (198) (DB).]

3. **(1991) 2 Cur Civ Cas 50 (53) (Mad).**

4. **AIR 1916 Mad 745 (745) : 38 Mad 36 (DB).**

Section 52 — Note 43

1. **AIR 1965 SC 414 (426, 427) : (1965) 1 SCA 172.**

2. 1999 AIHC 4469 (4474) : 2000 (1) ICC 229 (Bom).

the notification is issued by Government as provided in the Proviso to S 2 of the T P Amendment Act of 1939 When no notification is issued the question of *lis pendens* will have to be considered as per provisions of the Central Act In absence of such notice it will not be necessary to register *lis pendens* When agricultural land is purchased during pendency of tenancy proceedings, the purchasers will be affected by *lis pendens*.(3)

When the plaintiff files a suit for specific performance the statute confers upon him a right to register the *lis pendens* after complying the necessary formalities as contemplated under sub-sec (2) of S 52 as stands in Maharashtra Even if there is a valid registration of *lis pendens* a power has been conferred on the Court whereby the Court can permit the transfer of property on such terms as it may impose Thus the power is discretionary and not a blanket power (4)

44. Writ proceedings.

A proceeding under Arts 226 227 which is not collusive and in which the right to immovable property is directly and specifically in question will be a proceeding under S 52 (1)

The claim of the original owners that they did not hold land exceeding ceiling limit was upheld in Appeal by the District Court A writ petition challenging the judgment of the District Court was pending The land was transferred by owners. **Held** that the principle of *lis pendens* would not apply to subsequent transferees who were not impleaded in the writ petition.(2)

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^[**53. FRAUDULENT TRANSFER.**—(1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.]

[A] *Substituted* for the original section by the Transfer of Property (Amendment) Act 1929 (20 of 1929), S. 15

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3. 1999 AIHC 4469 (4475)

4. 2002 (3) Bom CR 346 (349) : 2000 (1) ICC 229 (Bom).

Section 52 — Note 44

1. AIR 1992 Kant 71 (76) · ILR (1991) Kant 3288

2. 1994 (2) Civ LJ 182 (188) (All)

Synopsis

1. History of the section.
2. Scope of the section.
2A. This section and S. 23, Contract Act.
3. Section applies only to transfers of immovable property.
4. Hindu and Muhammadan law.
5. "Transfer of property".
6. Intent to defeat or delay creditors.
7. Benami transactions not necessarily fraudulent.
8. Transfer is valid until avoided.
9. Who can avoid a fraudulent transfer.
10. "Creditor", meaning of.
10A. "Of the transferor".
11. Subsequent creditors.
12. Creditor need not obtain judgment on his debt before being entitled to impeach fraudulent transfer.
13. "At his option".
14. Plea in defence.
15. Avoidance of transfer in part.
16. Transfer taken in good faith and for consideration.
17. Consideration.
18. Transfer for dower.
19. Good faith.
20. Preference of one creditor over others.
21. Transferee from a transferee.
22. Questions of intent and good faith are questions of fact.
23. Frame of suit under the section.
24. Suit must be a representative one.
25. Leave of Court.
26. Defence need not be in representative capacity.
27. Suit under this section is a "suit for land" within the meaning of the Letters Patent.
28. Transferor insolvent — Suit by creditor under this section.
29. Receiver in insolvency, if can avoid fraudulent transfer under S. 4 of the Provincial Insolvency Act.
30. Distinction between this section and Ss. 53 and 54 of the Provincial Insolvency Act.
31. Sub-section (2) — Transfer in fraud of subsequent transferee.
32. Auction-purchaser, whether is a subsequent transferee.
33. Plea of fraudulent transfer.
34. Onus of proof.
35. Limitation for suit to avoid document under this section.

1. History of the section.

The general principle is that a man can do what he likes with his own property. Limitations on this right were introduced from motives of equity by various statutes in England(1). By 13 Eliz. Chap. 5 it was provided that conveyances of any kind of property, whether land or goods with intent to defraud *creditors* were voidable at the instance of the person thereby prejudiced, except where the transferee had taken the property for good consideration and without notice of the intent to defraud(2). By 27 Eliz, Chap. 4 it was provided that conveyances of lands (not goods) with intent to

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Section 53 — Note 1

1. AIR 1938 Lah 156 (157) (DB)

2. The material sections of (1571) 13 Elizabeth, Chapter 5 run as follows

Section 1.—All conveyances, etc., made to defeat creditors to be void, etc., against them — Be it therefore declared, ordained and enacted, that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and every bond, suit, judgment and execution at any time had or made since the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had

defraud subsequent *purchasers were void against such purchasers for value, except where the prior transferee* had taken the property for good consideration and *bona fide*(3)

or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs successors, executors, administrators and assigns, and every of them, whose actions, suits, debts accounts, damages, penalties, forfeiture, heriots, mortuaries and reliefs by such guileful, covinous, or fraudulent devices and practices as is aforesaid, are, shall or might be in any wise disturbed, hindered delayed or defrauded) to be clearly and utterly void, frustrate, and of none effect : any preference, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

Section 5. Saving for estates and interest made, etc., upon good consideration and bona fide to parties without notice of fraud.— Provided also, and be it enacted, that this Act, or anything therein contained shall not extend to any estate or interest in lands tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had made, conveyed or assured, or hereafter to be had, made, conveyed or assured which estate or interest is or shall be upon good consideration and bona fide lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud, or collusion as is aforesaid : anything before mentioned to the contrary hereof notwithstanding

3. The material sections of (1584) 27 Elizabeth, Chapter 4 run as follows :

Section 2.— Fraudulent conveyances, etc., made to defraud and deceive subsequent purchasers to be void as against them.— For remedy of such inconveniences and for the avoiding of such fraudulent, feigned, and covinous conveyances, gifts, grants, charges, uses and estates, and for the maintenance of upright and just dealing in the purchasing of lands, tenements and hereditaments Be it enacted that all and every conveyance, grant charge lease, estate, incumbrance and limitation of use or uses of, in or out of any lands, tenements or other hereditaments whatsoever had or made at any time heretofore since the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased or shall afterwards purchase in fee simple, fee tail, for life, lives, or years, the same lands tenements and hereditaments, or any part or parcel thereof, so formerly conveyed, granted leased, charged, incumbered or limited in use or to defraud or deceive such as have, or shall purchase any rent, profit or commodity in or out of the same, or any part thereof, shall be deemed and taken only as against that person and persons, bodies politic and corporate, his and their heirs, successors, executors, administrators and assigns, and against all and every other person and persons lawfully having or claiming by, from or under them, or any of them, which have purchased or shall hereafter so purchase for money, or other good consideration off the same lands tenements or hereditaments, or any part or parcel thereof, or any rent profit or commodity in or out of the same, to be utterly void, frustrate and of none effect, any pretence, colour, feigned consideration, or expressing of any use or uses to the contrary notwithstanding.

Section 4.— Act not to impeach conveyances made bona fide for good consideration.— Provided also, that this Act or anything therein contained shall not extend or be construed to impeach, defeat, make void, or frustrate any conveyance, assignment of lease, assurance, grant, charge, lease estate interest, or limitation of use or uses, or in to or out of any lands, tenemens, or hereditaments heretofore at any time had or made, or hereafter to be had or made upon, or for good consideration, and bona fide to any person or persons, bodies politic or corporate, anything before mentioned to the contrary hereof notwithstanding

Section 6.— Saving for mortgages made bona fide for good consideration.— Provided nevertheless, that no lawful mortgage made or to be made bona fide and without fraud or covin, upon good consideration, shall be impeached or impaired by force of this Act but shall stand in the like force and effect as the same would have done if this Act had never been had or made anything in this Act to the contrary in any wise notwithstanding

Before the Transfer of Property Act was passed the said two statutes were applicable to the Presidency Towns of India. The principles underlying them were also applied in the mofussil in India as being in conformity with justice, equity and good conscience(4). In S. 53 of this Act the Legislature introduced with some modifications the abovementioned provisions of the two statutes(5) and thus codified what had been recognised as the law in this country(6). The two statutes were repealed by this Act.

In the interpretation of this section there was, however, a difference of opinion in this country based on English decisions which interpreted 27 Eliz., Chap. 4 as meaning that a *voluntary* conveyance was void if the grantor subsequently conveyed the same property for value, no matter whether the subsequent purchaser took the property with *notice* of the prior conveyance or not(7). It was held in some cases in this country following the above interpretation, that in every case of voluntary conveyance the fraudulent intent "*shall* be presumed" and that such conveyance was void against the subsequent purchaser even though he had notice of the prior purchase(8). Even in England the land was altered in 1893 by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. C. 21, S. 2), whereby a voluntary conveyance could not be made void under that Act *unless it was made with fraudulent intent*. Section 172 of the Law of Property Act, 1925 (15 Geo. V Chap. 20), re-enacted the provisions of 13 Eliz., Chap. 5 and S. 173 re-enacted the provisions of 27 Eliz., Chap. 4 as modified by the Voluntary Conveyances Act, 1893(9).

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4. **(1884) 10 Cal 616 (624)(PC)** ** (1901) 25 Bom 202 (208, 209) (DB) (The said two statutes and the authorities based thereon may be accepted as unmistakable guides to the law in India on the subject prior to T. P. Act.) ** (1887) 11 Bom 666 (675)(DB) ** (1868) 4 Mad HC R 84 (87) ** **(1865) 1 Agra HCR 41 (43, 44) (DB).**

   [See also (1860) 6 Suth WR 90 (91) (DB).]

5. AIR 1960 Mad 536 (536) ** AIR 1918 Mad 225 (226) 22 Mad LT 474 (DB) ** AIR 1917 Pat 448 (449) (DB) (In re Le Moroney (1887) 21 Irish 27 is referred to as containing a most clear and able exposition of the law of England and Ireland relative to the fraudulent transfers of property.) ** AIR 1916 Sind 22 (24) ** (1907) 34 Cal 999 (1009) (DB) (The third paragraph of S. 53 is based on Statute 13 Eliz. c. 5) ** (1903) 27 Bom 322 (327) (DB) ** 1901 Pun Re no. 6 page 18 (23) ** (1888) 1 CPLR 63 (64) ** *(1888) 1 CPLR 59 (59).

6. AIR 1960 Mad 536 (536) ** (1904) 17 CPLR 24 (26) ** (1900) 13 CPLR 180 (182).

7. See Note 31.

8. See Note 31.

9. Sections 172 and 173 of the Law of Property Act, 1925 are as follows:

   Section 172.— Voluntary conveyances to defraud creditors voidable.— (1) Save as provided in this section, every conveyance of property made whether before or after the commencement of this Act, with intent to defraud creditors shall be voidable, at the instance of any person thereby prejudiced.

   (2) This section does not affect the operation of disentailing assurance or the law of bankruptcy for the time being in force.

   (3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors.

   Section 173.— Voluntary disposition of land how far voidable as against purchasers.— (1) Every voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser.

   (2) For the purposes of this section, no voluntary disposition, whenever made, shall be deemed to have been made with intent to defraud by reason only that a subsequent conveyance for valuable consideration was made, if such subsequent conveyance was made after the twenty eighth day of June, eighteen hundred and ninety-three.

In view of these changes in England and in view of the conflict of opinion abovereferred to, this section was altered by the amendment of 1929 on the lines of Ss 172 and 173 of the Law of Property Act, 1925(**10**) Sub-section (1) reproduces S 172 of the Law of Property Act, 1925, which reproduced 13 Eliz , Chap 5(**11**) and sub-s (2) reproduces S 173 of the Law of Property Act, 1925, which reproduced 27 Eliz , Chap 4 as modified by the Voluntary Conveyances Act 1893

2. Scope of the section.

Sub-section (1) of the section deals with transfers in fraud of *creditors* and sub-s (2) deals with transfers in fraud of subsequent *transferees* It is the right of creditors *as a whole* that all the property of the debtor should be applied in payment of demands of them or some of them without any portion of it being parted with, without consideration, or reserved or retained by the debtor to their prejudice(**1**) As was observed by the Lord Keeper in *Partridge* v. Goppt(**2**)

> "no man has so absolute a power over his own property as that he can alienate the same, when such alienation directly tends to delay, hinder or defraud his creditors unless it is made upon good consideration and *bona fide*."

Where, therefore, a debtor transfers his property with intent to defeat or delay the exercise of this right of the creditors, it is just and equitable that the transfer should be voidable at the option of any creditor so defeated or delayed This is the principle on which 13 Eliz , Chap 5 was based and on which the first sub-section of this section rests The second paragraph of the section is also based on equity.

The principles of the section, based thus on the principles of equity which are of universal application, will apply even in places to which this Act is not directly applicable(**3**) It will also apply to transfers to which the section is not, in terms, directly applicable such as transfers of goods(**4**) and transfers by operation of law(**5**).

The principle laid u/S 53 by which the creditors could seek to set aside transfers of immovable property by debtor effected for defeating or delaying The creditors is available to the income tax department in connection with the arrears of tax due to it (**6**)

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10. See the Report of the Special Committee

11. AIR 1938 Cal 818 (821) (DB).

Section 53 — Note 2

1. See AIR 1915 PC 115 (116) : 43 Cal 521.

2. (1758) 28 ER 647 (648) : 1 Eden 163

3. AIR 1961 Punj 398 (399) ILR (1962) 2 Punj 378 (DB) (Technical and procedural rules not followed) ** AIR 1971 Punj 325 (326, 327) (DB) (Principles of S 53 are followed in Haryana) ** AIR 1968 Punj 479 (483) (Though provisions of S 53 are not in terms applicable in Punjab principles underlying it are applied) ** AIR 1960 Punj 417(418) 62 Pun LR 224 (DB) ** (1949) 1 Pepsu LR 198 (211) (DB) (But the courts in the Union are not bound to follow the mere rules of procedure prescribed by the last para of sub-s (1)) ** AIR 1923 Lah 478 (479) (The Punjab) ** (1937) 171 Ind Cas 735 (735) (Lah) (Do) ** (1936) 164 Ind Cas 933 (934) (DB) (Lah) (Do) ** 1912 Pun Re No 74 (DB) (Do) ** AIR 1921 Lah 97 (99) (DB) (Do) ** AIR 1938 Lah 156 (157) (DB) (Do) ** AIR 1924 Lah 707 (707) (DB) (Do) ** AIR 1927 Lah 420 (420) 8 Lah 544 (DB) (Do) ** AIR 1930 Lah 136 (137) (Do) ** AIR 1934 Lah 161 (162) (Do) ** 1901 Pun Re No 6 p 18 (23) (Do) ** 1908 Pun Re No 81, p 381 (387) (DB) (Do) ** (1913) 78 Ind Cas 519 (519) (Lah) (Do) ** (1892-1896) 2 Upp Bur Rul 315 (316) (Burma before 1924) ** (1911) 10 Ind Cas 922 (923) (Low Bur) (Do) ** (1913) 6 Low Bur Rul 170 (171) (Do).

[See also AIR 1916 Low Bur 89 (89). (Burma before 1924.)]

4. See Note 3 ** AIR 1960 Punj 417 (418) 62 Pun LR 224 (DB)

5. See Note 5 ** AIR 1960 Punj 417 (418) 62 Pun LR 224 (DB)

6. AIR 1984 Cal 215 (219) : (1984) 1 Cal HN 317.

The section cannot be correctly understood and applied without reference to English cases on which the section is really founded(7). In fact English decisions on the Statutes 13 Eliz. and 27 Eliz. are generally referred to in this country as guides for the construction of this section(8). In matters of *Procedure*, however, the English law cannot be a guidance in this country(9).

Where there is a concurrent finding that transfer of suit land pending execution of money decree was not made with intent to defeat or delay the creditor or the transferor that such transfer was not hit by S. 53 of the T.P. Act. Then this fact cannot be interfered with in Second Appeal(10).

Section 53 of the T. P. Act and S. 281 of the I. T. Act operate in different field. Section 53 specifically mentions that rights of bona fide purchaser is safeguarded. The Proviso to S. 281 of the I.-T. Act refers to assessee alone and not transferee. There cannot be a conjoint reading of the two provisions(11).

2A. This section and Section 23, Contract Act.

The following illustrations will bring out the distinction between this section and S. 23, Contract Act :

1. *A* is heavily indebted. He has some immovable property which he is anxious to save from his creditors. With this view he consults *B*. *B* agrees to help him to put the property beyond the reach of his creditors. With this object, they enter into an arrangement. Under this arrangement, *A* transfers the property to *B* for a consideration which *A* is to dispose of secretly so as to put it out of the reach of his creditors. Such a transaction will come under S. 23, Contract Act. The reason is that in such a case, the transfer is based on an agreement the object of which is fraudulent and is therefore unlawful within the meaning of S. 23, Contract Act. In such a case, the transfer will be wholly void and not merely voidable at the option of the creditors of the transferor. In other words, the transaction will not be binding even as between the parties to it(1). As for the transferor's creditors they can ignore the transaction altogether and proceed against the property as if it had not been attempted to be transferred at all. It may also be noted here that under S. 6(h) of this Act, no transfer can be made for an unlawful object or consideration within the meaning of S. 23, Contract Act. This section does not apply to such cases.

2. *A* transfers to *B* for consideration of a certain immovable property with the intention of defeating his creditors. *B* knows *A*'s intention and takes the transfer with such knowledge. But *A* has not communicated his object to *B* and such object has not become part of the subject-matter of the agreement between the parties which is purely confined to the transaction of transfer. In such a case, S. 23, Contract Act, will not apply because the section will only apply where the *agreement* between the parties includes an unlawful object(2). The mere fact that one of the parties to the agreement is actuated by an unlawful intention and that the other party is aware of this will not make the object of the *agreement* an unlawful one.

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7. (1897) 20 Mad 465 (467).
8. AIR 192[illegible] All 298 (300, 301) (DB) ** AIR 1918 Mad 225 (226) ** 22 Mad LT 474 (DB) ** AIR 1917 Mad 519 (520) ** (1900) 25 Bom 202 (209) (DB) ** (1889) 15 Bom 297 (308) (DB).
9. AIR 1921 All 298 (301) : 19 All LJ 299 (DB).
10. AIR 1984 (NOC) 85 (Gauhati).
11. 1998 (1) CTC 547 (552) (Mad).

Section 53 — Note 2A

1. AIR 1943 Nag 129 (134) : ILR (1944) Nag 42 (DB). (Transferee cannot sue transferor for possession.)
2. AIR 1943 Nag 129 (134) : ILR (1944) Nag 42 (DB). (No agreement can be unlawful and thus void under S. 23 unless both sides are concurring parties to the matter which renders unlawful.)

In such a case, this section will apply. Under this section it is not necessary that the parties must have *agreed* as to the unlawful object. It is enough if the transfer is made with the intention of defeating or delaying creditors and the transferee is not acting in good faith. If he is aware that the transfer is being made with the intention of defrauding creditors, he cannot be said to be acting in good faith. Such a transaction, however, will not be *void* under this section. It will be binding as between the parties to it(3). It will be only *voidable* at the option of the *creditors* of the transferor.

3. Section applies only to transfers of immovable property.

The English Statute 13 Eliz., Chap. 5 on which this section is based applied to transfers not only of *lands*, but also of *goods and chattels*(1). This section is, however, limited in its application to transfers of *immovable property*(2). Thus, the section will not apply to the transfer of a *decree* by the decree-holder in fraud of his creditors(3). Such cases must be decided according to justice, equity and good conscience(4). The principles underlying the section are, however, in accordance with justice, equity and good conscience, and will, consequently, be applied to transfers of movable property(5). According to these principles a deed is void against creditors when the debtor is in a state of insolvency and when the effect of the deed is to leave the debtor without the means of paying his present debts, unless the transfer has been made upon valuable consideration and in good faith(6).

4. Hindu and Muhammadan Law.

Section 2, as it stood before the amendment, provided that nothing in Chap. II (which includes this section) should affect any rule of Hindu or Muhammadan law. There is however, no rule

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3. AIR 1943 Nag 129 (132) : ILR (1943) Nag 42 (DB) (Transferee can sue transferor for possession of the property.) ** AIR 1936 Nag 207 (209) : ILR(1936) Nag 183.

Section 53 — Note 3

1. (1788) 100 ER 249 (251) : 2 TR 462.

2. **AIR 1914 PC 137 (139) : 37 Mad 227.** (Assignment of rights under decree — S. 53 does not directly apply as subject-matter of assignment is not immovable property. 30 Mad 6 Affirmed.) ** AIR 1960 Punj 417 (418) (DB). (It is doubtful whether a dissolution of partnership amounts to such a transfer.) ** (1911) 7 Nag LR 72 (77).

3. **AIR 1914 PC 137 (139) : 37 Mad 227.** (30 Mad 6, Affirmed.)

[See (1912) 17 Ind Cas 323 (324) (DB) (Mad).]

4. **AIR 1914 PC 137 (139) : 37 Mad 227.** (30 Mad 6, Affirmed.)

[See also AIR 1959 Mad 141 (142) (DB). (Collusive and fraudulent decree and execution — Suit by other creditors to set decree and the execution proceedings up to sale and the possession as null and void — This Section though in terms will not apply, suit is maintainable.)]

5. AIR 1960 Punj 417 (418) : 62 Pun LR 224 (DB) ** AIR 1956 Bhopal 22 (24). (Sale of a she-buffalo.) ** AIR 1938 Nag 249 (250, 251) : ILR(1940) Nag 316 ** AIR 1932 Rang 13 (13) : 9 Rang 614 (DB) ** AIR 1929 Rang 110 (111). (Sale of standing crops.) ** AIR 1927 Nag 205 (205). (Sale of moveable property.) ** 1901 Pun Re No. 6p. 18 (23).

[See also (1912) 15 Ind Cas 193 (194) (Mad). (Assignment of debt in fraud of creditors — Creditors can impeach it.)]

6. **AIR 1914 PC 137 (139) : 37 Mad 227** ** (1887) 11 Bom 666 (676) (DB).

[See also AIR 1942 Mad 714 (715). (Assignment of decree to defraud creditors — Creditor of assignor can attach decree and claim that assignment is fictitious and is not binding on him.)]

of Hindu law(1) or Muhammadan law(2) inconsistent with the provisions of this section. Under both systems of law a transfer is bad if made to defraud creditors. This section will therefore apply to transers by Hindus or Muhammadans. The amendment of S. 2 by deleting the word "Hindu" makes the position, so far as transfers by Hindus are concerned, still more clear.

Where the sons are joint with the father, the sons, under the doctrine of pious obligation being liable to discharge the father's debts where they are not tainted with immorality and have been incurred by him even for his own personal benefit and not for family purposes. The liability of the sons extends to the extent of their interest out of the estate they have received and this liability arises whether the father is alive or dead, property transferred by the father to his sons would still be available to the creditors. The transfer would also be voidable u/S. 53(1) at the instance of the creditors(3).

5. "Transfer of property."

As has been seen in the Notes on S. 5, a transaction is not a "transfer of property" unless it involves a *conveyance* of rights in property by one person to another. This section applies only where there has been a "transfer of property" as defined in S. 5 involving a conveyance of rights in property by one person to another. In this respect it differs from the Statute 13 Eliz., Chap. 5 which applied even to colourable transactions (1) But the word "transfer" in this section is comprehensive enough to embrace within its purview all kinds of transfers whether with or without consideration.(2) The section is intended to cover cases of transfers which are capable of being set up and defended and not barred transfers.(3)

In order to claim that the transfer is fradulent, the plaintiff must prima facie establish that either sale is sham or if real one is a fraud on him. Burden then shifts on transferee to prove his good faith.(4)

Section 53 — Note 4

1. AIR 1960 Mad 536 (536) ** AIR 1918 Mad 225 (228) : 22 Mad LT 474 (DB) ** AIR 1917 Mad 519 (522) (DB). (11 Bom 666, Followed.)

2. AIR 1960 Mad 536 (536) ** AIR 1955 Pat 270 (276) : 1955 BLJR 346 (DB) (A wakf by Shia Muhammadan cannot be excluded from the provisions of the section which are general in terms.) ** AIR 1930 All 462 (465) : 52 All 710 (DB) (There is no rule of Muhammadan law which allows an idebted personto make a wakf of his property with intent to defraud his creditors.) ** AIR 1929 All 277 (278) (DB) ** AIR 1917 Mad 841 (844) (DB) (Even if the transfer was to a charity.)

   [**See also** AIR 1943 All 2 (5) (DB) (Deed of wakf impeached as being fraudulent — **Held** that there was nothing to show that this section did not apply.) ** AIR 1940 All 55 (56) : ILR (1939) All 962 (DB) (Wakf by Muhammadan financially embarrassed is not void but void able.)]

   Also see S. 2, Note 9.

3. AIR 1986 Kant 225 (227) : (1985) 2 Kant LJ 389

Section 53 — Note 5

1. 1964 All LJ 1079 (1081) ** AIR 1952 All 83 (84) (DB) ** (1770) 98 ER 384 (385) : 5 Bur 2631, Martyn v. Podger. (Fraudulent bill of sale.)

2. AIR 1941 Oudh 205 (208) (DB)

   [**See also** AIR 1960 Mad 536 (536) (Marriage settlement made before marriage with intent to defeat creditors of settlor — Voidable.)]

3. AIR 1955 Mad 446 (448) : 1955 Mad WN 283

4. AIR 2002 Guj 209 (218) : 2002 (1) Guj LH 588 (Where the transferee was having knowledge of fraudulent intention of transferor and helped him to achieve that purpose, the transfer falls within 1st paragraph of S. 73 and is voidable at the instance of the plaintiff.)

Sham transactions.

The section does not apply to *nominal, sham or simulated* transactions in the form of transfers of property (but which are really not transfers of property) at all in the proper sense of the expression, there being, in such cases, no *animus transferendi* and no conveyance of any rights in property **(5)** Section 53 includes admission that the transfer is a real one **(6)** The transaction is inoperative even as between the parties thereto If such a transaction is brought about, as is often the case, for the purpose of defeating or defrauding creditors, the latter are not affected by it **(7)** It is not

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5. **AIR 1957 SC 49 (66) : 1957 SCJ 1.** (Distinction between a transfer which can be correctly described as 'benami' and a sham transaction which is also occasionally described as a benami transaction pointed out) ** **AIR 1944 Nag 44 (52): ILR (1944) Nag 342 (FB)** ** 2000 (1) APLJ 458 (460) ** AIR 1998 Ker 139 (143) 1997 (2) Ker LJ 610 ** ILR (1964) 2 Mad 483 (487) ** 1964 All LJ 1079 (1080) (It neither extinguishes an existing interest in the property nor creates a new one) ** AIR 1963 Mys 257 (260) 1963 Mys LJ (Supp) 266 ** AIR 1962 Andh Pra 25 (27 28) (Suit under this section is unsustainable in the case of such transactions) ** AIR 1961 Pat 158 (160) (DB) ** AIR 1958 Cal 143 (146) (Apparent transfer fraudulently made to defeat the provisions of statute viz W B Estates Acquisition Act) ** AIR 1958 Pat 568 (570) 1957 MPLJ 107 (108) ** AIR 1955 Madh B 159 (160) ILR (1955) Madh B 297 (DB) ** AIR 1955 Pat 270 (275) 1955 BLJR 346 (DB) ** AIR 1953 Mad 545 (547) (1953) 1 Mad LJ 123 ** AIR 1953 Cal 251 (252) 56 Cal WN 740 (DB) ** AIR 1953 Mys 22 (24) 32 Mys LJ 123 ** AIR 1952 All 83 (84) (DB) ** AIR 1951 All 443 (445) (DB) ** AIR 1951 Mys 103 (105) 30 Mys LJ 64 (DB) ** 1950 Ker LT 502 (504) (DB) (Benami or fictitious transfers are not intended to exist Fraudulent transfers contemplated by this section are intended to exist though their object was to defeat third parties) ** AIR 1946 Sind 78 (79) (DB) ** AIR 1924 Oudh 314 (316) (DB) (In order to bring a suit within the purview of S 53 it is necessary to accept the genuineness of the transfer as an initial fact and then to prove that the transfer was made with a view to defeat or delay the general body of the creditors AIR 1941 Oudh 457 Foll) ** AIR 1944 All 214 (215) ILR (1944) All 325 (The law draws a clear distinction between a fictitious and a fraudulent transaction — If a transaction is fictitious it was never intended to exist — If it is fraudulent, it was intended to exist though its object was to defeat the legal rights of other people) ** AIR 1943 Nag 129 (132) ILR (1943) Nag 42 (DB) (It is necessary for a creditor to avoid the transaction under S 53 of the Transfer of Property Act, it must in the eye of the law have had and have legal and valid existence until avoided) ** AIR 1943 Nag 113 (113 114) ** AIR 1942 All 344 (345) ILR (1942) All 848 (DB) (Fictitious and fraudulent transfers — Distinction between, pointed out) ** AIR 1941 Oudh 95 (98) (Section presupposes real transfer — Plaintiff's case not that transfer is fraudulent but that it is fictitious — Section 53 does not apply) ** AIR 1941 Oudh 457 (464) (DB) (In a suit under S 53 the plaintiff has to accept the genuineness of the deed as an initial fact) ** (1940) 42 Punj LR 3 (6) (DB) (Transfer not intended to be acted upon and not acted upon) ** AIR 1936 Nag 207 (208 209) ILR (1936) Nag 183 ** AIR 1927 Mad 1104 (1104) 38 Mad LT 105 (A colourable transaction is void) ** AIR 1923 Pat 561 (567) (DB) ** AIR 1919 Pat 345 (350) (DB) ** (1908) 30 All 297 (308) (Fictitious mortgage) ** AIR 1982 All 316 (317)

[**See also** AIR 1944 Nag 133 (134) ILR (1944) Nag 125 (A fraudulent transaction is not a sham transaction) ** (1901) 26 Bom 577 (584) ** AIR 1939 Pat 5 (6) (DB) ** AIR 1915 Bom 89 (90) 39 Bom 507 (DB) ** AIR 1938 Nag 249 (249) ILR (1940) Nag 316 ** **AIR 1920 Nag 80 (83) : 16 Nag LR 3 ** AIR 1941 Pat 394 (394) (DB)**]

[**See however** AIR 1965 Ker 288 (292) 1965 Ker LT 341 (AIR 1945 Mad 59 and AIR 1962 Andh Pra 25, **Dissented from.**)]

[**But see** AIR 1925 Bom 287 (287 288) (DB) (Submitted wrong)]

6. **AIR 1998 Ker 139 (143) : 1997 (2) Ker LJ 610**

7. 1964 All LJ 1079 (1080) ** AIR 1954 Manipur 1 (3) ** AIR 1944 Mad 381 (383) ILR (1945) Mad 138 (DB) (Colourable partition — Creditor can enforce his remedies as if parties continued to be joint) ** AIR 1943 Nag 129 (136) ILR (1943) Nag 42 (DB) (Colourable transaction — Creditors can proceed in same way as if the transaction had not

required to be set aside by a suit(**8**) and can be challenged otherwise than under the provisions of this section (**9**) The question whether a transaction is a real transfer of property or a sham or simulated transaction must be decided on the facts and circumstances of the particular case (**10**) The

been affected) ** AIR 1928 Oudh 414 (416) (DB) (Judgment-debtor making a gift to his son while decree was being executed — Possession not passing to donee or mutation of names effected — Donor refusing to present the deed for registration — Gift was held to be not real and effective) ** AIR 192. All 298 (299) (DB) (Joint family property — Transfer by one member to another member ** (1911) 16 Ind Cas 906 (907) (DB) (All) (Father's transfer to son.)

[**See also AIR 1930 PC 255 (256, 258)**. (False document not intended to be given effect to but intended to defeat creditor held not to be binding on creditor) ** **(1884) 10 Cal 616 (624) (PC)** (Hibba made in favour of son — Gift not followed or completed by change of ownership or management — Transferor applying whole of income of gifted property to his own use — Transaction held benami for transferor ** **1890 All W N 15 (17) (SB)**. (Defendant in executing a decree against immovable property of the plaintiff's husband was met by plaintiff with an objection that subsequent to the decree the property had been transferred to her under an arbitration award which was made a decree of Court in discharge of her dower debt — **Held** that the award being the result of fraudulent and collusive arrangements to defeat the creditors the fact that the parties in perfecting the fraud obtained a decree would not afford an answer to the creditor's claim) ** AIR 1926 All 470 (472) (48 All 414 (DB) (Application by Receiver of an insolvent — Case under Insolvency Act S 53) ** (1896) 22 Bom 255 (258) (DB)]

8. **(1908) 35 Cal 551 (560) (PC) ** AIR 1944 Nag 44 (52) (ILR (1944) 342 (FB)** ** AIR (1962 Andh Pra 25 (27, 28) ** AIR (1962 Madh Pra 36 (364) (1962 MPLJ 596 (DB) ** AIR 1955 Madh Bha 159 (160) (ILR (1955) Madh B 97 (DB) ** AIR 1952 A 183 (184) (DB) ** AIR 195. All 443 (445) (DB) ** AIR 1943 Nag 129 (132) (ILR (1943) Nag 42 (DB) ** AIR 1940 All 407 (409) (ILR (1940) A 1 542 (DB) (Sham and bogus sale deed) ** AIR 1927 Mad 805 (812) (35 Cal 551 (PC). Followed) ** AIR 1920 Mad 88 (88) (DB)

[**See** 1981 All LJ 1079 (1081) (It cannot be said that unless the sale deed (alleged to be sham) is got cancelled its validity cannot be gone into by the consolidation authorities) ** (1913) 18 Ind Cas 332 (335) (DB) (Mad) (A sham and colourable transaction is inoperative as between the parties to it and it is different from an alienation that is voidable by the creditors on the ground of fraud.)]

9. **AIR 1920 Nag 80 (83) : 16 Nag LR 3.**

10. **AIR 1928 PC 139 (143) : 51 Mad 349 ** AIR 1977 SC 409 · 1978 UPTC 75** (A purchased a house in the name of his son B while huge arrears of Income-tax were due from A A Company was incorporated during recovery proceedings by B and his relatives and B sold the house to this Company — **Held** transaction was sham ** (1976) 46 Com Cas 454 (460) (Pat) ** AIR 1970 Assam 75 (78) (1970 Assam LR 77 (Sham transaction — Burden to prove absence of consideration is on person who challenges ** AIR 1961 Pat 158 (160) (DB) ** 1960 MPLJ 1029 (1030) (DB) (No evidence on record to show payment of consideration — Vendor admittedly continuing to be in possession of property — **Held** the sale was sham)

[**See also** AIR 1958 Raj 280 (281) (1958 Raj LW 23) (Oral evidence to prove that transaction evidenced by written instrument is fictitious or benami is not barred by C I 9 Proviso I of S 92 Evidence Act) ** AIR 1954 Manipur 1 (3) ** AIR 1953 Mad 545 (547) (1953) 1 Mad LJ 123 (Question depends on *animus transferendi* which parties had at the time of transfer — All transfers intended to defraud creditors cannot be presumed sham) ** AIR 1953 Mys 22 (24) (32 Mys LJ 123 ** AIR 1952 Nag 106 (111) (ILR (1953) Nag 684 (Transfer of few fields *in lieu* of dower — Wife being pardanashin lady of high class family, husband continuing to manage property — Failure to record property in the name of wife — Neither of the facts held sufficient for holding transfer a nominal transaction) ** AIR 1951 All 443 (445) (DB) ** (1909) 31 All 170 (172) (DB) ** (1909) 32 Mad

mere fact that the transaction is without consideration(11) or that the consideration mentioned is grossly inadequate does not necessarily show that the transaction is unreal.(12)

Benami transactions.

A *benami* transaction is not necessarily a *sham* transaction not intended to be given effect to. *A* may make a *real transfer* to *C*, but in the name of *B*. *B* is a *benamidar* for *C*.(13) It has been held in some cases that a *benami* transaction properly so called is of this nature (14) Such transactions are "transfers of property" within the meaning of this section (15) But the word *benami* is very often used to describe a simulated transfer by *A* in favour of *B*, neither party intending that title should pass from *A* to *B* (16) Such transactions are, as has been seen above, not "transfers of property" at all within the meaning of this section.

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325 (329) (DB) (Sale deed by widow to prevent property from going to reversioner of husband — Deed though retained by the widow duly communicated — Tenant in possession also attorning to the vendee — **Held** fact that no consideration was paid did not prevent title passing to vendee and the transaction was not a sham one) ** (1904) 28 Bom 364 (369) (DB) ** (1902) 26 Bom 577 (584) ** 1893-1900 Low Bur Rul 201 (201) ** AIR 1953 Hyd 77 (78) ILR(1953) Hyd 165 (Question whether transaction is real or sham — Slight evidence is sufficient to show it as sham — Subsequent conduct not a safe test as invariably such conduct is adjusted to fit in to correspond with the benami nature) ** AIR 1937 Oudh 443 (443) 13 Luck 455 (Question of genuineness of transaction — Suspicion cannot be substituted for evidence)]

11. ILR (1964) Cut 719 (724) ** AIR 1957 Mad 630 (631) :(197) 2 Mad LJ 414 ** AIR 1944 Nag 133 (134) ILR (1944) Nag 125 ** (1909) 32 Mad 325 (327, 329).

[**See also** AIR1958 Mad 580 (582) (Coupled with other facts it may show the deed to be a sham one.)]

12. AIR 1936 Nag 207 (208) : ILR (1936) Nag 183.'

[**See also** AIR 1957 Mad 630 (631) (1957) 2 Mad LJ 414 (Evidence of real worth of property not available — Application of doctrine of inadequate consideration proving fraud, by shocking conscience of the Court, is inadvisable — In such cases careful scrutiny of circumstances is necessary to determine whether purchaser is a 'lucky purchaser' or 'fraudulent purchaser'.)]

13. **AIR 1957 SC 49 (66) ** AIR 1944 Nag 44 (54) : ILR (1944) Nag 342 (FB).** (Distinction between sham and benami transactions pointed out) ** ILR (1964) 2 Mad 483 (487) (In benami transactions title of property passes till it is questioned by the real party.) ** AIR 1958 Pat 568 (570) ** (1956) 60 Cal WN 886 (890) (Property purchased by husband in name of wife will be regarded as benami transaction until the contrary is established.) ** AIR 1952 Vind Pra 69 (73) ** AIR 1920 Mad 26 (39) (DB)

14. **AIR 1957 SC 49 (66) : 1957 SCJ 1 ** AIR 1980 SC 727 (732) : (1980) 2 SCR 628.** (Nature of two kinds of benami transactions as generally recognised in India pointed.) ** AIR 1934 Mad 587 (590) (A sham transaction is one in which no title passes — In a benami transaction title passes for certain reasons to the name of third party who could bring a suit, give a discharge etc., on his title.) ** AIR 1925 Mad 1005 (1007) (DB).

15. **AIR 1957 SC 49 (66) : 1957 SCJ 1.** (In such cases there is an operative transfer vesting the title in transferee.)

16. **AIR 1957 SC 49 (66) : 1957 SCJ 1** ** AIR 1960 MPLJ 1029 (1030) (DB) ** AIR 1958 Pat 568 (570) ** 1950 Ker LT (504) (DB) (Fictitious or benami transfers, as distinguished from fraudulent transfers contemplated under this section are never intended to exist.)

[**See** AIR 1945 Mad 35 (54) : ILR (1945) Mad 412 (DB) (Suit by creditor for declaration that certain trasnfers made by debtor to his wife and daughter are benami and fictitious — S 53 does not apply) ** AIR 1943 Nag 129 (136) ILR (1943) Nag 42 (DB).]

See also the undermentioned cases.(17)

[See also AIR 1953 Hyd 77 (78) ILR (1953) Hyd 165 (DB) (Very slight evidence is necessary to show that the benami transaction is a sham transaction.)]

17. AIR 1966 Pat 110 (119) 1965 BLJR 800 (Burden of proof lies on person alleging transaction to be benami.) ** 1990 (1) Bank CLR 543 (368) (Ker.) ** 1979 Ali LJ 996 (998) (When a gift deed was executed by the tenure holder in favour of his four sons and subsequently mutation was also effected in the names of the four sons on the basis of such gift deed and subsequently rent receipts (irrigation slips etc.) were granted in the names of each son separately these facts could not come in the way of putting up a case by the State that the real tenure-holder was the father for the purpose of including the gifted lands in his holdings.) ** AIR 1977 Mad 292 (296) 90 Mad LW 207 (Where a serious dispute had arisen between the benamidar and the real owner as a result of the latter filing a suit for recovery of possession of the suit properties the benamidar should be taken to have no power to represent the real owner.) ** 1977 Pun LJ 199 (201) (Alienation made by a Judgment-debtor in favour of his son-in-law who was living with him and during execution proceedings — Transaction could not be called a bona fide transaction as it was to defeat the interests of the creditors.) ** AIR 1976 Gauhati 24 (Benami transaction — Proof of motive is relevant.) ** AIR 1962 Pat 160 (165) (DB) (Benami transaction — Tests usually taken into consideration are passing of consideration custody of title deed possession of property, motive and relationship — Failure of plaintiff claiming transaction to be benami on first four tests — Mere relationship is not sufficient to establish benami.) ** AIR 1962 Orissa 74 (77) ILR (1962) Cut 625 (Essentials of benami nature — Consideration of motive, relationships between parties and source of consideration necessary.) ** AIR 1960 Pat 420 (421) 1960 BLJR 148 (DB) (Benami is a question of fact and not a mixed question of law and fact.) ** AIR 1960 Punj 575 (578) (DB) (Benami nature of transaction — Question of fact — Cannot be raised in second appeal.) ** AIR 1960 Andh Pra 70 (74) (1959) 2 Andh WR 140 (DB) (Purchase of property benami — Question is one of fact.) ** AIR 1959 Andh Pra 407 (412) ILR (1959) Andh Pra 208 (DB) (Plea of benami must be strictly made out — Apparent title must prevail in absence of evidence — Onus of proof is on person alleging benami.) ** 1959 Cal LJ 1 (5) (DB) (Person named as consignee in railway receipt — Presumption arises that he is the owner of the goods — Onus is on person claiming the named consignee to be his benamidar to prove that purchase money came from him.) ** AIR 1958 Pat 434 (436) 1958 BLJR 383 (DB) (Question of benami — Motive for transaction, relationship of parties payment of consideration, custody of the document and possession over property are main tests — Decision on these points is a decision of fact.) ** AIR 1958 Cal 733 (734) ILR (1959) 1 Cal 121 (DB) (Burden of proof lies on person assailing transaction as benami to prove his allegation.) ** AIR 1958 Pat 537 (538) 1958 BLJR 103 (Question of benami is a question of fact.) ** AIR 1957 Mad 488 (491) (DB) (Burden lies on him who raised the plea of benami or sham to prove that what is apparent is not real.) ** AIR 1957 Ker 121 (123) (DB) (Plaintiff setting up benami — Burden of proof is heavy on him — He must adduce the best evidence — Court must not rest its decision on suspicion.) ** AIR 1957 Hyd 37 (39) ILR (1956) Hyd 733 (DB) (Benami is not a matter of mere presumption — It has to be pleaded and proved by evidence.) ** AIR 1957 Cal 177 (179) 61 Cal WN 154 (DB) (Finding of benami based on cogent materials placed before Court — Absence of evidence of motive does not vitiate the finding.) ** ILR (1955) 1 Cal 207 (212, 213) (DB) (Question of benami — Initial presumption is in favour of the ostensible or apparent owner — It is not a pure question of onus or burden of proof but of rebutting the initial presumption — Disregard of presumption on the view that where evidence has been led on both sides question of onus is not important is a serious mistake.) ** AIR 1955 Him Pra 2 (3) (Burden of proof lies on person who alleges the transaction to be benami.) ** AIR 1955 NUC (Cal) 2867. (Person alleging a transfer to be sham must prove the facts relied on by him.) ** AIR 1955 Madh Bha 148 (155) ILR (1955) Madh Bha 239 (DB) (Property purchased in name of wife, husband paying purchase money — Presumption of wife being benami arises — Burden lies on her to rebut it by showing that the husband purchased it by way of gift to her

Partition of joint property.

There is a difference of judicial opinion(**18**) as to whether a partition of joint property is a transfer of property. But it has been held that a partition made in fraud of creditors can be avoided under the provisions of this section (**19**) Thus, where in a partition between a Hindu father and his sons, the father was allotted a smaller share than that to which he was entitled under the law, with intent to defeat his creditors, it was held that the partition could be avoided under this section (**20**) In the undermentioned cases(**21**) it was held that apart from the question whether a partition is a transfer of property with in the meaning of this section, the principle of the section is applicable to partitions.

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or advancement) ** (1954) 26 ITR 249 (254) (DB) (Person alleging benami must prove the allegation by direct or circumstantial evidence) ** ILR (1954) 1 Cal 220 (227) (DB) (Finding as to nature of transaction alleged as benami must rest on evidence and not on suspicion) ** AIR 1952 Nag 246 (247) 1952 Nag LJ 160 (Onus of proving benami nature of transaction is on the person alleging it so Person in whose name transfer stands providing purchase money No motive for entering into benami transaction Mere continuous possession of the person who claims to be the real owner not sufficient to establish benami) ** AIR 1951 Trav-Co 237 (238) ILR (1951) Trav-Co 294 and 788 (DB) (Transaction in fraud of creditors is not a sham transaction) ** 1946 Mar LR 26 (27) (Question whether transaction is benami or not - Test Source of purchase money is the best test) ** AIR 1937 Cal 203 (206 207) (DB) (Transaction alleged as benami — Court's decision must not rest on suspicion — Fraudulent intention can be inferred only upon tangible facts proved in the case)

18. See Note 4 on Section 5.

19. AIR 1956 Punj 46 (48) (Partition between husband and wife under which all tangible properties are given to the wife and the husband retains only property of a very flimsy character) ** AIR 1950 Bom 278 (284 285) ILR (1950) Bom 114 (DB) (Partition made without making provision for payment of debts due to creditors of the joint family) ** AIR 1950 Bom 247 (249) (DB) ** AIR 1936 Bom 10 (12) 60 Bom 34 (DB) ** AIR 1923 Mad 577 (577) (DB) (AIR 1920 Mad 20, Not followed) ** (1926) 97 Ind Cas 70 (70) (Mad) (AIR 1923 Mad 577, Followed.)

[See also AIR 1928 Mad 735 (742) : 51 Mad 417 (FB). (Partition not providing for debts is not bona fide.)]

20. AIR 1950 Bom 247(249) (DB) ** AIR 1947 Mad 203 (204) (Partition between father and sons — No property allotted to father - All property given to sons — Sons undertaking to pay debts incurred by father — Effect of partition is to defraud creditors Partition is fraudulent as the creditors not being parties to it cannot take advantage of it to enforce the arrangement against the sons — AIR 1944 Mad 381 Foll) ** AIR 1944 Mad 381 (382 383) ILR (1945) Mad 133 (DB) (Creditors can proceed against what would be the father's proper share ignoring the actual partition but they cannot proceed against the sons shares because the division in status brought about by the partition cannot be affected by its fraudulent nature - Where partition is fair and in accordance with the proper shares of the parties, it is not liable to be impeached under this section although entered into with a view to prevent attachment of the sons' shares in execution of decree against the father obtained after partition and in that sense mala fide AIR 1937 Mad 424 Relied on)

[See also AIR 1983 Guj 126 1983 (1) 24 Guj LR 278 (DB) (Where the value of the share paid to the indebted coparcener on his effecting release of his share is so meagre that he would be hardly able to pay about 25% of his total debts, that one circumstance alone would be sufficient to establish that his intention was not merely to release his share in the interest of the suit property but was to defeat and delay the creditors)]

21. AIR 1944 Nag 44 (52) . ILR (1944) Nag 342 (FB). (Properties assigned to A, a member

Deed of appointment.

A deed of appointment made in accordance with a power reserved in deed of trust is a "transfer of property" within the meaning of this section **(22)**

Relinquishment and surrender.

A mere relinquishment of rights by a person does not operate as a transfer of property **(23)** This section does not in terms apply to such cases **(24)** Similarly a *surrender* to the next reversioner which is merely an effacement of the surrenderor of his or her interest is not a "transfer of property" **(25)** It has been held in the undermentioned cases**(24)** that where the transaction is not a mere effacement of the interest of the alleged transferor, but is *intended to convey* rights to the next reversioner, it would amount to a transfer of property within the meaning of this section

In the undermentioned case**(27)** it was held by the Madras High Court that where a judgment-creditor gave up his claim against his judgment-debtor and certified satisfaction of his decree, the transaction was not a transfer of property and that neither S 53 nor the principle underlying it applied to the case so as to enable the creditors of the judgment-creditor to question the transaction In a later case,**(28)** however, the same High Court has held that a mortgagee giving up his claim against the mortgagor must be considered to have made a 'gift' of his claim to the mortgagor and that the principle underlying this section can be applied to such transactions It was argued that the giving up of the claim cannot amount to a reservation to the mortgagee of any benefit and that consequently, it could not be considered a fraudulent transaction Their Lordships rejected this contention and observed that it was not necessary under S 53 that the transferor should reserve any benefit to himself As to the correctness of this observation, see Note 6

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of joint family in such way that A's creditors would be defeated **Held**, that A retained a benefit to himself and so partition was voidable at the instance of A's creditors) ** (1986) 1 Andh LT 392 (397, 398) ** AIR 1926 Nag 355 (356).

[**See also** ILR (1976) 2 Delhi 364 (382 386) (Partition of property under Hindu Law does not amount to a transfer within the meaning of S. 53.)]

22. (1894) 22 Cal 185 (202) (The operation of the Transfer of Property Act is not intended to be confined to transfers by contract.)

Also see S 5 Note 1.

23. AIR 1973 Mad 309 (1973) 1 Md LJ 264 (Deed of Surrender by a Life tenant in favour of the remaindermen under a settlement is not transfer.)

See Note 4 on S. 5.

24. AIR 1938 Oudh 65 (67) (DB) (Relinquishment of his rights by one coparcener in favour of another coparcener.)

See also Note 6.

25. See Note 4 on S. 5.

26. AIR 1965 Mad 337 (338) 77 Mad LW 683 1964 Mad WN 606 (Widow asking for maintenance and simultaneously surrendering her interest in the property — A 1946 All 267 and AIR 1939 Bom 496, Rel on) ** AIR 1939 Bom 496 (500, 501) (Surrender of estate in favour of daughers pending suit by husband's creditor for recovery of debt from estate in widow's hands) ** AIR 1936 Nag 166 (167) ILR (1936) Nag 69 (Surrender by widow of her widow's interest.)

[**See also** AIR 1946 All 267 (267) ILR (1946) All 341 (DB) (Surrender by Hindu widow or other female with limited estate in favour of next reversioner is transfer within S 7 U P Encumbered Estates Act, just as it is under S 53 T P Act) ** (1898) 23 Bom 1 (11) (Assignment in favour of son.)]

27. (1909) 2 Ind Cas 523 (DB) (Mad).

28. AIR 1916 Mad 481 (482) (DB).

Waqf.

It has been held by the High Court of Allahabad that a deed of waqf is a "transfer of property" within the meaning of this section, and can be set aside if made in fraud of creditors **(29)** See also the undermentioned Patna case to a similar effect **(30)** In the undermentioned case**(31)** of the Privy Council it was assumed that a wakfnama is a transfer within this section See in this connection Note 3 on S. 5.

Transfer by operation of law.

It has been seen in Note 3 on S. 5 that a Court is not a "living person" and that a transfer in execution of a decree is not a "transfer of property" within the definition of that section Section 2, cl (d) specifically excludes transfers by operation of law or by, or in execution of, a decree of a Court from the operation of the Act This section, therefore, will not in terms apply to such transfers **(32)** But the principles embodied in the section are in accordance with the general principles of justice, equity and good conscience and, as such, would be applied in the case of such transfers **(33)**

Collusive decree

Suit by creditor based on pronotes — During its pendency defendant's wife filing fictitious suit against him on pronote without consideration, obtaining collusive decree — Court sale — Wife purchasing the property in execution of the decree obtained collusively and on playing fraud on Court — Would not convey any right in property to her.**(34)**

Acquiescence in mutation.

Where the owner allowed a third person to apply for mutation on the false allegation of an oral gift and acquiesced in the passing of an order for mutation by stating that he had no objection, it was held by the Chief Court of Oudh that it was a transfer of property within the meaning of this section.**(35)**

6. Intent to defeat or delay creditors.

A transfer with intent to defeat or delay the creditors of the transferor is, as stated in the marginal note to the section, a "fraudulent transfer" The fraud, for the purpose of this section, consists therefore, in the *intention to defeat or delay the creditors* of the transferor. As has been seen in Note 2, the right of the creditors, taken as a whole, is that all the property of the debtor should be applied in payment of demands of them or some of them without any portion of it being

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29. AIR 1943 All 2 (5) (DB)** AIR 1930 All 462 (465) 52 All 710 (DB) ** AIR 1929 All 277 (278) (DB).

30. AIR 1955 Pat 270 (276) : 34 Pat 133 (DB)

31. AIR 1946 PC 177 (177). (Wakfnama alleged to have been made to defeat or delay creditors of settlor — Wakfnama is not revocable by settlor but is only voidable at option of creditors.)

32. AIR 1942 Mad 632 (633) ILR (1943) Mad 47 (DB) ** AIR 1929 All 238 (239) : 51 All 595 (DB). (Transfer by decree of Court) ** (1928) 110 Ind Cas 386 (386) (Lah)

33. AIR 1960 Punj 417 (418) 62 Pun LR 224 (DB) ** AIR 1942 Mad 632 (633, 634) ILR (1943) Mad 47(DB) (Collusive decree and execution sale — Court can grant relief by applying principles of common law 10 Cal 616 (PC) and 10 HLC 404, Rel on, AIR 1918 Mad 557 Approved) ** AIR 1929 All 238 (239) 51 All 495 (DB). (Collusive award and decree.)

[See also AIR 1934 Lah 460 (462) 15 Lah 849 (DB) (Technical provision in S 2(d) is not binding on Punjab Court.)]

Also see S. 2, Note 6

34. 1996 (3) Andh LT 322 (336)

35. AIR 1938 Oudh 165 (167) (DB).

parted with, *without consideration* or *reserved or retained* by the debtor to their prejudice. An intent to defeat or delay the creditors as a whole in the enforcement of this right is what is regarded a fraudulent intent under this section. The intention must be to defeat or delay the creditors *generally* and not merely *one creditor* (1) Before Section 53 of Act can be applied, the creditor and plaintiff must come to the Court in the premise that although the transaction was genuine and effective yet it was entered into with intent to delay or defeat the creditors(2) the recitals in a deed of sale of immovable property by the debtor as to the existence of necessity for the alienation such as to discharge sundry debts and meet agricultural expenses cannot be treated as evidence by themselves. The recitals cannot be relied upon without corroborating evidence (3) Think of conveniently discharging his remaining debts On record to show that the other properties still possessed by the transferor are of considerable value and of easy availability to other creditors to satisfy their demands. Then and then only, the transfer in question could escape the clutches of S 53(1).(4) The benefit of this section cannot be refused to the defeated and delayed creditor on the ground that at the time of the institution of suit by him the debtor has no other creditor in existence than himself.(5) The primary object of sub-s. (1) is to make the assets of the transferor available to the

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Section 53 — Note 6

1. AIR 1966 Mad 247 (252) (1965) 1 Com LJ 1 ** AIR 1989 (NOC) 4 (1988) 101 Mad LW 441 ** (1974) 1 Mad LJ 455 (DB) ** AIR 1961 Mad 403 (404) ** AIR 1958 Mad 580 (582) (Benami transfer entered into with the motive of defeating an impending execution is not hit by S 53) ** AIR 1955 Mad 446 (447) 1955 Mad WN 283 ** AIR 1947 Cal 154 (155) (DB) ** AIR 1930 Mad 665 (668) ** AIR 1917 Low Bur 124 (124) (DB) ** AIR 1914 Low Bur 180 (181) ** (1905-1906) 3 Low Bur Rul 188 (189) ** (1901) 25 Bom 202 (224) (DB) ** (1910) 8 Ind Cas 1205 (1206) (Low Bur).

   [See AIR 1982 All 316 (317) (Where the transfer was made to avoid the taking of property in execution of money decree in money suit, the transfer was fraudulent within the meaning of S. 53.)]

   [**See also** AIR 1955 NUC (Ajmer) 774 (Transfer made substantially for the benefit of creditors or some of them — Is not a transfer 'to defeat or delay creditors' within the meaning of S. 6(b), Provincial Insolvency Act.)]

   [**But see** AIR 1968 Pun 479 (484) ILR (1968) 1 Punj 10 (DB)]

2. AIR 1983 All 440 (442) 1983 All CJ 137 (A suit under O 21 R 62 of Civil Procedure Code can be either on basis that judgment-creditor was entitled to proceed against the property notwithstanding, the gift deed executed by judgment-debtor as the same was sham and fraudulent and in that event Section 53 of Act is not at all attracted The judgment-creditor could also bring a suit on allegation that although, transaction was proper yet the same was executed to delay and defeat the creditor and as such same could be legally avoided by him, in that event Section 53 would in terms apply and must be brought in a representative capacity or for benefit of creditors at large)

3. AIR 1986 Kant 225 (229) : (1985) 2 Kant LJ 389

4. AIR 1986 Kant 225 (229) : (1985) 2 Kant LJ 389

5. AIR 1952 All 226 (227) (FB). (Sole creditor of judgment debtor filing suit under O 21 R 63 Civil P C for declaration that the sale by the judgment-debtor is in fraud of creditors — Suit as brought is in representative capacity) ** AIR 1984 Cal 215 (218 219) (1984) 1 Cal HN 317 ** AIR 1973 Ker 125 (127) 1973 Ker LT 31 ** AIR 1968 Punj 479 (483 484) . ILR (1968) 1 Punj 10 (DB) ** AIR 1967 Ker 171 (171, 172) 1967 Ker LT 8,0 (Even if plaintiff is only creditor, he can maintain representative suit on behalf of creditors, if any) ** AIR 1967 Madh Pra 145 (146) 1966 Jab LJ 258 (AIR 1955 Mad 446 and AIR 1918 Mad 481 (FB), **Dissented from**) ** AIR 1965 Andh Pra 68 (69) (DB) (Section does not contemplate the existence of plurality of creditors for its application) ** (1963) 2 Andh LT 224 (226, 227) (There is no distinction between a case where a transferor had a single creditor and a case where he had several creditors.) ** AIR 1961 Punj 361 (363)

general body of creditors.(6)

The *test*, therefore, to see whether a particular transfer is a fraudulent one or not within the meaning of this section, is whether the debtor *intended to prejudice the creditors as a whole* (a) by parting with his property *without consideration* or (b) by *securing or reserving a benefit to himself* It follows that a transfer cannot be avoided under this section :–

(A) where there is no such intention as aforesaid,(7) or

(B) Where the transfer is for consideration and no benefit is secured or reserved to the debtor

In some cases the test was held to be to see whether the transfer was executed as a *mere cloak* the real intention of the parties being that the ostensible owner should retain the benefit for himself (8) In the undermentioned cases,(9) however, it has been held that this is by no means an exhaustive test For even if a transaction is not a cloak, if the object of transferor is to convert land into money and thus place it beyond the reach of the creditors, the fraudulent intention is made out It is submitted that there is really no difference between the two tests In each case, the debtor gets a benefit of himself and the transaction is to that extent a cloak

Intention.

The mere fact that a transfer by the debtor has the *effect* of defeating of delaying the creditors of the transferor is not by itself sufficient to render the transfer voidable as a fraudulent transfer, without proof of *intention* on the part of the transferor to prejudice the creditors by such transfer (10) As was observed by Fry J , in *Golden v Gillam*,(11), a case arising under the statute 13 Eliz , Chap 5 corresponding to this section, "the statute was not intended to set aside and honest dealing between man and man, which might, nevertheless have the effect of delaying the execution of a creditor."

The intention referred to is not the same thing as the motive in executing the transfer If defeating or delaying the creditors is intended the *motive e g* of making a provision for the family

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(DB) ** AIR 1951 Trav-Co 237 (238) ILR (1951) Trav-Co 294 and 788 (DB) ** AIR 1939 Sind 97 (99) ILR (1939) Kar 269 (DB) ** AIR 1930 Mad 665 (668) ** AIR 1917 Pat 448 (449, 450) : 2 Pat LJ 546 (DB).

6. AIR 1960 Punj 417 (418) 62 Pun LR 224 (DB) ** AIR 1921 Pat 53 (54) 6 Pat LJ 48 (DB)

[See (1873) 42 LJ Ch 14 (16) LR 14 Eq 184, Cornish v Clark ** (1882) 51 LJ Ch 523 (523) : 19 Ch D 588, Ex parte Russell; In re Butterworth]

[See also AIR 1963 Mys 257 (260) 1963 Mys LJ (Sup) 266 (Relief given under section enures to the benefit of all the creditors though they are not parties to the suit)]

Also see No 24

7 AIR 1954 Trav Co 404 (405) 1954 Ker LT 234 (DB) ** (1906) 8 Bom LR 110 (114) (DB) ** (1904) 28 Bom 364 (369) (DB).

8. AIR 1927 Cal 836 (839, 840) 54 Cal 687 (DB) ** (1905) 29 Bom 428 (434) (DB) ** (1903) 27 Bom 322 (327) (DB) ** 1901 Pun Re No 6 p 18 (27) (Citing 24 Cal 825) ** (1900) 13 CPLR 180 (182 183) ** (1897) 20 Mad 465 (466) (DB)

9. AIR 1918 Cal 82 (85) (DB) ** (1907) 34 Cal 999 (1012) (DB)

10. AIR 1965 Mad 395 (398) ILR (1965) 2 Mad 250 (DB) (Landed property disposed of in furtherance of vendor's intention to migrate to Pakistan — Income-tax department assessing him to tax on profits of sale after six years — At time of sale vendor having no debts at all and no facts also available to show an intention to defraud future creditors — **Held** sale cannot be struck down as fraudulent merely because the I T department, a future creditor, has been defeated,) ** AIR 1958 Mad 580 (582) ** AIR 1955 Pat 270 (276) 34 Pat 133 (DB).

11. (1882) 51 LJ Ch 154 (156) : 20 Ch D 389

of the transferor is immaterial **(12)** In the undermentioned case**(13)** it was observed that the intent is the *dominant motive or sole object* of the transaction and not a mere knowledge that the transfer is likely to prejudice the creditors.

In determining the question whether a transfer has been made with such intent it is essentially necessary that the facts should be considered in relation to each other and weighed as a whole **(14)** The conduct of the parties prior, contemporaneous and subsequent will be relevant for this pur-

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12. (1938) 42 Cal WN 34 (37)

13. (1901) 25 Bom 202 (226) (DB).

14. **AIR 1919 PC 6 (8) . 15 Nag LR 68** ** AIR 1968 Mad 256 (259) (Debtor selling property to one creditor in discharge of debts — Price realised is considerably in excess of debt to be discharged — Intention to defraud creditors has to be inferred) ** AIR 1966 Punj 361 (363) (DB) ** AIR 1958 Mad 580 (581) ** AIR 1955 Pat 270 (276) (54 Pat 13) (DB) ** 1954 All WR (HC) 565 (569) (Transfer of equity of redemption by mortgagor — Since it cannot affect the rights of mortgagee at all the mere fact that the transfer was made a day before the institution of suit by mortgagee would not make it a fraudulent transaction) ** AIR 1954 Nag 129 (134) ILR (1953) Nag 937 (Transfer by sale in favour of father-in-law — Property worth much more than price stated — Consideration being payment of mortgage debt which had not become due — No legal necessity for alienation — Subsequent payment towards mortgage made by transferor who continued in possession — **Held**, prima facie case of intention to defeat and defraud creditors was made out ** (1949) Pepsu LR 198 (204) (DB) ** AIR 1943 All 2 (5) (DB) (Where after executing a promissory note for a large sum the executant executes a wakf alal aulad covering the major portion of his property and applies under S 4 of the U P Encumbered Estates Act and shows only two items of property not forming a part of the wakf as his which are not sufficient to meet his debts these facts are sufficient to show that the intention of the executant of the wakf was to defeat or delay creditors) ** AIR 1943 Mad 531 (534) ILR (1944) Mad 133 (DB) (Gift of bulk of the properties to daughter-in-law by a person who is indebted to a considerable extent and is apprehensive of further liabilities without making any provision for any of them — **Held**, fraudulent intent must be presumed) ** AIR 1941 Lah 228 (232) (DB) (Mortgagor being under pressure from earlier mortgagee raising money from another to redeem the mortgage — Property redeemed mortgaged to the lender of the money — No other creditor in existence at the time of the transaction — The latter mortgage cannot be regarded as effected merely to afford protection to the mortgagor or to defeat or delay any creditors — Case is merely substituting one mortgagee for another) ** AIR 1941 Oudh 205 (208) (DB) (Mere fact that transfer is executed without consideration as in case of gift or mere fact that transfer is made merely with intent to defeat anticipated execution is not sufficient to make it fraudulent transfer) ** AIR 1937 Rang 51 (52) (DB) (Property attached in execution — Daughter of judgment debtor paying off decretal amount and getting sale deed of released property — Decree holder subsequently obtaining another decree against same judgment debtor — Previous sale could not be set aside as fraudulent and collusive under S 53) ** AIR 1936 Pesh 216 (216) (Judgment-debtor transferring property after issue of execution of decree — Wife — Consideration of dower — No previous attempt to pay dower — No circumstances showing necessity for transfer — Transfer must be deemed to have been made to defeat judgment creditor) ** AIR 1936 Nag 166 (168) ILR (1936) Nag 69 (Judgment debtors making gift of property as wahiwatdars of a Devasthanam — Registration of the deed after attachment — No evidence to show that the property was dedicated to the Devasthanam — Property described in the deed as judgment debtor's property — **Held**, deed was made to defeat and delay creditors) ** AIR 1927 Nag 166 (167) (Cumulative effect of all facts must be considered) ** AIR 1926 Sind 109 (111) (AIR 1919 PC 6 Followed ** AIR 1923 Nag 103 (103) ** (1909) 4 Ind Cas 970 (972) (Lah) ** (1902) 71 LJ Ch 518 (521) (1902) 2 Ch 360 (372) **In re Holland; Gregg v. Holland**

See also the following cases :

pose **(15)** Where once it is established that the transfer is made with intent to defeat or delay the creditors, its nature is not affected by the fact that subsequently some of the creditors have been fully satisfied.**(16)**

Where the predominant object of sale was to pay the creditors out of proceeds and the purchaser was unaware of the existence of certain promissory note debts, the payment of all the debts would be a case of fraudulent preference which could be impugned only under the law relating to insolvency and could not be characterised as a fraud on creditors so as to justify the initiation of proceedings u/S 53 of the Act The sale deed in such case cannot be treated to have been executed with an intent to defeat or delay the creditors of the transferor and the sale should be treated to be one in favour of a bona fide purchaser for value.**(17)**

Where the wife pleaded that the property settled by her husband in her favour should not be attached as the husband owned other property but could not substantiate it by adducing evidence that in fact he owned other property, the settlement in favour of wife could be inferred to be with intention to defraud creditors of her husband.**(18)**

Transfer having effect of defeating creditors.

The second paragraph of the old section provided that a transfer may be *presumed* to have been made with a fraudulent intent, where its *effect* was to defeat or delay the creditors of the transferor *and* it was made gratuitously or for a grossly inadequate consideration **(19)** This was

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** **AIR 1959 Ker 380 (381) (FB).** (Determination of question of good faith — Does not depend on recitals and covenants in the deed alone Circumstances surrounding transaction as well as the conduct of parties at the time of execution of the deed as well as after that should be taken into account — Facts should be considered in relation to each other and as a whole) ** AIR 1960 Punj 548 (549) (DB) (Partition amongst brothers to save joint family property from attachment and sale under decree against one of her brothers who was indebted — Inference of fraudulent intent cannot be made) ** AIR 1951 Trav Co 55 (70) 1950 TCLR 707 (DB) (Transfer otherwise appearing to be fraudulent — Mere fact that there was threat of legal proceedings to the transferor who was hopelessly involved cannot render transfer a bona fide transfer under S 53 Provincial Insolvency Act) ** AIR 1938 Oudh 230 (231) (DB) (Oral gift to daughter after the creditor had obtained decree — Intention to defraud was presumed) ** AIR 1938 Lah 564 (566) (A decree holder attaching land of judgment-debtor in execution — One T objecting to the attachment as holder of lease from judgment-debtor — Lease for twenty years and the annual rent to be paid not to the judgment debtor but to his creditors — Latter obtained no decree — No evidence that judgment-debtor gave possession to T or that T actually paid any rent to judgment-debtor's creditor — **Held,** the deed was executed with intention to defeat and delay creditors) ** AIR 1957 Lah 819 (820) (DB) Person indebted to B and other creditors making gift of property to third person — Subsequent to gift person treating property as his own and few months after mortgaging property to B — Gift held either fictitious or intended to defeat or delay creditors.)

15. AIR 1961 Punj 361 (363) (DB) (Subsequent conduct of vendee in not taking steps to get his name mutated in revenue papers) ** AIR 1958 Mad 580 (582) ** AIR 1938 Lah 136 (137).

[**See however** AIR 1941 Mad 188 (191) (DB) (Intention of parties cannot be judged by subsequent events.)]

16. AIR 1941 Rang 76 (77) · 1940 Rang LR 777 (DB) ** AIR 1922 All 449 (454) 44 All 748 (DB)

17. AIR 1984 (NOC) 198 (Mad)

18. 2002 (2) Mad LW 263 (266)

19. AIR 1929 All 458 (458, 459) (Transfer without consideration — Other property insufficient to pay the decree-holder — Intention to defeat presumed) ** AIR 1928 Pat 199

merely an enactment of a rule of evidence **(20)** It gave rise to a doubt whether a presumption of fraudulent intent can be made where the transfer was for proper consideration. This paragraph has now been deleted and the matter is left to be determined in each case by the ordinary rules of evidence One of such rules is that a man must be taken to intend the natural consequences of his acts **(21)** The Court may therefore, presume a fraudulent intent not only where the transfer is made gratuitously or for a grossly inadequate consideration,**(22)** but it is conceived, even in cases where the transfer is made for proper consideration The presumption will, however be weaker in the latter case than in the former The Court must, in each case, look to the whole of the circumstances surrounding the transaction and ask itself the question whether the transaction was in fact, executed with intent to defeat or delay the creditors **(23)** Where there are suspicious circumstances care must be taken by the Court to rest its decision only upon the legal ground established by legal **testimony and not upon suspicion (24)**

Where the judgment debtor is aware of the decree, the attachment before judgment and also

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(200, 201) (DB) ** AIR 1927 All 714 (715) 50 All 137 (DB) ** AIR 1927 Lah 420 (420) 8 Lah 544 (DB) ** AIR 1927 All 731 (733) (Subsequent transferee defrauded — Original transfer gratuitous — Intent to defraud presumed) ** AIR 1922 Pat 572 (574) (DB) ** AIR 1919 Pat 181 (183) (DB) ** AIR 1914 Oudh 392 (396) 17 Oudh Cas 73 ** AIR 1914 Low Bur 262 (263) 8 Low Bur Ru 233 ** (1909) 2 Ind Cas 81 (85) (DB) Mad ** (1904) 17 CPLR 24 (27) ** (1903) 5 Bom LR 255 (263) ** (1901) 25 Bom 202 (225) (DB) ** (1887) 11 Bom 666 (677, 678) (DB)

[**See also** AIR 1929 Oudh 75 (97) (DB) ** (1905) 7 Bom LR 267 (2 (DB) (**Held** the expression 'may presume' in the second paragraph of the old S 53 vested the Court with a discretion in the matter and did not impose an obligation to presume an intent to defraud)]

20. (1903) 5 Bom LR 213 (214) (DB) ** (1900) 13 CPLR 180 (181) ** (1923) 71 Ind Cas 23 (23) (Pesh)

[**See** (1904) 73 LJP 97 (103) 1904 P 362 (376), **Edmunds v. Edmunds**]

21. (1870) 39 LJ Ch 689 (690, 691) 5 Ch AIR 538, **Freeman v. Pope**

22. AIR 1958 Mad 580 (582) ** (1870) 39 LJ Ch 689 (690, 691) 5 Ch A 538 Freeman v Pope (On appeal from (1870) 39 LJ Ch 148) ** (1886) 55 LJ QB 558 (560, 56 QBD 290 Ex parte Mercer In re Wise ** (1882) 52 LJ Ch 343 (345, 346) 22 Ch D 74 (80) In re Ridler Ridler v Ridler ** (1896) 66 LJ QB 111 (141) 5 LT 166 Tetley In re **Jeffrey Ex parte ** (1936) 40 Cal WN 561 (565) (DB)**

[**See also AIR 1958 SC 1 (6).** (Case under Provincial Insolvency Act S 53 — Absence of good faith can be presumed when there is no consideration for transfer or it is very inadequate.)

23. AIR 1963 SC 1150 (1156). (Transfer in favour of member of same community — Sale though real and supported by consideration effected at a juncture when the vendor was under great pressure from his creditors for payment and registered at a different place from where disputed property is situate — Sale deed containing no stipulation that the consideration is to be used for payment of creditors — **Held** that an inference as to the object of the sale being to defeat creditors is justified) ** AIR 1962 Andh Pra 93 (103) ILR (1962) 1 Andh Pra 579 (DB) (Sale deed — Execution and registration at a different place from the one where all previous transactions were effected — Attestation also by persons of the place of registration — No schedule of property furnished and registration also entered in Book 4 thereby preventing others from getting information — **Held** all these facts indicated the motive of executing document was to delay or defeat creditors) ** AIR 1961 Punj 361 (363) (DB) ** AIR 1950 Ajmer 41 (41) ** (1936) 164 Ind Cas 933 (934) (DB) (Lah)

24. AIR 1961 Punj 361 (363) (DB) ** AIR 1960 Pun 548 (549) (DB) ** AIR 1950 Ajmer 41 (41)

attachment in the execution case and still sells the suit property, the transfer is intended to defeat and delay the creditors. There was also no passing of consideration The private sale embarked upon by the judgment-debtor was hit by lis pendens and no title can pass on the vendee (25) A lessor having knowledge of the fact that only two days thereafter he will cease to be a lessor of which the lessee also had knowledge cannot execute a lease deed for a period subsequent to his ceasing to be the lessor and no reliance can be placed by the lessee on such a document and the transferee is not bound by the lease deed which is outcome of fraud (26)

Where it was found that the sale of the assets of the company was effected for the purpose of discharging the debts payable by company and it is also found that the consideration was not inadequate, sale was not fraudulent It is immaterial that the transfer was effected in favour of a person who was not a creditor.(27)

Voluntary or gratuitous transfer.

A "voluntary" conveyance under the English law is really a "gratuitous" transfer referred to in the second paragraph of the old section and denotes a transfer made without *valuable* consideration. A transfer in consideration of natural love and affection is a voluntary or gratuitous transfer (28) A voluntary transfer cannot be said *ipso facto* to be a fraudulent transfer (29) If it is made *bona fide* it will be valid against the creditors (30) If it has the effect of defeating or delaying *existing* creditors, it may be presumed to have been made to defeat or delay them (31) As regards *subsequent* creditors, even the fact that the transfer resulted in defeating or delaying them is not sufficient to raise this presumption (32) It is further necessary to show that the transferor, at the time of the transfer, was *indebted* to others and was unable to meet his liabilities(33) or that he embarked, soon after the transfer, on some hazardous business, enterprise or speculation (34) If

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25. 1999 (3) Kant LJ 193 (211).

26. AIR 1982 All 215 (217) : 1982 All WC 127.

27. AIR 1986 SC 1748 (1750) : (1986) 3 SCC 426.

28. AIR 1919 Oudh 95 (97) (DB) ** 1912 Pun Re 74 14 Ind Cas 232 (234) (DB)

29. ILR (1962) 12 Raj 517 (521) ** AIR 1950 Ajmer 41 (41) ** AIR 1941 Oudh 205 (208) (DB). (Deed of gift) ** (1816) 56 ER 152 (154) 1 Mad 414 Holloway v Millard ** (1748) 27 ER 934 (938) 1 Ves Sen 127 Peacock v Monk (Voluntary transfer is void under 13 Eliz., Ch. 5 only if fraud is proved.)

30. AIR 1965 Mad 395 (397) ILR (1965) 2 Mad 250 (DB) ** (1868-1869) 4 Mad HCR 84 (88) (DB)

31. See AIR 1965 Ker 288 (291) 1965 Ker LT 341 (Gift by father to sons of large portion of property — Part retained by donor very small and utterly inadequate to satisfy decree that would be passed in an impending suit — Finding that transfer was with intent to defeat or delay plaintiff and other creditors — No error of law.)

32. (1900) 69 LJQB 722 (724) (1900) 2 QB 508 Lane Fox In re Gimblett Ex parte ** (1977) 1 All ER 200 Cadogan v Cadogan ** (1864) 46 ER 649 (653) 3 De GJ & Sm 293 (302, 303), Spirett v. Willows

33. AIR 1933 Rang 252 (253) ** AIR 1930 Lah 217 (218) ** AIR 1927 Lah 420 (421) 8 Lah 544 (DB) (Per Tek Chand J) ** AIR 1914 All 424 (426) (DB) ** (1945) 26 ER 61 (61) 1 Atk 94, Walker v. Burrows.

[See also AIR 1941 Oudh 178 (179) (DB) (All creditors existing on date of deed paid off before suit by subsequent creditor — No borrowing for 3 years after the date of deed — These facts negative though not conclusively the inference of fraudulent intention)]

[But see (1910) 33 Mad 205 (207) (DB) (Second paragraph was held to apply in favour of subsequent creditors also — No question of indebtedness was adverted to)]

34. AIR 1933 Rant 252 (253).

that is shown the presumption will arise.(35) for ordinarily a voluntary conveyance cannot be *bona fide* when the transferor is largely indebted at the time (36) Every man ought to be just before he is generous (37) But when the debtor has no debts and is not in any embarrassed circumstances, the execution of a voluntary transfer in consideration of natural love and affection cannot be held to be in fraud of subsequent creditors.(38)

Transfer for inadequate consideration.

Under the second paragraph of the old section a transfer for *grossly* inadequate consideration was regarded as being one on the same footing as a gratuitous transfer Where the consideration was not so inadequate as to be *gross* no presumption was raised against good faith (39) In the undermentioned case (40) Mitter, J , held that where the inadequacy of the price in a transaction is not so great as to shock the moral sense, such inadequacy, by itself, was no evidence of fraud, but that it was otherwise where the inadequacy was so great as to shock the conscience

In cases of *mortgage* it cannot be said that consideration is inadequate or grossly inadequate, because a mortgage can be executed for any amount regardless of the value of the property Consequently, the presumption referred to in the second paragraph of the old section was held not to arise in such cases (41) As has been seen already, the deletion of the second paragraph of the old section will now enable the Court to apply the ordinary rules of evidence in all cases and inadequacy of consideration may, under circumstances, be considered as evidence of fraud (42)

Transfer reserving benefit to transferor.

A transfer intended to reserve a *benefit* to the debtor to the *prejudice* of the creditors must be held to have been made with intent to defeat or delay the creditors (43) Thus where a trust was

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35. (1816) 56 ER 152 (154) 1 Mad 414 Holloway v Millard ** (1738) 26 ER 9 (11) 1 Atk 13, Russel v Hammond

36. (1949) 1 Pepsu LR 198 (204) (DB) ** (1919) 88 LJKB 679 (683) (1919) 1 KB 583 Denny s Trustee v Denny ** (1892) 16 Bom 1 (14) ** (1856) 69 ER 1043 1046 3 K & J 40 Barrack v Mc Culloch ** (1840) 173 ER 991 (992) 9 Car & P 640 Riches v Evans

37. (1870) 39 LJ Ch 689 (690) 5 Ch D 538 Freeman v Pope (Affirming the decision in (1870) 39 LJ Ch 148) ** (1817) 56 ER 386 (393) 17 RR 226 Copis v Middleton ** (1758) 28 ER 647 (648) : Amb 596, Partridge v. Gopp

38. AIR 1965 Mad 395 (397) ILR (1965) 2 Mad 250 (DB) ** ILR (1962) 12 Raj 517 (521) ** AIR 1936 Lah 222 (224) (DB) (Gift to wife to provide for her future maintenance) ** AIR 1927 Lah 420 (421) 8 Lah 544 (DB) (Voluntary settlement in favour of children for natural love and affection) ** (1902) 36 Bom 577 (585) ** (1750) 28 ER 1 2 Ves 10, Townshend Lord v. Windham.

39. AIR 1924 Nag 124 (125) ** (1902) 26 Bom 543 (549 550) (DB) ** (1901) 25 Bom 202 (225) (DB) ** (1912) 18 Ind Cas 691 (692) (DB) (Mad) ** (1900) 3 CPL R 180 (185)
[See also AIR 1957 Mad 630 (631) (1957) 2 Mad LJ 414 No evidence to show that consideration was shockingly low — Other evidence showing that at best the consideration was half the real value of the property and about one-fourth at the worst — **Held**, it was a case where the doctrine of lucky purchase applied) ** (1866) 6 Suth WR 30 (33) (DB).]

40. (1936) 40 Cal WN 561 (565) (DB).

41. AIR 1931 Lah 213 (215) ** (1910) 9 Ind Cas 1018 (1019) (Lah)

42. AIR 1955 NUC (Mad) 3169 ** AIR 1941 Oudh 457 (463) 16 Luck 832 (DB) ** (1911) 10 Ind Cas 922 (924) (Burma) (Sale of property for inadequate consideration immediately after a decree was passed against — Fraudulent intention was inferred)
[See also (1817) 56 ER 386 (392) : 17 RR 226, Copis v. Middleton.]

43. AIR 1944 Nag 44 (52) : ILR (1944) Nag 342 (FB). (Partition between A and B members of joint family — A assigned properties which A's creditors would not be able to touch

made for the benefit of all such creditors as were willing to accept the terms of the debtor and the debtor retained a benefit for himself, it was held that the trust must be taken to have been made with intent to defeat or delay the creditors **(44)** But when a transfer is not intended as a cloak or device for the protection of the transferor against the claims of creditors, it cannot be impeached as fraudulent **(45)** Thus, where a person executes a trust deed of all his properties with the chief object of paying off all his creditors, the deed cannot be said to be fraudulent even though one of the objects with which the deed was executed is to avoid the Court of Wards taking over the estate **(46)** So also where a person *bona fide* parts with all control over his property, it is not fraudulent, even though the deed contains a provision that if anything remains after the payment to existing creditors it should be applied for the benefit of the transferor or his children **(47)**

Where the sale deed was supported by inadequate consideration and it was executed only nominally for a collateral purpose and with a view to stave off creditors with the express understanding that the properties sold would be reconveyed to the vendors after the pressure of the credi-

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B given his rightful share — **Held,** object of partition was not merely to give B his share but to effect the partition in such a way that A would be able to defeat and delay his creditors and keep the property to himself — A retained a benefit to himself and therefore partition was liable to be set aside at instance of A's creditors) ** AIR 1966 Mad 247 (252) (1965) 1 Com LJ 1 ** AIR 1961 Mad 403 (404) (1961) 1 Mad LJ 235 (Agricultural debtor selling his only property pending execution of a money decree and retaining the balance after discharging a mortgage debt) ** AIR 1952 Nag 106 (110) ILR (1953) Nag 684 ** AIR 1927 Cal 836 (839) 54 Cal 687 (DB) ** (1854) 139 ER 169 (172) 2 Cur & Kir 452 Graham v Furber ** (1903) 72 LJKB 237 (240) (1903) 1 KB 671 Maskelyne v Smith (Transfer ostensibly in favour of creditors but really intended to benefit the debtor)

[**See also** AIR 1943 Nag 129 (132) ILR (1943) Nag 42 (DB) (Sale to one of the creditors with further agreement by the vendee to reconvey on payment of whatever would be found due to him (creditor) after credit for the profits from the property had been given provided the other creditors settled their claim — Arrangement is not illegal although it might give other creditors the rights to avoid the transfer under S 53 because it would be possible to argue that the debtor had retained a benefit for himself) ** (1899) 23 Bom 1 (11). (Transfer to protect property from creditors)]

[**See however** AIR 1918 Mad 377 (378) (DB) (A transfer of immovable property which is not bona fide and is effected so as to defraud creditors is void though the transferor secures no benefit thereby.)]

44. **(1878) 48 LJQB 204 (206) : 4 QBD 13. Spencer v. Slater**

[**See also** AIR 1941 Cal 233 (236) (DB) (Trust deed intended to be a cloak for shielding property from creditors and benefiting the debtors)]

45. AIR 1938 Cal 818 (821) (DB) (A trust created by the debtor for the payment of his creditors) ** **AIR 1916 Cal 404 (405) (DB)**

[**See also** AIR 1941 Mad 188 (191) (Members of Christian family by agreement making arrangement for payment of creditors and incidentally making small provision for religious purposes — Dedication held real and not made to defeat or delay creditors)]

46. **AIR 1923 Oudh 80 (87) : 25 Oudh Cas 291 (DB).**

47. **(1857) 26 LJ Ch 179 (182) : 3 Kay & J 90. Holmes v. Penney**

[**See also** (1904) 28 Bom 364 (369) (DB) (Substantial part of property assigned in trust for creditors — Rest was retained for benefit of debtor — Facts proved not showing that debtor even contemplated bankruptcy or wished to give undue preference to certain creditors over others — Composition binds old creditors including those who had not signed the deed as it is one for benefit of all of them — One of such creditors suing to avoid the deed is not doing so for and on behalf of all the creditors and cannot invoke S 53 of this Act)]

tors had subdued, the transaction of sale would be vitiated and no relief in equity could be granted to vendees even if some of the amounts paid by the vendees to some of the creditors of vendor was genuine.(48)

Again, a settlement for consideration with the object of protecting the property from the extravagant habits of the settlor cannot be said to be fraudulent (49) In the undermentioned case(50) a family arrangement was come to by which some property was given to *A* and some cash to *B* in order to protect the property from the profligate habits of *B*. It was held by their Lordships of the Privy Council that the transaction was not of fraud upon subsequent creditors. The mere fact that the debtor retains some interest in the property transferred will not make the transaction fraudulent as a *matter of law* but will be a piece of *evidence* showing a fraudulent intent (51)

Indebtedness of transferor on date of transfer.

Evidence of indebtedness of the transfer subsisting on the date of the transfer is relevant to show an intention to defeat or delay the creditors (52). It is strong badge of fraud in the case of a

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48. **AIR 1982 SC 84 (95, 96) : 1982 UJ (SC) 326.**

49. AIR 1938 Oudh 65 (68) (DB) (Son profligate — Transfer to grandson to save property is not fraudulent.) ** (1919) 88 LJKB 679 (683) (1919) 1 KB 583, **Denny's Trustees v Denny** (Transfer of property to father by person of extravagant and dissolute habits to save himself from moral and financial ruin.) ** (1896) 66 LJ QB 111 (114) 75 LT 166 **In re Tetley : Jeffery Ex parte**

50. **(1884) 6 All 560 (572) : 11 Ind App 164 (PC).**

51. AIR 1958 Mad 586 (582) ** (1902) 71 LJKB 476 (478) (1902) 2 KB 158 **Mask Ivory v Smith** — **Spencer v Slater** (1878) 48 LJ QB 204 **Dissented from.)** ** (1[illegible]) [illegible] and Cas 623 (624) (Cal)

52. ILR (1966) 1 Mad 114 (119) ** AIR 1965 Mad 395 (397) (1965) 1 Mad LJ 59 (DB) (Mala fides can be presumed in such cases. But not so in cases where there is no indebtedness at the time of transfer.) ** AIR 1961 Pun 361 (363) (DB) ** AIR 1958 Mad 580 (583) ** AIR 1955 NUC (Mad) 3169 ** (1860) 14 Moo PC 121 (136) 15 ER 251 **Corlett v Radcliffe** (Deed by debtor in State of insolvency.) ** AIR 1944 [illegible] ILR (1944) All 325 (**No transaction should be assumed fictitious or fraudulent** — In the absence of evidence as to the extent of debts and assets [illegible] **a transaction is fraudulent.**) ** **AIR 1919 Cal 984 (2) (985) (DB)** ** **1911 Pun LR No 62** p 263 (270) (DB) (But a settlement made in favour of [illegible] of a very small portion when the son was not at the time seriously embarrassed cannot be said to be fraudulent.) ** **1896 All WN 123 (123) (DB)** ** **(1872) 41 LJ Ch 539 (541) 14 Eq 106, Mackay v Douglas** ** (1871) 40 LJ Ch 480 (485) 12 Eq 158 (Crossley v Elworthy — Voluntary settlement by person involved in heavy speculations.) ** (1867) 7 Sch WR 513 (513) (DB) ** (1867) 15 WR (Eng) 919 (920) 4 Eq 390 **Smith v Cherrill** ** (1864) 3 De GJ & Sm 293 (302) 46 ER 649 (653) **Spirrett v Willows** (The fact that the settlor retains money enough to pay debts but does not actually pay them does not make any difference.) ** (1861) 70 ER 807 (811) 1 J & H 416 (422) **Ackrannan v Corbett** (Marriage settlement when husband was heavily in debt and pressed by creditors — **Held,** there was intention to defeat or delay creditors.) ** (1857) 26 LJ Ch 179 (180) 3 K & J 90 **Holmes v Penney** ** (1856) 25 LJ Ch 338 (339) 3 Drew 419, **Jenkyn v Vaughan** ** (1855) 25 LJ Ch 612 (614) 6 De GM & G 95, **French v French** (Transfer by trader in insolvent circumstances.) (1841) 174 ER 426 (429) Car & M 97, **Jackson v Bowley** ** (1840) 9 LJ Ch 241 (243) 50 RR 193 **Townsend v Westcott** ** (1822) 37 ER 958 (960) Jac 552 **Richardson v Smallwood**

[**See also** AIR 1937 Rang 27 (28) 14 Rang 748 (DB) (Insolvent heavily indebted and pressed by his creditors transferring substantial part of his property to his creditors — False circulation by him of his inability to pay to creditors — Transfer is fraudulent and must be set aside.) ** (1856) 52 ER 1078 (1080) 22 Beav 184 (189) (Dearing v Wate — Voluntary settlement — Remaining assets not sufficient to pay debts — Held on facts there could be no inference that the settlement was made with intent to defeat or delay creditors.

voluntary settlement.(53) But such indebtedness would not *per se* establish a fradulent intent (54) The terms of sub-section (1) are satisfied even if the transfer does not defeat the creditors but only delays them The fact, therefore, that the entire property of the debtor was not sold but only a part of it was sold cannot by itself negative the applicability of sub-section (1) (55) Where, however, at the time of the transfer, the transferor has other property *sufficient to satisfy his creditors* the transaction cannot be said to be with intent to defeat or delay the creditors (56) In the undermentioned

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53. AIR 1965 Ker 288 (291) 1965 Ker LT 341 (Gift of large portion of property to sons — Donor retaining only a portion absolutely inadequate to satisfy a final decree which is about to be passed in a pending suit — Finding of intent to delay or defeat creditors is justified in law) ** 1911 Pun LR No 62 p 263 (270) (DB) ** (1877) 98 E R 1318 (1321) Doed Watson v. Routledge.

[See also (1956) 2 All ER 537 (544) (Debtor on brink of bankruptcy making payment to one of his creditors voluntarily — Object of debtor to give an advantage to a friend of his and to some extent to himself — Held it was fraudulent and void against trustee in bankruptcy) ** (1955) 2 Mad LJ 380 (381) (Insolvency case — Amount due to scheduled creditors Rs 38000 — Assets available for unsecured creditors only about Rs 400 — Insolvent paying to one creditor an amount — Coupled with other facts in the case it was held that the payment was fraudulent)]

54. AIR 1958 Mad 580 (583) ** AIR 1950 Bom 247 (249) (DB) (Debt incurred by father for purpose binding on sons — Suit by creditor — Partition of joint family property cannot be regarded as fraudulent merely because it took place during the pendency of creditor's suit) ** AIR 1950 Pesh 11 (13) (Donor indebted at the time of making gift — Mere indebtedness not sufficient to prove fraudulent intention — Person challenging must bring some more material on record to prove guilty intention of donor) ** AIR 1938 Lah 136 (137) (It must be proved that at the time of transfer motive for the transaction was to defeat or delay the creditors) ** 189 Pun Re No 38, p 186 (189) ** (1892-1896) 2 Upp Bur Rul 315 (317)

[See also AIR 1941 Lah 228 (232) 43 PLR 128 (DB) (Property under mortgage redeemed by obtaining money from another and mortgaging it to him — No other creditor in existence at the time of transaction — Mortgage cannot be regarded as one intended to afford protection to the mortgagor or to delay or defeat creditors) ** (1912) 15 Ind Cas 509 (511) (Oudh) (Transfer made to defeat an anticipated attachment — Fact by itself is not sufficient to show fraudulent intent.)]

55. **AIR 1963 SC 1150 (1156) : (1964) 1 SCJ 168.**

56. **AIR 1963 SC 1150 (1156) : (1964) 1 SCJ 168** ** AIR 1968 Mad 256 (259) ** AIR 1966 Assam 36 (37) ILR (1965) 17 Assam 291 ** AIR 1965 Mad 395 (397) ILR (1965) 2 Mad 250 (DB) ** AIR 1952 Nag 106 (110) ILR (1953) Nag 684 ** AIR 1934 Rang 308 (309) ** AIR 1928 All 476 (479) (DB) (Mortgaged property was sufficient to satisfy mortgage debt — Mortgagor gifted non-mortgaged property — Gift cannot be said to be with a view to defeat mortgagee) ** AIR 1923 Nag 334 (335, 336) ** AIR 1919 Pat 236 (237) (DB) ** AIR 1918 Cal 82 (87) (DB) ** AIR 1914 Lah 108 (110) ** (1904) 17 CPLR 24 (29) ** 1896 All WN 123 (123) (DB) ** (1889) 13 Bom 297 (300 301) (DB) ** (1880) 2 All 891 (895) (DB) (Fact that property reserved to the debtor for payment to the creditors is not within the jurisdiction in which the creditors reside is too insignificant to stamp the transfer with fraud.) ** (1869) 1 Suth WR 21 (21) (DB).

[See also AIR 1965 Ker 288 (291) (Gift of large portion of property when a final decree against donor is imminent in a pending suit -- Property left with donor inadequate to satisfy decree — Finding of intent to defeat or delay creditor is justified) — AIR 1936 Lah 593 (593), (Gift of small portion by insolvent more than two years before adjudication — Property at date of gift considerable — Gift held was not fraudulent with object of defeating creditors.)]

case(57) it was held that even a presumption of fraudulent intent cannot be made from the indebtedness of the transferor. It is submitted that this view is not correct. If it is a relevant piece of evidence tending to show a fraudulent intent, it is not clear why a *presumption*, however weak it may be, cannot be made against the transferor.

Absence of indebtedness.

Where a simple mortgage was executed by a judgment-debtor at the time of receiving prize amount of chitty, such amount is not debt, such transaction could not be relied upon for taking plea that judgment-debtor was already indebted while executing sale-deed and that such sale deed was hit by S. 53.(58)

Transfer of all the properties of the transferor.

A transfer by a person indebted at the time of all his properties is evidence of an intention to defeat or delay his creditors,(59) though under particular circumstances the transfer may not even in such a case, be fraudulent. Thus, where a person indebted at the time transferred all his properties in favour of the children of the first wife at the time of his second marriage and in consideration of

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57. (1937) 171 Ind Cas 735 (735) (Lah)

58. AIR 1998 Ker 139 (145) : 1997 (2) Ker LT 610

59. ILR (1966) 1 Mad 114 (119) ** AIR 1956 Punj 361 (363) (DB) ** AIR 1960 Mad 536 (537) (Conveyance of all properties to wife under ante-marriage settlement is fraudulent.) ** AIR 1958 Mad 580 (583) ** AIR 1956 Andhra 225 (226) (DB) ** AIR 1955 NUC (Mad) 2169 ** (1949) 1 Pepsu LR 198 (204) (DB) ** (1940) 42 Punj LR 367 (DB) (Person in embarrassed circumstances transferring all properties excepting those that are immune from attachment and sale.) ** AIR 1937 Lah 847 (848), (Gift by debtor of his entire attachable and saleable property.) ** AIR 1939 All 82 (83) (DB) (Transfer of the property in favour of a relation after the creditor had obtained a decree — Transfer for half market value — Intention to defeat the creditor presumed.) ** AIR 1938 Rang 5 5 Rang 588 (DB) ** (1899) 68 LJQB 287 (293) (1899) 1 QB 617 In re Hirth ** 8 N 9 Pun Re No 86 p. 232 (233) ** (1869) 17 WR (Eng) 601 (602) 7 Eq 347 Reese River Silver Mining Co v Atwell ** (1864) 1 Suth WR 41 (41) (DB) ** (1856) 52 ER 957 (959) 959) 21 Beav 511 (515 516) Bott v Smith (Transfer in favour of son for inadequate consideration.)

(See also AIR 1960 Mad 536 (537) (Marriage settlement — Transferring all property of indebted settlor — Grantee charged with notice of fraud.) ** AIR 1956 Punj 40 (48) (Partition between husband and wife — Husband heavily indebted — All tangible property given to wife and husband retaining only property of flimsy character — Fraudulent intent inferred.) ** AIR 1951 Ajmer 44 (447 448) (DB) (Transfer by mortgagor of his other property when mortgaged property is not sufficient to satisfy mortgage debt, an indicate an intention to delay or defeat creditors.) ** AIR 1948 Nag 110 (1 S ILR (1947) Nag 510 (DB) (Partition by coparceners when family was heavily in debts — No provision for payment of debts — Notwithstanding such deed parties acting as members of joint family — Deed held fraudulent.) ** AIR 1947 Mad 703 (704) Partition between father and sons — No property allotted to father who was indebted heavily — Sons undertaking to pay father's debts — Partition must be held to be fraudulent as creditors not being a party to it cannot enforce it against sons.) ** AIR 1946 Sind 137 (140) ILR (1946) Kar 14 Joint Hindu family — Father A and son B partitioning joint family property — Subsequently B who was heavily in debts selling his as well as his son C's share in part of property to A without legal necessity — A then devising property absolutely to C — Transfer by B held fraudulent.) ** AIR 1943 All 2 (5) (DB) (Where after executing a promissory note for a large sum the executant executes a wakf covering the major portion of his estate, it was held that these facts were sufficient to show that the intention of the executant of the wakf was to defeat or delay creditors.) ** (1912) 14 Ind Cas 40 44 (DB) (Lah) (Fictitious transaction made in fraud of creditors.)]

being permitted to do so by the relations of the first wife, it was held that the transfer was not fraudulent **(60)**

Relationship of parties.

The mere fact that the transferor and the transferee are relations does not necessarily show an intention on the part of the transferor to defeat or delay the creditors**(61)** or bad faith on the part of the transferee**(62)** though the fact may be material as *evidence* of a bad faith **(63)** Where a person sold the property to a member of the same community to which he belonged and well known to him at a time when the vendor was under pressure for payment from his creditors it was held by the Supreme Court that the vendor might have chosen such a vendee in order to keep the transaction secret from the creditors**(64)**.

The father in instant case gifted property to his son in order to evade effecting of recovery of dues by Excise Debt, as arrears of land revenue by attaching and selling the property The son filed a suit for declaration that he is the owner of the property and for injunction restraining the Govt from attachment and sale of the property Held that the suit was not maintainable in view of S 53.**(65)**

Mutation in favour of near relative.

Where the mutation of immovable property was made fraudulently in favour of the son of the

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60. AIR 1917 Mad 484 (484) (DB)

61. AIR 1958 Mad 580 (582) ** AIR 1939 Lah 438 (439) (DB) (Transfer made to settle debt created by money advanced previously by transferee — Transfer cannot be said to be fraudulent merely because transferee is related to transferor) ** AIR 1938 Sind 215 (217) ILR (1939) Kar 136 (DB) ** AIR 1930 Rang 27 (29) 7 Rang 477 (DB) (The fact that a debtor transfers at the time when he is heavily indebted the whole of his property to his sister is not by itself a sufficient reason for avoiding the transfer if in fact the transfer is made bona fide and for valuable consideration) ** AIR 1925 Rang 227 (228) 3 Rang 71 ** AIR 1914 Low Bur 180 (182) (But it is a suspicious circumstance) ** (1818) 56 ER 386 (391 392) 17 RR 226 Copis v Middleton (Fraud cannot be imputed merely because a man has sold property to his nephew) ** (1911) 9 Ind Cas 1018 (1019) (Lah)

[**See also** AIR 1935 Pesh 168 (170) (A mere transfer of property in favour of a relation would not per se amount to an intention to defeat or delay creditors even if it affects a substantial portion of the debtor's estate in the absence of proof that the debtor owes a large sum of money and that he is financially embarrassed and is therefore likely to take the property out of the reach of his creditors.)]

62. AIR 1950 Kutch 57 (58)

[**See** AIR 1914 Lah 108 (110) (DB)]

63. AIR 1961 Punj 361 (363) (DB) ** **AIR 1928 PC 139 (143) : 51 Mad 349** ** AIR 1958 Mad 580 (582) ** AIR 1955 NUC (Mad) 3169 ** AIR 1950 Kutch 57 (58) (Transfer made to daughter — Facts of case showing the transfer to be without need — Transfer made in anticipation of decree in pending suit against transferor — Relationship of transferee to transferor becomes significant) (1949) 1 Pepsu LR 198 (204) (DB) (Transfer by way of gift of entire property to close relations during pendency of creditor's suit — Fraud is apparent.) ** AIR 1924 Mad 779 (780) (DB) ** (1868) 10 Suth WR 445 (445) (DB) ** (1913) 21 Ind Cas 333 (334) (Burma).

[**See also** (1955) 2 Mad LJ 380 (381) AIR 1955 NUC 5365 (Insolvency — Relationship of debtor with preferred creditor however distant it may be is not without significance when deciding whether the impugned payment amounted to fraudulent preference — Fact of absence of any compelling reason would stamp the payment as fraudulent)]

64. AIR 1963 SC 1150 (1155).

65. 2000 (1) RCR 221 (224) (P and H) ** 2000 (124) Pun LR 706 (708)

real owner without any document of title, with the object of depriving the victim of accident from realising the compensation from the owner direction was issued that the land may be brought to sale in execution of the order granting compensation to the victim The son could not object to attachment of property.(66)

Consideration, a barred debt.

The fact that the consideration for the transfer is a *barred* debt may be some evidence of a fraudulent intent but not strong evidence.(67)

Value of property transferred.

In considering whether a deed was executed with a fraudulent intent it is material to consider the relative value of the property sold to the amount of the creditors demands at the time (68)

Possession with transferor.

Where the property transferred continues in the possession of the transferor after the date of the transfer, the value of the inference to be drawn therefrom will vary according to the nature of the property and the deed,(69) and other circumstances of the case In the case of *moveables* such continuance was, in England, held to be a badge of fraud where it was *inconsistent* with the transfer (70) but not where it was *consistent* with it (71) In the undermentioned cases(72) such contin-

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66. AIR 1999 Bom 22 (25) . 1998 (4) Bom CR 490

67. AIR 19[illegible] Rang 471 (47[illegible]) (Obiter) ** AIR 19[illegible] Sind 284 (286) (DB) ** (19[illegible]) 17 Mad LJ 11 (14) (DB)

[See also (1825) 25 LJ Ch 232 (234) 5 De GM & G 547 Goldsmith v Russell (Settlement in favour of wife and children expressed for consideration — Consideration found illusory and the transaction not bona fide — **Held**, it was void against creditors of the settlor under 13 Eliz Ch 5)]

68. (1805) 102 ER 1283 (1295) 6 East 257, Dewey v Boynton

69. AIR 1958 Mad 580 (58[illegible]) (Subsequent to sale possession remaining with vendor — Conveyance held to be fraudulent.) ** (1900) 13 CPLR 180 (185)

[See also AIR 1958 Pat 434 (436[illegible]) 37 Pat 658 (DB) (Question of benami — Motive for transaction relationship of parties payment of consideration custody of documents and possession over property are tests ** AIR 1952 Nag 86 (1[illegible]) 11 R 1951 Nag 684 (Transfer for dower — Property continued to be managed by husband as agent or manager of wife who was purdanashin lady of high family — Transfer held not in fraud of fraudulent transaction) ** AIR 1954 Nag 129 (134) 11 R 1954 Nag 95 (DB) (Transfer by sale in favour of father in law — Property worth much more than price received — Consideration being payment of mortgage debt which had [illegible] — No [illegible] sity for alienation — Subsequent payments towards mortgage made by transferors who continued in possession — Story of lease not believed — **Held**, that prima facie case of intention to defeat and defraud creditors was made out — Transfer held not in good faith or for consideration) ** AIR 1962 Pat 160 (165) (DB) (Benami transaction — Tests usually taken into consideration are custody of title deeds possession of property motive and relationship) ** 1960 MPLJ 1029 (1030) (DB) (No evidence on record to show payment of consideration Vendor admittedly continuing to be in possession of property — **Held** sale was sham.)]

70. (1832) 110 ER 180 (183) 3 B & Ad 498 Martindale v Booth ** (1818) 106 ER 3[illegible] (31[illegible]) 2 B & Ald 134, Robinson v M'Donnell ** (1817) 129 ER 609 (611) 8 Taunt 838 Jezeph v Ingram ** (1813) 128 ER 669 (671) 5 Taunt 21[illegible] Reid v Blades ** (1795) [illegible] ER 329 (330) 1 Esq 205 Paget v Perchard ** (1808) 170 ER 976 (976) 1 Camp 335 Werdal v Smith ** (1788) 100 ER 315 (326) 1 RR 548 Edwards v Hicken ** (1788) 100 ER 319 (320) 2 TR 594n Bamford v Baron ** (1601) 76 ER 808 (81[illegible]) [illegible] (10th Ed.) 1 (3), Twyne's case.

71. (1872) 110 ER 180 (183) : 3 B & Ad 498. Martindale v. Booth

72. (1817) 129 ER 609 (611) 8 Taunt 838 Jezeph v Ingram ** (1813) 105 ER 94 (95) 1 M & S 251, Leonard v Baker ** (1813) 128 ER 555 (556) 4 Taunt 823 Watkins v Birch

ance of possession was, in the particular circumstances of the case held not to raise any presumption of fraud.

Transfer for consideration without reserving benefit to debtor.

Where a transfer is for *consideration* and there is no intent to reserve *any benefit* to the debtor then the transfer cannot be attacked as fradulent under this section It is good against the creditors even though the transferor intended thereby to defeat an impending execution (73) The reason is that the fraud contemplated by the section is an intent to defeat the creditors *generally* and not a particular creditor.

7. Benami transactions not necessarily fraudulent.

Benami transactions are very familiar in Indian practice.(1) They are not necessarily *fraudulent* A plea that a transfer is benami is not equivalent to a plea that the transfer is fraudulent (2) The word "Benami" really denotes two class of transactions which differ from each other in their legal character and instance They may be called as "benami" and "sham"

The benami transaction is one which evidences as operative and valid transfer resulting in the passing of title in the transferee, whereas in the sham transaction there is no valid transfer of interest, though ostensibly the deed incorporating the transaction seeks to clothe the transferee with the title in the property Sham transaction takes place inter alia, when there is no consideration for the transfer In such case if the transferor wants to assail the validity of the transaction, he shall have to seek cancellation of the document because so long as the document stands the transferee would remain clothed with the title to the property In case,of benami transaction however what happens is that the document has legal effect being perfectly valid document in the sense that if it be a sale deed the same having been executed on the passing of consideration but the question involved is who is the person who is the true owner of the property Whether it is the transferee named in the deed of somebody else the transferee being a benami In such a case the aggrieved person does not demand, indeed would not demand, cancellation of the sale deed because if the deed would be cancelled, he as well would not be clothed with any right, title or interest over the property which had been the subject-matter of the sale deed This would be directly against his interest inasmuch as he wants to derive right title and interest over the property on the strength of the concerned sale deed itself but wants a declaration that it is he who had derived title and not the person named as transferee in the document On the other hand in the case of sham transaction (loosely called as benami transaction), the aggrieved person may, in some cases require cancellation of the deed where the transaction is of voidable nature In sham transaction there is no operative transefer and

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73. AIR 1934 Mad 587 (592) ** AIR 1930 Mad 655 (667, 668)

[See AIR 1944 Mad 381 (383) ILR (1945) Mad 138 (DB) (Where a partition between father and sons is fair and in accordance with the proper shares of the parties it is not liable to be impeached under S 53, although it was entered into with a view to prevent attachment of the sons shares in execution of decrees obtained against the father after the partition and was in that sense mala fide)]

Section 53 — Note 7

1. **AIR 1960 SC 213 (219) : 39 Pat 186 ** AIR 1921 PC 56 (57) : 48 Cal 260 ** AIR 1918 PC 137 (139) ** (1887) 15 Cal 20 (23) : 14 Ind App 127 (PC)** 1958 Ker LT 902 (904) (System is prevalent both amongst Hindus and Mohamedans) ** AIR 1927 Cal 140 (144) (DB) ** AIR 1924 Cal 467 (470) (DB) ** AIR 1923 Cal 228 (230) (DB) ** (1877) 1 All 403 (410) (DB) (Ismfarzi transactions) ** (1871) 7 Beng LR 720 (727) (DB) ** (1867) 7 Suth WR 138 (140) (DB) (Benami transaction is a custom of the country)

2. AIR 1949 Cal 204 (206) (Real intention of parties should be examined to declare a benami document as fraudulent) **** AIR 1916 PC 238 (240) : 44 Cal 662 ****** (1866) 6 Suth WR 283 (285) (DB) (Taking a lease benami, unaccompanied by any other circumstances of suspicion, does not in itself constitute fraud)

the "transferor continues to retain the title notwithstanding the execution of the transfer deed. In such a case "there is no operative transfer at all and the title rests with the transferor notwithstanding the execution of the conveyance. In view of this legal effect of a sham transaction, it is apparent that conceptually it has to be regarded as a void transaction, as distinguishable from voidable. If in case of a sham transaction, the title rests with the transferor notwithstanding the execution of transfer deed, this would be so only when the transaction in question can be said to be void, in which case alone it would be non existent from its very inception. However, reference to S. 25 of the Contract Act and S. 53(2) of the T.P. Act shows that in certain situations a sham transaction can also be treated as voidable at the instance of some persons and these persons may approach the appropriate authorities for setting it so adjudged and for its cancellation, as permitted by S. 31 of the Specific Relief Act, 1963 (3).

See also the undermentioned cases (4). (See also Note 5.)

8. Transfer is valid until avoided.

A fraudulent transfer within this section is not *ipso facto* void, but is merely *voidable* at the option of the creditors or the subsequent transferee as the case may be. Until so avoided, the transaction is valid. (1) As between the *parties* to the transfer themselves, the transfer cannot be avoided by either of them. (2) It will be valid as between them even if it has been avoided as against creditors or a subsequent transferee. (3) As between them the transfer stands subject only to the right of the

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3. **AIR 1993 Orissa (3, 4, 7, 8, 34) ; 1992 (1) Bank LJ 325 (FB).**

4. AIR 1960 Punj 417 (418) (DB) (Benami transfer per se may not come within the mischief of the section. To hold that it does come within its scope the facts and circumstances of the transfer have to be taken into account.) ** AIR 1958 Mad 580 (582) (Benami transfer — Motive for transaction was the defeat of impending execution — Not a fraudulent transfer within the meaning of S. 53.) ** AIR 1955 NUC (Mad) 3926 (Benami transactions are not per se illegal transactions.)

Section 53 — Note 8

1. **AIR 1946 PC 177 (177) : ILR (1945) Kar (PC) 161.** (Wakfnama.) ** AIR 1962 Madh Pra 363 (364) (DB) ** 1960 MPLJ 1029 (1030) (DB) ** AIR 1955 Pat 270 (275) ; 34 Pat 133 (DB) ** AIR 1952 All 83 (84) (DB) ** AIR 1944 Nag 133 (134) ; ILR (1944) Nag [illegible] (Until avoided the transferee has title.) ** AIR 1943 Nag 129 (131) ; ILR (1943) Nag 42 (DB) ** AIR 1936 Nag 207 (208, 209) ; ILR (1936) Nag 183 ** AIR 1935 All 771 (773) ** AIR 1933 Cal 812 (813) ** AIR 1930 All 438 (439) ** AIR 1926 All 420 (421) ; 48 All 414 (DB) ** AIR 1918 Mad 225 (227) (DB) ** (1912) 17 Ind Cas 342 (343) (Mad).

[**See also** AIR 1963 Mad 450 (452) (Mortgage to which presumption under S. 6, Madras Indebted Agriculturists (Temporary Relief) Act, i.e., presumption that it had been made with intent to delay or defeat creditors applies — Mortgage will be valid until avoided under this section.)]

2. **AIR 1946 PC 177 (177) : ILR (1945) Kar (PC) 161.** (Wakfnama cannot be revoked by settlor.) ** AIR 1960 MPLJ 1029 (1030) (DB) ** AIR 1952 Trav Co 405 (410) (DB) (Bar extends also to persons claiming the properties through the parties and to those under such persons.) ** AIR 1951 All 443 (448) (DB) ** AIR 1943 Nag 129 (131, 132, 135) ; ILR (1943) Nag 42 (DB) (It cannot be set aside by the immediate parties to the transfer or their successors.) ** AIR 1936 Nag 207 (209) ; ILR (1936) Nag 183 ** (1887) 1 CPLR 165 (168).

3. AIR 1963 Mys 257 (260) (Avoiding transfer has merely the effect of wiping out the fraud without affecting validity of the transaction.) ** ILR (1974) Bom 1207 ** AIR 1956 Pun 423 (424) ; ILR (1960) 2 Punj 551 ** AIR 1954 Mad 173 (174) ** AIR 1954 Nag 129 (134) ; ILR (1953) Nag 937 (DB) ** AIR 1952 Vind Pra 69 (72) ** AIR 1936 Nag 207 (209) ; ILR (1936) Nag 183 ** AIR 1921 Lah 333 (335) (DB).

creditors to enforce their claim just as if the transfer had not been made.(4) As has been observed in Story's Equity Jurisprudence' :(5)

> Although voluntary conveyances are or may be void as to existing creditors, they are perfect and effectual as between the parties and cannot be set aside by the grantor, if he should become dissatisfied with the transaction It is his own folly to have made such a conveyance They are not only valid as to the grantor but also as to his heirs and all other persons claiming under him in privity of estate with notice of the fraud A conveyance of this sort it has been said with great truth and force, is void only as against creditors and then only to the extent in which it may be necessary to deal with the conveyed estate for their satisfaction To this extent and to this only it is treated as if it had not been made To every other purpose it is good satisfy the creditor and the conveyance stands

It is well settled that the factum of finding recorded on the nature of transaction that a particular sale transaction or a transfer is hit by S 53 has the resultant effect that the property was transferred in order to avoid debt in question of the creditor and it has no automatic effect of nullifying the transaction and that too, in a claim petition alone that came to be dismissed The effect is that the purchaser cannot avoid the debt in question by virtue of his purchase and it would be open to the creditor to get at the properties in accordance with law (6)

It has been held in the undermentioned case(7) that where a transfer is set aside at the instance of a creditor under this section, the case is governed by S 65 of the Contract Act and that the transferor is bound to restore to the transferee the price he had received It is not clear how if, as conceded in the judgment itself the transfer is *valid* as between the transferor and the transferee, S 65 of the Contract Act which applies to a contract which is *void as between the parties* can have any application.

Where a creditor or the subsequent transferee once *affirms* the transfer he cannot afterwards avoid it (8) Thus, where a creditor sued both the transferor and the transferee for recovery of his debt, but claimed merely a *money decree* against them, it was held that he impliedly affirmed the transfer and could not raise the question of avoidance of the transfer, in the appellate Court (9)

9. Who can avoid a fraudulent transfer.

Ordinarily a transfer cannot be avoided or questioned by a third party when the transferor admits it It is, however, otherwise, where such transfer is intended to defraud the third party (1) In such a case the third party has a right to question it This is the principle enacted in this section

Under the Statute 13 Eliz Chap 5 not only creditors but *all others* who were hindered or delayed by the transfer could avoid the transfer (2) The old S 53, also provided that a transfer intended to defraud

(a) a prior transferee,

(b) a subsequent transferee,

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4. AIR 1961 Punj 423 (424) ILR (1960) 2 Punj 551 ** AIR 1972 Ker 68 (69 70) 1971 Ker LT 730 ** 1957 MPLJ 107 (108) ** AIR 1954 Mad 173 (174) ** AIR 1952 Vind Pra 69 (72) ** AIR 1939 Mad 894 (896) : ILR (1940) Mad 73.

[See also AIR 1927 All 538 (539) 49 All 640 (Collusive decree -- Judgment-debtor cannot challenge validity of decree though it can be impeached by a creditor of his)]

5. Story, Equity Jurisprudence, Section 371.

6. 1997 (2) Mad LW 925 (927)

7. AIR 1936 Nag 268 (269) : ILR (1937) Nag 94

8. AIR 1928 All 234 (235) (DB)

9. AIR 1934 All 948 (949, 950)

Section 53 — Note 9

1. 1964 Andh WR 79 (81) ** (1910) 7 Ind Cas 957 (958) (DB) (Bom)

2. (1601) 76 ER 809 (816) : 1 Sm LC 1, Twyne's case

(c) the creditors of the transferor,

(d) co-owners of the property transferred, or

(e) other persons having an interest in the property transferred (3) was voidable at the option of such persons. The reference to prior transferees, co-owners and other persons interested in the property has been omitted in the present section, as in the opinion of the Special Committee(4) it was difficult to see how such persons could be defrauded by a transfer by the transferor.

A fraudulent transfer can, under this section, be avoided *only* by the person at whose instance the transfer has been declared in this section to be voidable(5) namely the creditor who is defeated or delayed or the subsequent transferee as the case may be. If they have not questioned it, an objection on that ground cannot be taken by anybody else.

It has been seen in Note 8 that the fact that a transfer is intended to defraud creditors or a subsequent transferee does not invalidate the transfer *as between the parties* to the deed and that such deed is *valid and operative* between them. It follows that a *party* to a transfer cannot claim to avoid the transfer on the ground that it was executed in fraud of third persons for *ex hypothesi* such fraud does not invalidate the transfer as between the parties themselves (6). Thus, if A executes a transfer in favour of *B* in order to defraud the creditors of *A*, and *B* subsequently sues A for reliefs in accordance with the transfer, such as possession of the property transferred, A cannot validly set up the plea that the transfer was intended to defraud his creditors, inasmuch as such a plea even if established, will not render the transfer invalid as between *A* and *B* (7). On the same principle, *A*

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3. AIR 1921 Mad 657 (658) (DB).

4. **See** the Report of the Special Committee printed on pages 55-101.

5. **AIR 1946 PC 177 (177) : ILR (1945) Kar (PC) 161** (Without a gift it remains valid and binding on the settlor and his heirs until it is so avoided.) ** **AIR 1950 Trav-Co 60 (61) (FB).** (Where A, a co-sharer, transfers his share to his wife B who sues for partition thereof other co-sharer defendants cannot raise the plea that the transfer was a sham transaction intended to defraud A's creditors.) ** AIR 1951 Trav-Co 237 (238): ILR (1951) Trav-Co 294 and 788 (DB). ** AIR 1943 Nag 129 (132, 134): ILR (1943) Nag 42 (DB). ** AIR 1942 Mad 714 (715). (Assignment by decree-holder to defraud creditors. Creditor of decree-holder can attach decree and claim that assignment is not binding on him. It may not be open to the assignor himself to object to the assignment.) ** AIR 1936 Nag 207 (208): ILR (1936) Nag 193. ** AIR 1928 Lah 9 (16) (DB). (Creditor.) ** AIR 1923 Nag 195 (196). (Creditor.) ** AIR 1915 Bom 89 (90): 39 Bom 507 (DB). (Person acquiring title at Court sale is not subsequent transferee or a person having interest.)

[**See also** AIR 1953 Trav-Co 321 (322): ILR (1953) Trav-Co 326 (DB). (Non prized or unpaid prized subscribers although have no proprietary interest in or a charge upon the 'Kuri vaippu' (assets of the Kuri) would be entitled to avoid any transfer of such assets when it has been made in such a manner as to defeat or delay their claims.)]

6. AIR 1952 Trav-Co 105 (110) (DB). (Persons claiming through the parties as well as those under such persons are barred.) ** AIR 1951 All 443 (448) (DB). ** (1913) 17 Cal LJ 209 (215).

[**See** AIR 1942 Mad 714 (715). (Case of transfer of decree. If an assignment of a decree is made by a decree-holder to defraud his own creditors, it may not be open to him (decree-holder) to object to the assignment during his lifetime. AIR 1927 Mad 903. Re-on.)]

7. AIR 1943 Nag 129 (135): ILR (1943) Nag 42 (DB). ** AIR 1936 Nag 207 (209): ILR (1936) Nag 183. (The principle of par delicto and ex dolo malo are not applicable to such cases.) ** AIR 1936 Nag 258 (269): ILR (1937) Nag 94. ** (1908) 3 Mad 206 (2, 1) (DB). (Mortgagor cannot object that mortgage was to defeat and delay creditors.) ** (1871) 15 Suth WR 273 (274) (DB). ** (1866) 3 Mad HCR 231 (236) (DB). (Party cannot question his own transfer for consideration when creditors do not do so.) ** 1864 Suth WR 265 (265) (DB).

cannot sue *B* for reliefs inconsistent with the validity of the transfer.**(8)**

The principles underlying the maxims *in pari delicto potior est conditio defendentis* (in equal fault, the condition of the defendant is more favourable), *nemo allegans suam turpitudinem audiendus est* (no one alleging his own baseness ought to be heard) and *ex dolo malo non oritur actio* (a right of action cannot arise out of fraud) do not apply to such cases**(9)** but are limited in their application to fraudulent transactions under which no valid interest has passed from one party to the other. Thus, they apply to fraudulent transactions when the fraud is of such a nature as to render the transaction void even as between the parties on grounds of public policy, and to cases of sham, nominal and collusive transfers *not intended to pass any title* from one party to the other, but brought about merely to defraud a third party. In other words, they apply only when the giving effect to a transaction in accordance with its apparent tenor, at the instance of a party thereto, would be to help him to take advantage of his own fraud and to which he was not otherwise entitled. The limits of the applicability of the said maxims to such cases may be briefly stated —

(1) Where the fraud intended to be effected by the transaction has been *carried out* substantially, the general rule is that the Court will not allow any party to it to allege his own fraud in order to avoid his own deed **(10)**. Thus, if *A* transfers property to *B* nominally in order to defraud a third party, and the fraud is carried out, *A* will not be allowed to allege his own fraud and claim relief on the basis that the transfer is not operative **(11)**. This is the application of the maxim *nemo allegans*

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8. (1834) 172 ER 1210 (1210) : 6 Car & P 207, Soms v Tuffs

9. AIR 1943 Nag 129 (133) : ILR (1943) Nag 42 (DB) (Observations in 35 Cal 551 (PC) regarding fraud being carried out etc., apply only to unreal and fictitious transactions.) ** **AIR 1936 Nag 207 (209) : ILR (1936) Nag 183.**

10. AIR 1935 All 529 (534) : 58 All 1 (FB) ** AIR 1960 Andh Pra 222 (226) : ILR (1959) Andh Pra 951 (DB) ** AIR 1956 Andhra 225 (228) (DB) (Sole coparcener or all coparceners transferring property benami to save it from creditors — Device of benami adopted for several years — Transferor possessing no other property — It must be held that fraudulent purpose has been achieved and they should not be allowed to recover it especially when the property is in the hands of transferee from benamidar.) ** AIR 1953 Pat 199 (200, 201) : 31 Pat 787 ** AIR 1952 Vind Pra 69 (73) ** AIR 1949 Cal 204 (206) ** AIR 1930 Mad 298 (300) ** AIR 1925 Oudh 120 (123) : 27 Oudh Cas 175 (DB) ** AIR 1923 Cal 90 (92) (DB) ** AIR 1923 All 411 (412) ** (1920) 2 Lah LJ 439 (442) (DB) ** AIR 1919 Nag 43 (44) : 16 Nag LR 129 ** AIR 1919 Pat 539 (540) ** AIR 1916 Sind 22 (23, 26) : 9 Sind LR 108 (Carried out means substantially carried out.) ** AIR 1915 Mad 519 (526) (DB) ** (1913) 17 Cal LJ 209 (215) ** (1913) Mad WN 470 (473) ** (1906) 29 Mad 72 (74) (DB) (The rule that a person in pari delicto cannot recover is applicable not only where the unlawful agreement has been fully carried out but also where there has been part performance of a substantial character.) ** (1905-1906) 3 Low Bur Rul 245 (247, 248) (The property was purchased benami in the name of mother of plaintiff who sued to recover it back on the ground that he was the real purchaser and the deed was executed benami because of fear of his creditors.) ** (1897) 20 Mad 326 (331) (DB) (20 Mad 323 approved.) ** (1873) 19 Suth WR 270 (271) (DB) ** (1866) 6 Suth WR 287 (287) (DB) ** (1865) 3 Suth WR 30 (30) (DB) (Heir of A held also bound by A's fraud.) ** (1865) 3 Suth WR 92 (92) (DB) (Heirs and representatives of fraudulent parties are equally bound.) ** (1865) 4 Suth WR 11 (12) (DB) (Representatives are bound.)

[See also AIR 1921 All 140 (141) (Fraudulent admission of payment by one creditor in order to defeat other creditors.) ** AIR 1919 Pat 447 (451) (DB) (Fraudulent transfer — Transferor however continuing in possession for more than twelve years — Party entitled to confirmation of possession — On subsequent dispossession he is entitled to recover possession.) ** AIR 1940 Pat 379 (380) (DB) (Person assigning his decree to another to avoid its attachment by his creditor cannot subsequently ask Court to declare that assignment was benami.)]

11. (1908) 35 Cal 551 (558, 559) : 35 Ind App 98 (PC) ** AIR 1977 (NOC) 291 (DB) (Ker) **

suam turpitudinem audiendus est. Some exceptions are recognized to this rule. One of these is that where a party to a fraudulent transaction seeks, as plaintiff, to *enforce the transaction* against the other party and thereby get an advantage to himself to which he is not really entitled, the defendant will be allowed to show his own turpitude in order to defeat the plaintiff (**12**). The exception is allowed not for the sake of the wrongdoer but on the principle that the Court ought not to assist the plaintiff in reaping the benefit of his fraud. This is the application of the maxim *in pari delicto potior est conditio defendentis*. The contrary view taken in the undermentioned cases (**13**) namely

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** 1970 All LJ 416 ** AIR 1933 Oudh 6 (8) (DB) (Purpose of fraud not carried out. Mere intention to defraud does not deprive true owner of right to recover his property.) ** AIR 1926 Cal 850 (853) (DB) ** AIR 1924 Oudh 321 (324) (DB) ** AIR [illegible] 23 Cal 90 (91) (DB) ** AIR 1921 Low Bur 63 (66) : 11 Low Bur Rul 83 (DB) ** AIR 1921 Low Bur 58 (59) : 11 Low Bur Rul 89 (DB) ** AIR 1919 Nag 43 (43) : 16 Nag LR [illegible] 29 ** AIR 1917 Mad 297 (299) (DB) ** AIR 1916 Sind 22 (24) : 9 Sind LR 108 (It is sufficient if the illegal purpose has been carried into effect in a material particular e.g. by deceiving the creditors for a long time.) ** AIR 1915 Oudh 160 (6[illegible]) : 18 Oudh Cas 3[illegible] (Parties to fraud cannot, whether as plaintiffs or defendants, plead fraud.) ** AIR 1915 Lah 264 (265) ** [illegible] 5 Nag LR 146 (150) ** [illegible] 28 Cal [illegible] 380) (DB) ** [illegible] 25 Cal [illegible] 966 (DB) ** (1901) 23 Cal 962n (966n) (DB) ** (1900) 27 Cal 231 (233) (DB) ** (1897) 20 Mad 333 (338) (DB) ** 1892 Pun Re No. 38 Page 149 (150) ** [illegible] Bom LR 284 (DB) ** [illegible] 11 Bom 708 (713) (DB) ** (1867) 7 Suth WR 118 (118) (DB) ** (1865) 3 Suth WR 221 (222) (DB). (Suit by representative of transferor.) ** (1932) [illegible] 15 Ind Cas 344 (345) (All.) ** (1914) 22 Ind Cas 86 (88) (DB) (Cal) ** (1912) 17 Ind Cas 918 (918) (Low Bur) (Obiter.) ** (1912) 16 Ind Cas 811 (815) (DB) (Cal).

[**See also** (1893) 7 C PLR 50 (52) (Defendant pleading his own fraud is a defence to suit for possession.) ** AIR 1936 All 401 (403) : 58 All 842 (DB) (Affirming the decision in AIR 1935 All 799. The fact that the party claiming advantage of fraud is original party's representative makes no difference.)]

[**See however** AIR 1927 Rang 86 (87) : 4 Rang 429 (DB) (Transfer with intention to defraud — Fraud effected — Transferor continuing in possession even after transfer — His possession will not be disturbed.) ** AIR 1936 Rang 405 (406) : AIR 1[illegible] Rang 56 followed.)]

12. **AIR 1962 SC 370 (376) ** AIR 1932 Lah 503 (512) : 13 Lah 713 (FB)** (Case law reviewed.) ** AIR 1974 Pat 51 (54) : 1974 BLJR 450 ** AIR 1968 Mad 362 (365) : (1968) 1 Mad LJ 1 ** ILR (1966) 1 Mad 114 (Part payment as advance under contract for sale to retain property — On partition amongst members of joint family certain debts allotted to vendor's share before contract of sale entered into — **Held**, alienation in vendee's favour could be assailed as one in fraud of creditors.) ** AIR 1963 Ker 79 (80) : ILR (1962) 2 Ker 681 ** AIR 1943 Nag 129 (136) : ILR (1943) Nag 42 (DB) (When a debtor executes a colourable sale deed, not intending to pass title, with the intention of defeating or delaying his creditors and the transferee shares the intention and the fraud on the creditors has been carried out, then as between the parties to the transaction the estate must lie where it falls — Transferor can resist transferee's suit for possession.) ** AIR 1943 Nag 113 (114) ** AIR 1941 Cal 233 (236) (DB) ** AIR 1927 Nag 365 (366) ** AIR 1923 [illegible] 90 (94) (DB) ** AIR 1923 All 504 (505, 507) : 45 All 396 (DB) (A was allowed to plead own fraud of A and B and B's suit was dismissed.) ** AIR 1921 Low Bur 63 (66) : 11 Low Bur Rul 83 (DB) ** AIR 1916 Lah 130 (13[illegible]) : 1916 Pun Re No. 21 (DB) ** (1909) 5 Nag LR 146 (149, 150) ** (1909) 32 Mad 323 (325) (DB) (26 Mad 326 Followed.) ** (1904) 8 Cal WN 620 (621) (DB) ** (1897) 20 Mad 326 (329, 330) (DB) ** (1894) 18 Bom 372 (374) (DB) ** (1928) 107 Ind Cas 110 (112) (Lah) (Case law discussed.) ** (1912) 17 Ind Cas 918 (918) (Low Bur).

[**See also** AIR 1924 Mad 189 (191) (DB).]

13. AIR 1937 Pat 453 (453, 454) ** AIR 1988 Him Pra 27 (30) : 1987 Sim LC 266 ** AIR 1934 Mad 252 (254) ** AIR 1933 Mad 457 (459) : 56 Mad 646 (DB) (AIR 1928 Mad

that if the fraud is *carried out* a party cannot, even by way of defence, set up his own fraud in order to defeat the plaintiff, must be held to be no longer good law in view of the Supreme Court decision in ***Immani Appa Rao v. Ramalinga Murthi.*(14)**

(2) Where the intended fraud is *not carried out* a party to the transaction may allege his own fraud whether as a plaintiff(**15**) or as a defendant(**16**) and the Court may grant relief in accordance with the true nature of the transaction. This principle is also found enacted in S 84 of the Trusts Act 1882 It has been held in the undermentioned case(**17**) by the Madras High Court that the deed of transfer being voidable and not void in such cases, the transferor cannot recover the property transferred, without getting the sale deed set aside, on a mere declaration of his title.

10. "Creditor," meaning of.

In order *that A* may be creditor of *B*, it is necessary that *B*'s liability to *A* constitutes a debt As to the meaning of the word "debt," see Note 22 on S 3

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365 Full AIR 1932 Lah 503 (FB,. **Dissented from.**) ** (1908) 31 Mad 485 (487 488) (DB) ** (1907) 31 Bom 405 (411, 412) (DB)

14. AIR 1962 SC 370 (376). (ILR 31 Bom 405 and AIR 1933 Mad 457 and AIR 1936 Mad 88 and AIR 1918 Mad 365, **Overruled;** S A No. 1656 of 1947, D/- 16-11-1951 (Mad), **Reversed.**)

15. AIR 1960 SC 213 (219) : 39 Pat 186 ** (1908) 35 Cal 551 (558, 559) : 35 Ind App 98 (PC) 1981 UPLT (NOC 65 ** AIR 1960 Andh Pra 222 (226) ILR (1959) Andh Pra 951 (DB) ** AIR 1956 Andh Pra 225 (227) (DB) (Device of benami adopted to cheat the creditors for a period of 35 years - No other properties available excepting those involved in the transactions Only reasonable inference is that the fraudulent purpose has been achieved) ** AIR 1953 Mad 545 (547) (It is unnecessary to consider whether the intended fraud was frustrated by his own penitence or by other causes) ** AIR 1952 Vind Pra 69 (73) ** AIR 1949 Cal 204 (206) ** AIR 1943 Nag 129 (136) ILR (1943) Nag 42 (DB) (Alleged transferor can recover his property from the alleged transferee) ** AIR 1929 Pat 127 (129) (DB) (Symes v Hughes, (1870) 39 LJ Ch 304 followed) ** AIR 1926 Cal 850 (853) (DB) ** AIR 1924 Nag 200 (203) ** AIR 1923 Cal 154 (155) (DB) (Distinction between fraud merely intended and fraudulent purpose actually accomplished is recognised in S 84 of the Trusts Act) ** AIR 1923 Cal 90 (90) (DB) ** AIR 1921 Low Bur 58 (59) 11 Low Bur Rul 89 (DB) ** AIR 1919 Pat 313 (316) (DB) ** AIR 1918 Mad 148 (149) (DB) (35 Cal 551 (PC), Followed) ** AIR 1916 Cal 532 (537, 538) (DB) (The principle applies even if the party suffers a decree to be passed against him in a fictitious and collusive suit which is only a part of the fraudulent scheme) ** AIR 1915 Lah 264 (265) ** AIR 1915 Cal 492 (494) (DB) ** AIR 1914 Low Bur Rul 135 (136) (The burden lay on plaintiff to prove that the intended fraud was not carried out) ** (1913) 17 Cal LJ 209 (215) ** 1908 Upp Bur Rul 3rd Or , Benami Transaction 1 (3) ** (1906) 33 Cal 967 (969) (DB) ** (1901) 28 Cal 370 (379) (DB) ** (1896) 23 Cal 460 (475 476) (DB) (13 Suth WR 87 **not followed.**) ** (1887) 1 CPLR 165 (172, 173) ** (1870) 39 LJ Ch 304 (306) 9 Eq 475, Symes v Hughes ** (1912) 16 Ind Cas 811 (815) (DB) (Cal)

[**See also** AIR 1929 Bom 147 (151) 53 Bom 321 (DB) (Party perpetrating fraud can retract from it at any time) ** (1908) 4 Nag LR 26 (27) (Burden is on the plaintiff to **prove that the fraud never went beyond the stage of intention.**)]

16. AIR 1936 Mad 717 (718) : 59 Mad 998 (FB). (AIR 1918 Mad 365 AIR 1926 Mad 1196 AIR 1924 Mad 604 and AIR 1917 Mad 297 **Overruled.**) ** AIR 1963 Ker 79 (80) ILR (1962) 2 Ker 681 ** AIR 1936 Mad 88 (89) 59 Mad 289 (DB) (**Overruled** on another point in AIR 1962 SC 370) ** AIR 1935 Mad 947 (952) ** AIR 1934 Mad 252 (255) (DB) ** AIR 1929 Mad 807 (810, 811) ** AIR 1923 All 164 (165) ** AIR 1915 Mad 1164 (1164) (DB) ** AIR 1914 Bom 283 (283 284) 38 Bom 10 (DB) (31 Bom 405 Distinguished) ** AIR 1914 Mad 696 (697) (DB) ** (1908) 31 Mad 97 (99) (DB)

17. AIR 1953 Mad 545 (548)

A who was an agent of *B* for purchasing supplies and who was remunerated by a commission on the price of supplies was given advances from time to time from which to purchase supplies. It was held by the Chief Court of Oudh that, in respect of the balance of the advance in the hands of *A*, *B* could not be said to be a creditor.(1)

A 'mortgagee' from a person of his property is a creditor of that person within the meaning of this section.(2)

A person entitled to *pre-emption* is not a creditor of the transferor of the property (3) Nor is an *auction purchaser* of the property transferred, a creditor of the judgment-debtor (4) But a creditor who has, in execution of his decree, purchased the property transferred will be a *creditor* notwithstanding his purchase, and can sue to avoid the transfer under this section (5)

It has been held by the High Court of Madras in the undermentioned case(6) that the liability under Hindu law, of a husband to pay for the maintenance of his wife during the years he had deserted her is a "debt" and that the wife is in that respect a creditor of the husband within the meaning of this section But in the absence of desertion or separation a wife can, according to the Chief Court of Oudh, be considered to be a 'creditor' of the husband merely by reason of the fact that she is entitled to be maintained by the husband (7)

Dower due to a Mahomedan wife ranks as a debt (8)

10A. "Of the transferor."

It is only a creditor of the *transferor* that can avoid a transfer under this section In *Bible Tokai Sherob v Beglar*(1), *A* made a fraudulent transfer in favour of his mistress *B* for the purpose of defeating or delaying creditors *A* left a will subsequently under which he appointed *G* his illegitimate son as his executor *X* obtained a decree *personally* against *G* got his right title and interest sold and then filed a suit against *G* and *B* for possession of the properties that were in the possession of *B* on the ground that the transfer by *A* to *B* was fraudulent It was held by their Lordships of the Privy Council that the suit could not succeed that *G*'s creditors might well dispute any fraudulent transfer which *G* might have made but that they could not dispute a transfer by *A* to *B* as fraudulent

Where *X* made a gift of joint family property to his daughters at a time when his son *Y* was heavily indebted, it was held by the High Court of Madras that the creditors of *Y* could not avoid the

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Section 53 — Note 10

1. AIR 1927 Oudh 162 (169) (DB)
2. AIR 1916 Mad 494 (494) (DB) (A simple mortgagee who has obtained decree for sale and whose right to personal decree is not barred is creditor of the mortgagor ** 89 Bom PJ 461 (DB)

   [See also AIR 1951 All 443 (448) (DB).]
3. AIR 1925 All 358 (359) : 47 All 424 (DB)
4. AIR 1954 Mad 173 (175) ** AIR 1951 Mys 103 (105) ILR (1951) Mys 407 (DB) ** AIR 1915 Bom 89 (90) 39 Bom 507 (DB) (He is also not a subsequent transferee or a person having an interest in the property within the meaning of S 53.)
5. AIR 1951 All 443 (448) (DB) ** (AIR 1939 Bom 508, Foll) ** AIR 1939 Bom 508 (5, 2)
6. AIR 1927 Mad 657 (658)
7. AIR 1932 Oudh 40 (42) : 7 Luck 411 (DB)
8. AIR 1926 Pat 404 (404) (DB)..

Section 53 — Note 10-A

1. (1857) 6 Moo Ind App 510 (524) : 4 Suth WR PC 87 (PC).

transfer under S 53, as no transfer had been made by *Y*, the debtor.(2)

Where *A purchases* property in the name of *B* with a view to keep the property out of reach of his creditors, it cannot be said that *A* 'transferred' the property to *B* so as to enable the creditors of *A* to apply this section and attach the property.(3)

Where *A* gifted certain property to *B's* wife upon a request made by *B* that *A* should transfer the property to his wife instead of himself so as to protect it from his creditors, it was held that *C* a creditor of *B* who was a stranger to the transaction could not avoid the transaction and proceed against the property in execution of his decree.(4) It could not be said in such a case that C was a creditor of the transferor or that *B* had transferred the property to defeat or delay his creditors.

11. Subsequent creditors.

In England it has been held that even a *subsequent* creditor can impeach a fraudulent transfer by the debtor.(1) The reason of the rule was stated by Sir Thomas Plumer, M. R., in *Richardson v. Smallwood*,(2) as follows :

> "Suppose a person indebted to execute a conveyance, such that if those who were creditors at the time complained, it would be void as against them ; then if they are paid off and a new set of creditors stand in their places, does that make any difference ? Does it not hinder and delay these creditors and is it not void as against them ? If it be not so, it would be easy to evade the statute ; the party may pay off those to whom he is then indebted by borrowing of others and he may then say to them, I did not make the settlement to defraud you, but to defraud the other person who were my creditors ."

The general trend of opinion in this country also is that not only an existing(3) but also a *subsequent* creditor(4) can impeach an alienation by the debtor. The reason is that the expression

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2. AIR 1936 Mad 825 (826).

3. AIR 1936 Bom 160 (161) : 60 Bom 226.

4. AIR 1944 Nag 133 (134) : ILR (1944) Nag 125.

Section 53 — Note 11

1. (1912) 81 LJ KB 334 (338) ; 105 LT 897 ; Glegg v. Bromley ; (**Reversed** on another point in (1912) 81 LJ KB 1081) ** (1822) 37 ER 958 (960) ; Jac 552, Richardson v. Smallwood ** (1882) 51 LJ Ch 521 (523) ; 19 Ch D 588 (600, 601) ; Ex parte Russell ; In re Butterworth ** (1872) 41 LJ Ch 539 (542) ; LR 14 Eq 106 (122), Mackay v. Douglas ** (1871) 40 LJ Ch 480 (484) ; LR 12 Eq 158 (168), Crossley v. Elworty ** (1870) 39 LJ Ch 148 (151), Freeman v. Pope ; (Affirmed in (1870) 5 Ch app 538.) (1860) 54 ER 689 (690) ; 29 Beav 417, Barling v. Bishop ** (1856) 61 ER 963 (965) ; 25 LJ Ch 338, Jenkyn v. Vaughan, (Where there are certain debts at the time of execution of the deed, and some of those debts still remain unpaid, a subsequent creditor can sue to set aside the deed) ** (1856) 26 LJ Ch 179 (182) ; 3 Kay & J 90 ; Holmes v. Penny ** (1800) 31 ER 642 (643) ; 5 Ves 384, Lush v. Wilkinson ** (1743) 26 ER 758 (759) ; 2 Atk 800, Taylor v. Jones

[See (1854) 139 ER 169 (172) ; 14 CR 410, Graham v. Furber ; (Quaere)]

[See also (1742) 26 ER 688 (690) ; 2 Atk 477, Amb 13, Stileman v. Ashdown]

[But see (1806) 33 ER 53 (60) ; 12 Ves 136 (156), Kidney v. Coussmakar ; (A settlement is fraudulent only as against such creditors as were creditor at the time) ** (1699) 24 ER 51 (51) ; 1 Eq Abr 149, Lwekner v. Freeman ** (1843) 63 ER 76 (78) ; 2 Y & C Ch Cas 172, Ede v. Knowles ; (A deed can only be set aside as fraudulent against creditors at the instance of a person who was a creditor at the time though when it shall have been set aside, subsequent creditors may be let in.)

2. (1822) 37 ER 958 (960) : Jac 552.

3. AIR 1966 Mad 247 (252) ** **(1884) 10 Cal 616 (623, 624) : 11 Ind App 10 (PC) ** (1864) 1 Suth WR 319 (319) (FB).** (Case before T.P. Act) ** AIR 1954 Mad 173 (176)

4. ILR (1966) 1 Mad 114 (119) ** AIR 1966 Mad 247 (252) ** AIR 1965 Mad 395 (397)

'creditor' includes future creditors (5) A contrary view has been, however, expressed in the undermentioned cases (6) In *Vaikuntarama v Athimoolam*,(7) Wallis, J., in expressing the latter view distinguished the English cases on the ground that the Statute 13 Eliz. Chap 5 used the words "creditors and *others*" while this section used the word "creditor" only It is submitted that the contrary view referred to above is not correct The English decisions do not rest on the use of the words "and others" in the Statute, but on general principles of justice which are equally applicable in this country.

12. Creditor need not obtain judgment on his debt before being entitled to impeach fraudulent transfer.

In England it is not necessary that in order to maintain a suit to avoid fraudulent conveyance the creditor should obtain a judgment on his debt, or a lien on the property (1) The same view has been held in this country, and it is, therefore, not necessary to enable a creditor to impeach a fradulent transfer under this section that he should have obtained a decree on his debt (2) The contrary view expressed in the undermentioned cases(3) is opposed to the general trend of opinion and is not correct.

13. "At his option."

The avoidance of a transfer under this section need not necessarily be by way of a *suit* instituted for the purpose An open and unequivocal declaration of intention to avoid the transfer ex

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ILR (1965) 2 Mad 250 (DB) ** AIR 1955 Madh B 159 (160) ILR (1955) Madh B 297 (DB) ** AIR 1954 Mad 173 (176) ** AIR 1954 Trav-Co 404 (405) (DB) ** (1949) 1 Pepsu LR 198 (200) (DB) (Per Teja Singh C J in his judgment referring the case to a Division Bench) ** AIR 1948 Bom 265 (269) ILR (1947) Bom 807 (DB) ** AIR 1947 All 383 (387) ILR (1947) All 624 (DB) (But the word 'creditor' as used in Provincial Insolvency Act will not include a person who becomes creditor after date of transfer or other act of insolvency) ** AIR 1946 Sind 137 (140) ILR (1946) Kar 14 ** AIR 1944 Rang 302 (303) 22 Rang 666 (The term 'creditor' includes subsequent creditor) ** AIR 1931 Oudh 333 (338) 7 Luck 131 (DB) ** AIR 1931 Oudh 134 (135) 6 Luck 49 (DB) ** AIR 1930 Lah 217 (218) ** AIR 1930 All 610 (611) (DB) ** AIR 1927 Lah 420 (421) 8 Lah 544 (DB) (Per Tek Chand, J) ** AIR 1927 Mad 657 (658) ** AIR 1924 Mad 779 (780) (DB) ** AIR 1921 All 298 (300) (DB) (Per Stuart J) ** (1903) 5 Bom LR 255 (256 257) ** (1903) 16 CPLR 164 (167 168) ** (1910) 33 Mad 205 (206) (DB)

[See also AIR 1914 Cal 503 (504, 505) (DB).]

5. AIR 1966 Mad 247

6. AIR 1940 Oudh 200 (201) 15 Luck 503 ** AIR 1930 Nag 51 (53)

[See also AIR 1927 Lah 420 8 Lah 544 (DB) (Per Campbell J) **]**

7. AIR 1914 Mad 641 (643) : 38 Mad 1071 (DB).

Section 53 — Note 12

1. (1869) 17 WR (Eng) 601 (602) LR 7 Eq 347 (351), Reese River Silver Mining Co v Atwell ** AIR 1969 Bom 66 70 Bom LR 359 (Being a suit for a declaration proper Court-fee would be under S. 6(iv)(j) of the Court-fees Act.)

2. ILR (1966) 1 Mad 114 (119) ** AIR 1973 Orissa 229 (231) 39 Cut LT 316 ** AIR 1948 Bom 265 (269) ILR (1947) Bom 807 (DB) ** AIR 1927 Mad 657 (658) (Claim for maintenance not merged in decree) ** AIR 1926 Nag 494 (494) ** AIR (1923) Nag 334 (335) ** AIR 1923 Lah 478 (479 480) (DB) ** (1904) 17 CPLR 24 (28) ** (1903) 16 CPLR 164 (166) ** (1902) 27 Bom 146 (149) (DB) (Absence of decree is not fatal

[See also AIR 1927 Nag 295 (296) (Lease while the suit on mortgage was pending set aside as fraudulent) **]**

3. A 1918 Mad 225 (227) (DB) (Mere obtaining a judgment for the debt is not sufficient — Creditor must in addition attach the property to enable him to utilize this section) ** (1882) Pun Re No. 10 page 36 (39) ** (1867) 2 Agra 411 (411)

pressed by a creditor is sufficient in law, to enable him to treat it as void and take steps on that footing to enforce his rights as a creditor (1) Thus, where *B* took a subsequent transfer, in discharge of his own debt, from *C* of one item of certain properties which had been sold by *C fraudulently* in favour of *A*, it was held that *B's* conduct in taking the transfer with noise of the sale in favour of *A* constituted a declaration of intention to avoid the sale in favour of *A*. But in such a case it was further held, that the avoidance was only in respect of *that item*.(2) Where *A* who had obtained a decree against *B* attached certain properties as belonging to *B* and repudiated, in the attachment proceedings, the sale of such properties by *B* in favour of *C* it was held that A had made an unequivocal declaration avoiding the transfer and that the auction purchaser in execution of *A's* decree obtained a good title to it as against *C* (3) A creditor who did not object to mutation applied for by the judgment-debtor consequent on a gift by the debtor cannot be said to have exercised his option debarring him from challenging the transfer (4) The following decisions(5) taking the view that the transaction can be avoided only by a suit must be held to be no longer good law in view of the Supreme Court decision in Abdul Shukoor Saheb v Arji Papa Rao (6)

14. Plea in defence.

The institution of a *suit* to avoid a transfer would be the most unequivocal way of avoiding a fraudulent transfer But that is not the only mode of avoiding it It may be made by way *of defence* in a suit brought to enforce the transfer.(1) Thus, in a suit under O 21, R 63, Civil Procedure Code,

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Section 53 — Note 13

1. AIR 1956 Mad 682 (684) (Para 4 is merely intended to prescribe the form of the suit if the creditor chooses to institute one It does not lay down the only way in which to plead fraud under the section) ** **AIR 1944 Nag 44 (51) : ILR (1944) Nag 342 (FB).** (For example by an application under S 4 Insolvency Act (1920) 5 Nag LR 146 Relied on Note See in this connection Note 29) ** **AIR 1920 Mad 748 (751) : 43 Mad 760 (FB).** (AIR 1918 Mad 421, **Overruled.**) ** AIR 1955 Pat 270 (276) 34 Pat 133 (DB) (A creditor may manifest his intention to avoid the transfer otherwise than by filing a suit as for instance by attaching the property) ** AIR 1954 Mad 173 (174) (The right of the creditor does not depend on his ability to establish fraud in a Court of law though without it, the practical worth of that right will be nothing) ** AIR 1953 Cal 251 (257) (DB) ** AIR 1951 Trav-Co 237 (238) ILR (1951) Trav-Co 294 and 788 (DB) (Where a decree-holder attaches property which is the subject-matter of transfer, in execution of his decree, it constitutes an unequivocal repudiation of the transfer) ** AIR 1946 Sind 137 (140, 141) ILR (1946) Kar 14 (Question of fraudulent transfer can be raised in execution proceedings)
2. **AIR 1954 Mad 173 (175) ** AIR 1921 Mad 657 (659) (DB)**
3. AIR 1955 Pat 270 (276) 34 Pat 133 (DB) ** AIR 1951 Trav Co 237 (239) ILR (1951) **Trav-Co 294 and 788 (DB) ** AIR 1936 Mad 408 (410)**
4. **AIR 1968 Punj 479 (485) : ILR (1968) 1 Punj 10 (DB)**
5. AIR 1963 Mad 450 (452) (Mortgage executed in contravention of S 6 Madras Indebted Agriculturists (Temporary Relief) Act — Execution of decree obtained on mortagage — Plea that the mortgage in view of presumption arising under that section is one which was executed with intent to delay or defeat creditors cannot be raised in the execution proceedings) ** AIR 1955 Mad 446 (447) (Section will come into operation only when a suit is instituted to avoid the transfer and not when only an execution petition is filed) ** **AIR 1944 Nag 133 (134) : ILR (1944) Nag 125.**
6. **AIR 1963 SC 1150 (1160).**

Section 53 — Note 14

1 **AIR 1963 SC 1150 (1160).** (AIR 1918 Mad 225 being a contrary view must be held to be **no longer good law.**) ** **AIR 1934 All 155 (159) : 56 All 624 (FB).** (The amendment of the section does not alter the law in this respect) ** 1977 Punj LJ 199 (201) ** AIR 1959 Andh Pra 280 (287) (DB) (AIR 1917 Mad 519 AIR 1918 Mad 421 (FB). **Held, overruled** in AIR 1920 Mad 748 (FB)) ** AIR 1956 Mad 682 (684) ** AIR 1954 Manipur 1

by a defeated claimant on the basis of transfer made to him by the debtor. the creditor who has attached the property in execution of his decree may plead in defence that the transfer was fraudulent under S. 53.(2)

Where the petitioner objected to attachment of property in execution proceedings on ground that he was a bona fide purchaser, the opposite party could in defence raise the ground of fraud on creditor (3) Section 53(1) can be applied even in proceedings where the property is sought to be attached and it is not necessary to file a separate suit to set aside the document. But this dictum can be made applicable only when there is sufficient pleadings. Actual drafting of pleading is necessary and only on the basis of the pleadings evidence can be let in since there was no pleading attachment was raised in instant case with liberty to the Bank to file suit under S. 53(1) (4)

Where the husband suffered the decree in favour of his wife knowing it full well that he had taken loan by executing a pronote and receipt then it was immaterial that the suit filed by the wife against her husband was decreed earlier before the institution of suit by the decree-holders. The creditor can exercise his option to avoid a fradulent transfer (consent decree) u S. 53 by attaching the transferred property in execution of his decree. A regular suit is not necessary for avoiding transfer. Simply because the decree was possed earlier to the filing of the suit by the decree holder it was of no consequence as the loan was taken much earlier by the judgement debtor. It could not be disputed that if decree in favour of the wife is avoided then the judgement debtor is the owner of land which he fraudulently transferred by way of consent decree in favour of his wife. Thus he could not claim the protection of the Act.(5)

In view of the amended provisions of O. 21 R. 58 C.P.C. the question of filing a separate suit is barred and all questions relating to title or interest in the property attached have to be decided and adjudicated only in the claim proceedings and not by a separate suit. The attaching creditor need not file a separate suit under S. 53 of T.P. Act in representative capacity to put forth his case that the

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(3) ** AIR 1951 All 443 (445) (DB) ** AIR 1942 Mad 714 (715) (Fraudulent assignment of decree — Creditors of assignor impeaching same as fraudulent by raising plea in defence) ** AIR 1939 Sind 97 (98, 99) : ILR (1939) Kar 269 (DB) ** AIR 1927 Cal 836 (838) : 54 Cal 687 (DB) (Suit to enforce mortgage — Defence of fraudulent transfer assumed to be maintainable) ** (1908) 35 Cal 105 (1056, 1057) (DB) (Fraudulent transfer by way of mortgage — Suit on mortgage — Defence of fraudulent transfer was assumed to be maintainable) ** (1900) 5 Cal WN 403 (404) (DB) (Assumed) ** (1897) 24 Cal 825 (828) (DB). (Plea in defence assumed to be maintainable)

[See AIR 1943 All 2 (5) (DB) (Application by debtor under S. 4 U.P. Encumbered Estates Act — Creditors challenging wakf executed before Chapter I of the Act came into force as being executed with object of delaying and defeating creditors — Held, S. 53 of the Act did not apply but it was assumed creditors could rely on S. 53, T.P. Act.)]

[See also AIR 1936 All 663 (665) (DB)]

2. AIR 1963 SC 1150 (1160) (AIR 1920 Mad 748 (FB) Approved) ** AIR 1920 Mad 748 (754) : 43 Mad 760 (FB) (AIR 1918 Mad 421 and AIR 1917 Mad 519 Overruled. AIR 1919 Mad 87 is also no longer good law in view of this decision) ** AIR 1954 Mad para 1 (3) ** AIR 1955 Cal 251 (257) (DB) (Creditor does not become disentitled from setting up defence under S. 53 in a declaratory suit under O. 21 R. 63 C.P.C. by debtor or his assignee because of the fact that such a suit is not a representative suit) ** AIR 1921 All 298 (301) (DB) (AIR 1917 Mad 519 Dissented from; 14 Ind Cas 715 Followed) ** AIR 1920 Nag 83 (85) ** AIR 1920 Bom 10 (10) (DB) ** AIR 1920 Nag 80 (81) : 83 Ind Cas 6 Nag LR 3 ** (1912) 14 Ind Cas 715 (716) (DB) (Cal)

3. 1997 (2) CJC 371 (375) (Mad).

4. 1999 (1) Kant LJ 694 (696)

5. 1989 Pun LJ 218 (219, 220)

transfer was in fraud of creditors and that he is entitled to plead by way of defence in the claim proceedings.(6)

In the undermentioned cases(7) where a claim to attached property was made by a party to the suit under S 47 of the Civil Procedure Code on the basis of a transfer from the judgment-debtor, it was held that the attaching creditor was entitled by way of defence to plead that the transfer was fraudulent. A plea that the transfer sought to be enforced is fraudulent must be raised in the written statement. It cannot be raised at the time of arguments if it would take the plaintiff unawares.(8)

15. Avoidance of transfer in part.

A fradulent transfer was under the *Statute 13 Eliz* Chap 5, declared to be "clearly and utterly void, frustrate and of none effect" against any persons defeated or delayed thereby. In *Tareeny Charn Bonnerjee v Maitland*,(1) a case before this Act, *A* executed a deed of trust, by which he charged real property to secure his certain alleged debts. It was found that this deed was executed for purpose of defeating and delaying the creditors of *A*. It was held by their Lordships of the Privy Council that the deed could not be maintained even to the extent to which it may be supported by valid consideration, they observed as follows :

> If the deed was executed with a view to defraud and delay creditors ... it appears to their Lordships to be utterly impossible for any party to that deed or any person claiming under those who were parties to that deed to maintain the deed *for any purpose whatever*. The deed is one which, in that view of the case, is not executed to secure Rs 13,873 (i e the valid portion of the consideration paid), but it is a deed executed to defeat and to delay creditors the deed therefore, utterly fails to the ground and cannot be maintained, as their Lordships think as a *security for any sum whatever*."

In cases arising under this section, there has, however, been a difference of opinion. The *general trend* of opinion is that if a transfer offends this section as being in fraud of creditors, it cannot be upheld even to the extent to which it may be found to be supported by consideration, whether such consideration is paid at the time of the transfer(2) or in the discharge of prior debts due to the transferee himself(3) or

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6. AIR 1989 Mad 311 (312, 313) (1989) 103 Mad LW 131 ** 1987 Ker LJ 455 (459, 461)

7. AIR 1955 Pat 270 (276) 34 Pat 153 (DB) ** AIR 1946 Sind 137 (141) ILR (1946) Kar 14 (Same principle applies to plea raised by attaching creditor in execution proceedings in answer to defence of the judgment debtor that the property in his hands is separate property and not liable in execution owing to a transfer made by his father and himself ** AIR 1938 Lah 136 (138) ** AIR 1938 Nag 166 (168) ILR (1936) Nag 69 (Objection to attachment by transferee — Decree holder can rely on S 53 without instituting suit to set aside transfer)

8. AIR 1941 Oudh 457 (464) : 16 Luck 832 (DB).

Section 53 — Note 15

1. **(1866-67) 11 Moo Ind App 317 (343, 344) (PC).**

2. AIR 1954 Nag 129 (134) ILR (1953) Nag 937 (DB) ** AIR 1939 Mad 745 (749) (DB) (**Distinguishing** AIR 1924 Mad 450) ** AIR 1938 Nag 249 (250) ** (1938) 40 Punj LR 613 (615) ** AIR 1935 Lah 404 (405) 16 Lah 680 (DB) ** AIR 1931 Lah 430 (431) (DB) ** AIR 1928 Mad 20 (20) (DB) ** AIR 1927 Mad 278 (279) (DB) ** AIR 1923 Lah 423 (424) 4 Lah 211 (DB) (Substantial portion of consideration was fraudulent — Whole transfer treated as fraudulent 30 Mad 6, Followed) ** AIR 1918 Mad 377 (378) (DB) ** AIR 1915 Mad 82 (82) ** (1913) 24 Mad LJ 266 (269) (DB) ** (1909) 4 Ind Cas 1140 (1140) (Mad) (30 Mad 6, Followed) ** 1930 Mad WN 1145 (1148) (DB) ** (1910) 33 Mad 334 (339) (DB). (30 Mad 6, **Distinguished.**)

3. 1944 Mad LR (Civ) 38 (DB) (Mortgage for a consideration which is partly fictitious and partly made up of a true money debt due to the creditor — Transaction should be set aside as a whole) ** AIR 1941 Cal 378 (383) ILR (1941) 1 Cal 536 ** AIR 1941 Mad 690

to a third party (4). But the following views also have been expressed

(1) Where a transfer is really supported by consideration to the extent of debts due already to the transferee, the transfer *to that extent* is not fraudulent at all, but is fraudulent only as regards the other portion.

The transaction must, therefore, be upheld to that extent (5)

(2) Where a transfer is supported partly by consideration to the extent of unsecured debts due to the transferee a *charge* may be declared on the property transferred for such amount although the transfer itself is set aside as fraudulent (6)

(3) If part of the consideration consists in the discharge by the transferee of a prior *incumbrance* on the property transferred, the transferee can be given a charge thereon for such amount.(7)

The first of these three views has not been followed and it is submitted is not correct As has been pointed out in *Sama Rao v Doraisami Chettiar*,(8) if a deed of transfer is intended to defeat or delay the creditors of the transferor, it cannot be separated into parts one of which is honest and the other fradulent

The second view does not also seem to be correct A transferee who has no charge for a debt due to him cannot be allowed to get an advantage by taking a fradulent transfer and claiming a *charge* for an amount for which he had no charge before

The third view is, however unexceptionable The declaration of the charge under such circumstances is merely giving effect to the principle of subrogation under which a person paying off an incumbrance on property stands in the shoes of the person whose incumbrance was discharged

16. Transfer taken in good faith and for consideration.

The second paragraph of the section corresponding to the last paragraph of the old section merely reproduces in substance the English law It saves from the operation of the first paragraph transfers taken in good faith and for consideration (1) In other words a mere fraudulent intent on

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(693) ** AIR 1939 Bom 508 (513) ** AIR 1930 Lah 1027 (1029) 12 Lah 194 (DB) ** AIR 1919 Bom 99 (100) 43 Bom 707 (DB) ** (1913) 18 Ind Cas 768 (769) (DB) (Mad) ** (1912) 17 Ind Cas 602 (603) (DB) (Mad)

4. AIR 1932 Lah 174 (176) 12 Lah 763 (DB) ** AIR 1931 Mad 5[illegible] (Transferee gets mortgage money only and not money debts of transferor discharged by him) ** AIR [illegible] Nag 83 (86)

5. (1908) 35 Cal 1051 (1057) (DB)

[See AIR 1943 Nag 129 (136) : ILR (1943) Nag 42 (DB)]

6. AIR 1936 Pesh 216 (216)

7. AIR 1941 Mad 690 (691) ** AIR 1934 Mad 587 (592) ** AIR 1933 Rang 91 (193) (Payment by transferee of revenue and encumbrances) ** AIR 1931 Mad 513 (519) ** AIR 1927 Mad 278 (279) (DB) ** AIR 1916 Mad 649 (650) (DB) ** 1916 Mad WN 1145 (1148) (DB) ** (1910) 33 Mad 334 (339) (DB).

[See AIR 1942 Mad 751 (753) (DB) (Part of consideration for the transfer attacked is fraudulent consisting in the discharge by the transferee of prior charge - Although the Court has granted equitable relief to such a person whose hands have not been altogether clean, yet the Court will not grant to the transferee who has been the prime mover in the committal of fraud on another's creditors 33 Mad 334, Referred)]

[See also AIR 1939 Mad 745 (749) (DB)]

8. (1913) 18 Ind Cas 768 (769) (DB) (Mad). (Per Sadasiva Aiyar, J.)

Section 53 — Note 16

1. AIR 1928 Pat 199 (200) (DB) (It is no part of the duty of the purchaser to see what is done

the part of the *transferor* to defeat or delay the creditors will not avoid the deed if the transferee has acted *bona fide* and paid consideration for the transfer **(2)** In spite of the presumption arising under Section 7 of the Madras Indebted Agriculturists Repayment of Debts Act I of 1965 if the transferee establishes that he is a transferor in good faith and for consideration the transfer cannot be avoided **(3)**

But the existence both of *good faith* and payment of *consideration* are essential conditions for saving the transfer from the liability of being avoided **(4)** The question of consideration and the question of good faith are not the same and the mere fact of payment of consideration does not necessarily establish good faith regardless of other circumstances **(5)**, though it may be an *ingredient* in showing showing good faith **(6)** and may shift the *onus* of proof of bad faith on to the person

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with the purchase money) ** (1903) 5 Bom LR 255 (257) ** (1919) 88 LJ KB 679 (683) (1919) 1 KB 583 (591). (Denny's Trustee v Denny ** (1881) 51 LJ Ch 154 (157) : 20 Ch D 389 (396). Golden v Gillam, In re Johnson ** (1877) 46 LJ Ch 729 (734) , 6 Ch D 29 (39 40) Kevan v Crawford ** (1861) 158 ER 333 (335) 30 LJ Ex 355, Darvill v Terry ** (1845) 115 ER 724 (725) 7 QB 892 Wood v Dixie ** (1840) 173 ER 991 (992) 9 Car & P 640 Riches v Evans ** (1817) 56 ER 386 (393) 2 Mad 410. Copis v Middleton ** (1601) 76 ER 809 (814) : 1 Sm LC 1, Twyne's case.

2. AIR 1959 Andh Pra 280 (288) (DB) ** (1972) 38 Cut LT 1323 ** 1955 Raj LW 316 (317) AIR 1955 NUC 2545 ** AIR 1945 All 42 (45) ILR (1944) All 737 (DB) (Where a person makes a real transfer the plea of fraudulent transfer cannot succeed unless it can be shown that the transferee had entered into a conspiracy with the debtor to defeat or delay his creditors The Court cannot deprive an innocent transferee for value on the ground that the transferor had been dishonest) ** AIR 1939 Bom 508 (512) ** AIR 1936 All 663 (664) (DB) (If the transferor alone had an intention to defraud the creditors and the transferee did not share the intention he would be a transferee in good faith and for consideration and his rights would not be impaired by S 53) ** AIR 1932 Rang 13 (14) 9 Rang 614 (DB) (Where the transferee pays what is the fair value of the property presumption is that transaction is *bona fide*) ** AIR 1926 Oudh 469 (470) ** AIR 1920 Oudh 182 (185) ** AIR 1917 Pat 448 (450) 2 Pat LJ 546 (DB) ** AIR 1917 Low Bur 124 (124) (DB) ** AIR 1916 Cal 349 (351) (DB) ** (1909) 31 All 170 (172) (DB) ** (1907) 34 Cal 999 (1017) (DB) (Where however the transferee is himself a creditor, he occupies a more favoured position) ** (1903) 5 Bom LR 213 (214, 215) (DB) ** 1897 Bom PJ 315 (DB) ** (1889) 13 Bom 434 (438) (DB) ** (1886) 1 CPLR 63 (64) ** (1884) 1 CPLR 59 (60) ** (1862-63) 1 Hyde 178 (191, 192) Tarrucknauth Paulit v Gladstone ** (1911) 12 Ind Cas 401 (403) (Oudh) (If transferee acts in good faith fraudulent intention of the judgment-debtor alone is not sufficient to avoid the transfer) ** (1910) 5 Ind Cas 179 (180) , Mo (1913) 17 Cal LJ 209 (215) (Purchase of property by B benami for A to shield it from creditors — B executing sham mortgage to C — C obtaining collusive decree and executing the same — D purchasing at auction in good faith — A cannot enforce his title against D.)]

3. AIR 1968 Mad 256 (259, 260) : (1968) 1 Mad LJ 513.

4. 1955 Raj LW 316 (317) AIR 1955 NUC 2545 ** **AIR 1914 PC 137 (139) : 37 Mad 227** ** AIR 1937 Oudh 349 (351) (DB) ** AIR 1930 Lah 1027 (1029) 12 Lah 194 (DB) ** AIR 1927 Mad 278 (280) (DB) (Consideration means the whole consideration recited in the document of transfer) ** AIR 1927 Cal 766 (767) (DB) ** (1907) 34 Cal 999 (1013 (DB)

5. AIR 1937 Oudh 349 (351) (DB) ** (1903) 5 Bom LR 213 (215 216) (DB)

6. **(1864) 1 Suth WR 319 (320) (SB).** (Case before T. P Act) ** AIR 1932 Rang 13 (15) : 9 Rang 614 ** (1882) 51 LJ Ch 154 (156) 20 Ch D 389 Goloden v Gillam, In re Johnson

[See also AIR 1937 Rang 51 (52) (DB) (Property attached in execution — Daughter of judgment-debtor executing promote for decretal amount and getting sale deeds of released property — Decree-holder subsequently obtaining another decree against same judgment-debtor — Previous sale could not be set aside as fraudulent and collusive.)]

impeaching the transfer (7). In many cases the payment of consideration may be proved and yet the object and purpose of the transfer may be to defeat and delay creditors (8). It therefore follows that the payment of consideration alone is not sufficient if there is no good faith on the part of the transferee (9). Similarly, the existence of good faith on the part of the transferee is alone not sufficient if there is no consideration for the transfer (10). The mere fact that the transferee paid consideration will not be sufficient if he helped the transferor to convert his land into cash with intent to avoid the demands of his creditors.(11) However, the care that the law asks of a purchaser in good faith is that of an average purchaser and not a legal expert, who wants to insure against every possible future controversy. It is sufficient if the purchaser makes enquiry about the title and about the occasion for the sale and has no knowledge of any circumstances like indebtedness that might suggest a motive for transfer.(12)

The vendees in the instant case knew that there was dispute pending between the vendor and third person in respect of the property proposed to be sold and thus the title of the vendor was under cloud and defective. Thus the vendees could not claim that they were bona fide purchasers for value and consideration without having notice of defective title of the vendor (13).

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7. AIR 1923 Nag 17 (18) ** (1882) 51 LJ Ch 154 (156) : 20 Ch D 389. Golden v. Gillam. In re Johnson.

8. (1882) 51 LJ Ch 154 (156) : 20 Ch D 389. Golden v. Gillam. In re Johnson ** (1913) 36 Mad 29 (31).

9. AIR 1914 PC 137 (139) : 37 Mad 227 ** (1864) 1 Suth WR 319 (319, 320) (SB) (Case before Transfer of Property Act — A sale by a husband to his wife may be collusive and a fraud on his creditors, notwithstanding the fact that the wife paid the price from her own funds.) ** 1955 Raj LW 316 (317) : AIR 1955 NUC 2545 ** AIR 1941 Cal 378 (381) : ILR (1941) 1 Cal 536 ** AIR 1937 Oudh 349 (351) (DB) ** AIR 1936 A[illegible] 66 (664) (DB) ** AIR 1926 Mad 624 (624) ** AIR 1926 Lah 167 (168) : [illegible] Lah 12 (DB) (Payment of debts takes precedence over a right of maintenance.) ** AIR 1919 Cal 773 (775) (DB) : AIR 1918 Cal 82 (85, 86) (DB) ** (1908) 11 Oudh Cas 197 (204) (DB) ** (1907) 34 Cal 999 (1013) (DB) ** (1903) 5 Bom LR 213 (215) (DB) ** 1901 Pun Re No. 6 p. 18 (25, 26) (This was so even under 13 Eliz. Cap. 5.) ** (1887) 11 Beav 66[illegible] 676 (DB) : [illegible] 38 LJ Ch 543 (545) : LR 8 EQ 46. Balmer v. Hunter ** (1888) 5 LR 25[illegible] : 4 Moo PC 121 (136). Corlett v. Radcliffe. (A deed of transfer is void against creditors when the debtor is in a state of insolvency or the effect of the deed is to leave the debtor without the means of paying his present debts.) ** (1859) 45 ER 233 (235) : 4 De G & J 600. Thompson v. Webster ** (1856) 26 LJ Ch 179 (181) : 3 K & J 90. Holmes v. Penny ** (1852) 22 LJ Ch 1066 (1068) : 10 Hare 81. Harman v. Richards ** (1913) 36 Mad 29 (31) ** (1910) 13 Oudh Cas 265 (276, 281) (DB) ** (1776) 98 ER 117 (1[illegible]) : Cowp 432. [illegible] v. Kennett ** (1601) 76 ER 809 (814) : 3 Co Rep 86, Twyne's case.

[See also 1887 All WN 52 (53) (Because the transaction [illegible] relieving one particular creditor, it cannot be said that the transaction was entered into with the intention of defeating or delaying creditors.) ** (1869) 5 Mad HCR 368 (371) (DB) ** (1853) 65 ER 98 (112) : 1 Sin & G 228 (256). Colombine v. Penhall. (Marriage as a part of scheme to defeat creditors is not in good faith.) ** (1926) 95 LJP 83 (85) : 1926 P 93. Jagger v. Jagger (Do.) ** (1864) 70 ER 807 (811) : 1 J & H 4[illegible]. Ataman v. Cube[illegible]

10. (1601) 76 ER 809 (815) : 1 Sm LC 1. Twyne's case.

11. AIR 1934 Mad 587 (592) ** AIR 1932 Rang 13 (14) : 9 Rang 614 (DB) ** AIR 1930 Mad 665 (667, 668) ** AIR 1926 Nag 494 (494) ** (1907) 34 Cal 999 (10[illegible]2) (DB) ** (1893) 16 Mad 397 (399) (DB) ** (1911) 10 Ind Cas 922 (924) (Low Bur) ** (1910) 33 Mad 334 (336, 339) (DB).

[See also (1913) 18 Ind Cas 332 (333) (DB) (Mad).]

12. 1979 All LJ 1302 : 1979 All WC 597.

13. 1998 (3) Rec Civ R 395 (428) (Punj and Har)

Where it is specifically and clearly mentioned in the body of the sale deed that entire consideration was already received by executants, the sale deed cannot be said to be fraudulent one **(14)**

It is to be noted that the good faith contemplated by the exception is good faith on the part of the *transferee* and not of the transferor **(15)** for if the transferor acted in good faith even the first paragraph of the section will not apply, and the second paragraph cannot come into operation unless the transfer is made by the transferor *with intent* to defraud the creditors **(16)**

If from an executor operating under probate later revoked, a bona fide purchaser takes property of the deceased without any notice of any fact, which gives the purchaser the notice of possibility of defeating the interest of another person, whether taking under will or possible intestacy and if the purchaser also pays valuable consideration, and is in substance a bona fide third party acting on the grant by placing reliance on the seal of the Court from where it is issued, the purchaser shall be protected.**(17)**

17. Consideration.

Under the English Statutes, 13 Eliz , Chaps 5 and 27 Eliz Chap 4, the words "good consideration" were used But this was interpreted to mean only *valuable* consideration and not a meritorious or gratitous consideration such as natural love and affection **(1)** Under this section also "consideration" means valuable consideration **(2)** Under S 25 of the Contract Act an agreement made on account of natural love and affection is not one for "consideration " A transfer in consideration of natural love and affection is not a transfer for "consideration" within the meaning of this section **(3)** A *time-barred debt*, under the said section of the Contract Act, is also not a "consideration" A transfer, therefore, in discharge of a time barred debt cannot be a transfer for consideration within the meaning of this section A contrary view has, however, been taken in the undermentioned case **(4)** It is submitted that it is not correct.

A trust deed executed to pay the creditors and to avoid the Court of Wards taking over the estate is not a transfer for consideration, though it may be valid if there is no intention to defeat and delay the creditors **(5)**

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14. 2002 (1) JCR (JHA) 188 (189)

15 AIR 1951 Trav-Co 55 (61) ** AIR 1928 All 29 (32) (DB) (Co sharer effecting fraudulent partition — *Bona fide* purchaser for value of share completely protected) ** (1896) 66 LJ QB 111 (115), 75 LT 166 3 Manson 226 In re Tetley Ex parte Jeffrey '

16. AIR 1938 Sind 215 (216) : ILR (1939) Kar 136 (DB).

17. 2000 (2) Cal HN 641 (656)

Section 53 — Note 17

1. (1843) 49 ER 1006 (1010, 1011) 13 LJ Ch 186, Richardson v Horton (Marriage is a valuable consideration) ** (1817) 56 ER 386 (393) 2 Madd 410 Copies v Middleton ** (1786) 29 ER 1165 (1166) 1 Cox 277 Earl of Salisbury v Cecil ** (1758) 28 ER 647 (648) 1 Eden 166, Partridge v Gopp ** (1743) 26 ER 758 (759) 2 Atk 600 Taylor v Jones (Trust left to a husband) ** (1601) 76 ER 809 (822 823) 1 Sm LC 1 Twyne s case ** (1926) 95 LJ P 83 (85) 1926 P 93 Jagger v Jagger (Do) ** (1877) 46 LJ Ch 729 (734) : 6 Ch D 29 (39), Kevan v. Crawford. (Do.)

[See also (1867) 15 WR Eng 919 (920) Smith v Cherrill ** (1775) 96 ER 599 (600) 2 Wm Bl 1019, Goodright D Humphreys v Moses ** (1790) 30 ER 109 (111) 2 Cox 235 (240), Dundas v. Dutens. (Marriage is a valuable consideration.)]

2. (1900) 13 CPLR 180 (183)

3. See (1900) 13 CPLR 180 (183).

4. AIR 1930 Sind 284 (286) (DB).

5. AIR 1924 Oudh 80 (86, 87) 25 Oudh Cas 291 (DB) (There is no necessity to consult the creditors before the trust-deed is executed.)

In England it has been held that the existence of an antecedent debt is not a valuable consideration for the assignment by a debtor to his creditor unless, coupled therewith, there is evidence of an express or implied request on the part of the grantor, acceded to by the grantee, to forbear to sue or some other advantage which will be regarded a valuable consideration **(6)** But the law will presume, in the absence of any evidence, from the fact of the assignment itself, a promise by the assignee of a forbearance to sue.**(7)**

It has been held that marriage is in law consideration of the highest value and is therefore sufficient to support an ante-nuptial conveyance of property **(8)**

18. Transfer for dower.

A transfer for a dower is a transfer for *consideration* **(1)** The general rule of Muhammadan law is that a man can fix the dower at any amount he pleases even though it is far in excess of his means.**(2)**

A transfer in consideration of a dower debt due is a transfer in favour of a *creditor* and is merely a *preference* of one creditor over others **(3)** Such a transfer does not fall within this section See Note 20

19. Good faith.

A transferee cannot be said to have acted in good faith if he has participated in the frudulent intention of the transfer to defeat or delay his creditors **(1)** Where the transferee has *notice* of the frudulent intention of the transferor, that fact will be an element in arriving at a finding on the

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6. (1912) 81 LJ KB 334 (338) Glegg v Bromley (**Reversed** on another point in (1912) 81 LJ KB 1081) ** (1912) 81 LJ KB 1081 (1085) (1912) 3 KB 474 Glegg v Bromley

[But see (1879) 27 WR (Eng) 744 (744) 12 Ch D 314 Ex parte Games In re Bamford (Alton v Harrison, (1869) 17 WR (Eng) 1034), Followed, (1879) 27 WR (Eng) 492 **Reversed.)]**

7. (1912) 81 LJ KB 1081 (1085), (1912) 3 KB 474, Glegg v Bromley

8. AIR 1960 Mad 536 (537)

Section 53 — Note 18

1. AIR 1952 Nag 106 (110) ILR (1953) Nag 684 ** (1949) 28 Pat 97 (101) ** AIR 1927 Oudh 176 (176) (DB) (Provided wife had no knowledge of husband's prior debt)

2. See Mulla, Principles of Mahomedan Law 6th Edn 1919 p 174 and F B Tyabji Mahomedan Law 3rd Edn 1940 p 174 ** **(1894) 21 Cal 135 (139), 20 Ind App 144 (PC).** (But the Courts of Justice are armed with large powers over that class of contract)

[See (1865) 10 MIA 252 (276, 277) : 2 Suth WR 55 (PC).]

3. (1949) 28 Pat 97 (101) (DB) ** AIR 1941 Oudh 457 (462 463) 16 Luck 832 (DB)

Section 53 — Note 19

1. AIR 1936 Lah 286 (289 290) (DB) (Donee party to fraud perpetrated by donor — Gift held voidable at the instance of creditors) ** AIR 1935 Lah 404 (405) 16 Lah 680 (DB) ** AIR 1934 Lah 318 (319) (It is the knowledge ad intention of the transferee which is the determining factor as to the validity of the transfer) ** AIR 1930 Lah 1027 (1028) 12 Lah 194 (DB) (Even though consideration is shown to have passed in full) ** AIR 1929 Lah 1 (4, 5) 10 Lah 447 (DB) In order to avoid a transfer on the ground of fraud it must be established that the transferee had same fraudulent intention as the transferor) ** AIR 1929 Lah 409 (413) (DB). (Removing property from creditors for debtor's benefit must be proved even where transferee knows debtor's intention and property is not worth more than his debt) ** AIR 1927 Mad 278 (279) (DB) ** AIR 1926 Nag 293 (296) (An intention to defeat the creditors may well exist on the part of the vendor yet the sale will be valid unless the vendee was also a party to the fraud 27 Bom 322 and 20 Mad 465 followed, 22 Bom 255, **Distinguished.)** AI 1926 Lah 25 (26) (DB) In each case it is a question of fact as to whether or not the transferee has bought in good faith and without the

question of good faith on his part **(2)** But the mere fact that the transferee has some reason to suspect that there may be other creditors of the transferor.**(3)** or even the fact that the transferee may have knowledge that the transferor is in financial embarrassment **(4)** or that the transaction might defeat or delay some creditors of the transferor (so long as he does not share in the intention of the transferor),**(5)** does not necessarily import bad faith Where the transferee has paid consideration, that fact, though it is not necessarily conclusive of good faith,**(6)** will give rise to a presumption of good faith.**(7)**

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knowledge of the transferor's object in selling) ** AIR 1924 Lah 707 (709) (DB) (Father selling property to son — Consideration proved as passed — Son's good faith proved — Sale not void) ** AIR 1923 Lah 423 (424) 4 Lah 211 (DB) ** AIR 1923 Nag 17 (18) ** AIR 1923 Nag 103 (103) (In order to avoid a transfer under this section so far as the transferee is concerned it must be found that he participated in the intention of the transferor to defeat or delay the creditors) ** AIR 1919 Cal 773 (776) (DB) (Mere knowledge on the part of a purchaser that a sale may defeat or delay the creditors is not sufficient to negative the *bona fides* of a purchaser) ** AIR 1914 Lah 356 (358) (DB) (Transferee's participation in fraudulent intention not proved — Transfer upheld) ** 1937 Mad WN 1161 (1162) (DB) (It is not sufficient to show want of good faith on the part of the transferor alone the knowledge and intention of the transferee are the determining factors) ** (1909) 31 All 170 (172) (DB) ** 1901 Pun Re No 6 p 18 (25) ** (1900) 13 CPLR 180 (183 184) (In order to constitute breach of good faith there must be some active participation in the fraud some collusion between the transferor and the transferee whereby an unfair advantage is to accrue to either of them)

Note — As seen in Note 2a where the transferee has *agreed* with the transferor as regards the fraudulent purpose the transfer would be void under S 6(h) of this Act and S 23 Contract Act — It is only where the want of good faith on the transferee's part does not amount to his having *agreed* with the transferor as to the defrauding of the creditors that this section will apply

2. AIR 1960 Mad 536 (537) Marriage settlement transferring all property of indebted settlor — Grantee charged with notice of fraud) ** 1979 WLN 705 (708) (Raj) ** AIR 1923 Mad 558 (561) 46 Mad 478 (DB) (Purchaser failing to inquire from person who could have given him best information as to defect in the title is not a *bona fide* purchaser)

3. **AIR 1937 All 39 (41) : ILR (1937) All 153 (DB).**

4. AIR 1952 Sau 47 (48) (DB) (Mortgage for pre existing debt — Creditor aware of precarious financial position of debtor at time of mortgage — Plea of good faith can stand) ** **AIR 1947 Cal 154 (156) (DB).**

[**See also** AIR 1958 Mys 35 (38) ILR (1957) Mys 147 (DB) (Transferor in insolvent circumstances and under pressure from his creditors — Transferee having knowledge of these facts purchasing entire stock — Neither substantial contemporaneous payment made nor any promise to make such payment Transaction cannot be held to be one entered in good faith.)]

[**See however** AIR 1955 Pat 458 (467) 34 Pat 440 (DB) (Facts indicating transferee's knowledge of debts exceeding transferor's assets — Transferee cannot be said to have acted in good faith.)

5. AIR 1933 Rang 169 (172) ** AIR 1932 Rang 13 (14) 9 Rang 614 (DB) (Citing 24 Cal 825) ** AIR 1918 Cal 82 (85) (DB) (Payment of full consideration does not validate transfer if the transferee has full knowledge of the intention of seller to defraud creditors) ** (1897) 24 Cal 825 (828) (DB) ** (1874) 22 Suth WR 473 (474) (DB) (Purchaser is not bound to see to the application of the money) ** (1923) 71 Ind Cas 20 (23) (Peshi)

6. AIR 1927 Nag 166 (167) (Purchaser must have acted in good faith also) ** AIR 1921 Nag 103 (104) 17 Nag LR 69 (DB) ** AIR 1918 Cal 82 (85) (DB) ** (1907) 34 Cal 999 (1008, 1012, 1013) (DB) (Good faith as well as consideration are essential conditions of the validity of transfer, 24 Cal 825 relied on) ** (1897) 24 Cal 825 (828) (DB)

7. AIR 1952 Sau 47 (48) (DB) (Mortgage for pre-existing debt almost equal to the value of

When the property was purchased with the knowledge that it was hypothecated with Bank, S 53 would come into operation and the application by purchaser under O 21, Rr 58, 59 is liable to be rejected.(8)

Where the property was partitioned during pendency of sales tax proceedings and some of the families members sold the property coming to their shares to third parties, the said transfers being fraudulent, the third parties could not claim protection, the maxim caveat emptor applies (9)

See also the undermentioned cases.(10) See also Note 16

20. Preference of one cerditor over others.

Under the law relating to insolvency a preference by the debtor of one creditor over others, is, under certain circumstances, deemed fraudulent and void as against the Official Receiver or Official Assignee (1) Apart from the law of insolvency however, a preference by a debtor of one creditor over others is not *ipso facto* deemed fraudulent (2) The reason of the rule is stated by Palles, C B., in *In re Moroney* (3), as follows :

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the property — Creditor aware of precarious financial position of debtor — Plea of good faith can stand) ** AIR 1928 Pat 199 (201) (DB) (Full consideration not paid — No ground for holding deed fraudulent) ** (1900) 13 CPLR 180, 183 (If a transfer is for valuable consideration the burden of proving that it was not made *bona fide* is upon those who seek to set aside the deed.)

[See also AIR 1958 SC 1 (6). (An application by the Official Receiver for the annulment of a transfer under S 53 Insolvency Act can be allowed on proof of either that there was no consideration or that the consideration was so inadequate as to raise the presumption of want of good faith.)]

8. 1997 (2) Mad LW 925 (927)

9. 2001 AIHC 4649 (4658) (Mad)

10 AIR 1951 Trav Co 55 (62) 1950 TCLR 707 (DB) Whether transfer is one made in good faith must depend upon its own circumstances and is always in such cases a question of fact) ** 1979 All LJ 1302 (1303) 1979 All WC 597 (Care that law asks of a purchaser in good faith is that on an average purchaser and not that of a legal expert ** (1977) 2 Mad LJ 431 (438) 90 Mad LW 543 (DB) (Question of good faith is necessarily a question of fact.)

Section 53 — Note 20

1. See Section 54 of the Provincial Insolvency Act 1920 S 56 of the Presidency Towns Insolvency Act S 44 of the English Bankruptcy Act 1914 ** AIR 1963 SC 1150 (1156) ** (1963) 2 Andh LT 224 (227) ** AIR 1955 NUC 5365 (1955) 2 Mad LJ 380 (381) ** AIR 1940 Pat 683 (690) 19 Pat 715 ** AIR 1933 Mad 653 (654, 655) (Provincial Insolvency Act, S 54 Transfer of whole of property to one creditor not only to secure past debts but also fresh loans — Transfer is voidable)

2. AIR 1963 SC 1150 (1156) ** AIR 1944 Nag 44 (52) ILR (1944) Nag 342 (FB). (In order to attract S 53 when the transferee is the creditor of the transferor it is not enough that there should be a real transfer and that it should be intended to defeat or delay the creditors, nor it is enough that both transferor and transferee share that intention It must be shown in addition that the real object of the transfer is to place the property beyond the reach of the creditors for the benefit of the debtor and is not for the payment of his debts or for the protection of his interests) ** AIR 1972 Mad 34 (35) (1971) 2 Mad LJ 292 (DB) ** AIR 1967 Ker 171 (172) (Transfer cannot be annulled unless it is established that it was intended to defeat or delay creditors of transferor) ** AIR 1966 Andh Pra 157 (158) (1966) 1 Andh WR 374 (DB) ** (1964) 1 Andh WR 79 (81) ** (1963) 2 Andh LT 224 (227) ** (1960) 73 Mad LW 195 (197) ** (1912) 81 LJ KB 1081 (1087) (1912) 3 KB 474, Glegg v Bromley ** (1912) 81 LJ KB 334 (338) Glegg v Bromley (Reversed on another point in (1912) 81 LJ KB 1081) ** (1909) 31 All 170 (172) (DB)

3. (1887) 36 WR (Eng) Dig 12 LR 21 Ir 27 (Cited in AIR 1915 PC 115)

"The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. It follows from this that security given by a debtor to one creditor upon a person of or upon all his property, although the effect of it or even the interest of the debtor in making it may be to defeat an expected execution of another creditor is not a fraud within the statute, because notwithstanding such an act the entire property remains available for the creditors or some or one of them and as the statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or affected."

These observations were approved by their Lordships of the Privy Council in *Musahar Sahu v. Hakim Lal* :(4)

"As matter of law" said Lord Wrenbury in delivering the judgment of the Board "their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving other unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts."

and later on

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid. *Middleton v. Pollock* (5) So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor, there being in the case no question of bankruptcy."

It follows from the principles stated above that—

(1) The mere fact that one creditor is preferred to another is not of itself, in the absence of any reservation of any benefit to the debtor, sufficient to render the transaction voidable.(6) and this

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4. AIR 1915 PC 115 (115, 116) : 43 Cal 521.

5. (1876) 45 LJ Ch 293 (294) : 2 Ch D 104

6. AIR 1929 PC 279 (281) : 56 Ind App 379 ** AIR 1976 SC 656 : 1977 UPTC 641 ** AIR 1944 Nag 44 (52) : ILR (1944) Nag 342 (FB). (When the transferee is not a mere volunteer and has an intrest to protect as for instance where he is a creditor of the transferor or a member of a joint family entitled to a share of the property it must be shown that the real object of the transfer is to place the property beyond the reach of the creditors for the benefit of the debtor, and is not for the payment of his debts, or for the protection of his interest.) ** AIR 1967 Ker 171 (173) 1967 Ker LT 810 ** AIR 1966 Mad 247 (252) ** AIR 1961 Mad 403 (404) ** (1960) 73 Mad LW 195 (197) ** AIR 1960 Punj 417 (418) (DB) ** AIR 1958 Mad 580 (582) ** AIR 1948 Nag 110 (115) ILR (1947) Nag 510 (DB) (A sale effected in order to pay off one creditor in preference to others is not invalid.) ** 1944 Mar LR (Civ) 38 (DB) (Security given by a debtor to one creditor upon a portion of or upon all his property although the effect of it or even the intent of the debtor in making it may be to defeat in expected execution of another creditor is not a fraud.) ** AIR 1943 Nag 129 (136) ILR (1943) Nag 42 (DB) ** AIR 1941 Cal 378 (382) ILR (1941) 1 Cal 536 (But where part of consideration for such transfer is proved to be fictitious and is put in the bond only to protect the transferor's property from his other creditors, the transfer is not a mere preference of one creditor over another but is one made to defeat and delay creditors within Section 53.) ** AIR 1939 Oudh 230 (231) 14 Luck 621 (DB) ** (1940) 42 Punj LR 385 (391) (DB) (Compromise with one of the creditors surrendering portion of property under pressure.) ** (1940) 42 Punj LR 119 (120) ** AIR 1939 Sind 97 (99) ILR (1939) Kar 269 (DB) (Section applies to transfers where the transferor prefers himself to his creditors.) ** AIR 1938 Sind 215 (216) ILR (1939) Kar 136 (DB) (AIR 1915 PC 115 Followed.) ** AIR 1929 Sind 94 (97) (Do.) ** AIR 1933 Pat 281 (283) 12 Pat 297 (DB) (Do.) ** AIR 1938 Bom 289 (290, 291) ILR (1938) Bom 445 (Do.) ** AIR 1937 Pat 609 (611) ** AIR 1938 Oudh 44 (44, 45) 13 Luck 655 (DB) (Transfer in favour

of wife for dower debt is valid.) ** AIR 1938 Nag 249 (250) ILR (1940) Nag 3,6 (Such transaction can be challenged only in insolvency proceedings.) ** AIR 1937 Lah 220 (222) (DB) ** AIR 1937 Nag 9, 11) ** AIR 1937 Nag 1 (3) ILR (1937) Nag 29 (DB) (Transfer by a Mohamedan to his wife for dower — Wife is his creditor just as others.) ** AIR 1937 Rang 531 (533) (The proper way to deal with such cases is to file a suit for administration.) ** AIR 1937 Rang 47 (471) ** AIR 1935 Mad 256 (25) (AIR 1915 PC 115 **Relied on.**) ** AIR 1934 Mad 294 (298) ** AIR 1934 Lah 318 (319) (DB) ** AIR 1934 Lah 705 (707) (A transfer of property by a Mahomedan husband to his wife in lieu of a dower debt.) ** AIR 1933 Rang 162 (164) ** AIR 1933 Mad 182 (184) (DB) (But the principle does not apply where the whole of the consideration of the transaction is not the debt of the preferred creditor — In such a case the whole transaction is void.) ** AIR 1932 Oudh 40 (42) 7 Luck 411 (DB) (Debts contracted by a husband must take precedence over a wife's claim for maintenance.) ** AIR 1932 Nag 33 (34) 27 Nag LR 182 ** AIR 1930 Rang 265 (268) 8 Rang 223 (DB) (Assignment by debtor of his decree to one creditor in preference to another is not invalid even if that creditor is a party to the intention.) ** AIR 1930 Lah 1027 (1028) 12 Lah 194 (DB) (Even if the creditor is his relation.) ** AIR 1930 Oudh 93 (94, 95) 5 Luck 625 (DB) (AIR 1915 PC 115. **Followed.** Even if the preference is given in anticipation of an attachment.) ** AIR 1929 Oudh 520 (521) 4 Luck 434 (DB) (Transfer in favour of wife for dower debt is valid.) ** AIR 1927 Oudh 617 (618) (Do.) ** AIR 1925 Oudh 267 (269) (Do.) ** AIR 1937 All 39 (41) ILR (1937) All 153 (DB) (Do.) ** AIR 1936 All 800 (805) (DB) (Do.) ** AIR 1936 All 600 (603, 607) (DB) (Do.) ** AIR 1929 Nag 3 (8) (9) ** AIR 1929 Lah 409 (4 3) (DB) ** AIR 1929 Nag 110 (111) ** AIR 1928 Mad 860 (864) (DB) (AIR 1915 PC 115 **Followed.**) ** AIR 1928 Mad 793 (793, 794) (DB) (However suspicious a transaction may be there must be evidence on which the fraudulent intention must be made out.) ** AIR 1927 Nag 363 (364) (Especially where the price fetched is not alleged or proved to be grossly inadequate.) ** AIR 1927 Nag 157 (157) (Mere undue preference of a creditor does not necessarily fall within S. 53.) (To determine whether a transaction is fraudulent or not the crucial test is the intention of parties.) ** AIR 1927 Nag 265 (265) (Principle applied to a sale of moveable property.) ** AIR 1927 Mad 684 (685) 50 Mad 776 (DB) (Assumed.) ** AIR 1927 Mad 278 (279) (DB) ** AIR 1927 Mad 1144 (1144) (DB) ** AIR 1927 Rang 168 (168) ** AIR 1927 Cal 836 (839, 840) 54 Cal 687 (Mortgage to one creditor on security of entire property held not fraudulent.) ** AIR 1922 Mad 447 (449) 45 Mad 90 (DB) ** AIR 1921 Pat 395 (396) (DB) (In this case transferee was wife.) ** AIR 1919 Cal 858 (859) (DB) (Mortgage in favour of one of the creditors.) ** AIR 1918 Nag 184 (185) (AIR 1915 PC 115. **Followed.**) ** AIR 1918 Oudh 5 (6) 21 Oudh Cas 97 ** AIR 1917 Mad 886 (886) (DB) ** AIR 1916 Mad 578 (578) (DB) (A transfer by a debtor for a genuine debt of a part only of his property is not voidable under S. 53.) ** AIR 1914 Oudh 392 (396) 17 Oudh Cas 73 ** 1908 Pun Re No. 8 (p. 381) (383) (DB) ** (1907) 17 Mad LJ 11 (13) (DB) ** (1907) 34 Cal 999 (1015) (1017) (DB) ** (1904) 28 Bom 639 (642) ** (1903) 5 Bom LR 142 (144) (DB) ** (1902) (1903) 2 Upp Bur Rul Civ Pro 15 (17) ** (1901) All WN 64 (65) (DB) (Transfer in favour of wife for dower debt is valid.) ** (1900) 13 CPLR 180 (185, 186) ** (1900) 25 Bom 202 (214) (DB) ** (1900) 23 Mad 184 (189) (DB) (But where a document given by way of security gives further and secures debts not due the effect is to delay or to defeat the creditors.) ** (1887) Bom 666 (674) (DB) (The fact of one creditor being the brother of the debtor would not make the preference impossible.) ** (1886) 8 All 178 (180) (DB) (Do.) ** (1874) 2 NWPHCR 224 (225) (DB) ** (1869) 1 NWPHCR 21 (22) (DB) ** (1839) 43 (1) WN 1136 (1138) (DB) (AIR 1915 PC 115 **Relied on.**) ** (1937) 2 Mad LJ 865 (867) (DB) ** (1937) 168 Ind Cas 695 (695) (Lah) ** (1936) 162 Ind Cas 749 (750) (Nag) ** (1919) 20 Ind Cas 355 (357) (DB) (Lah) (Question arose as regards decree passed on awards in favour of one creditor.) ** (1913) 36 Mad 29 (30) ** (1913) 20 Ind Cas 349 (350) (DB) (Low Bur.) ** (1911) 9 Ind Cas 1037 (1038) (DB) (Lah) ** (1910) 5 Ind Cas 179 (180) (All) ** (1910) 33 Mad 334 (337) (DB) (But the burden of proving this where the sale appears otherwise to be voidable is on the defendant transferee.) ** (1925) 95 LJ Ch 140 (143, 144) (1925 Ch 853 (860) In re Lloyd's Furniture Palace Ltd. Evans v. The Com

would be so even if the debtor did this on set purpose.**(7)** The fact that the debtor favours a creditor by effecting transfer in favour of a non-creditor and paying the consideration to the creditor, would not make any difference **(8)** A debtor, for all that is contained in this section, may pay his debts in any order he pleases and prefer any creditor he chooses.**(9)**

(2) The question of *good faith* does not ordinarily arise in the case of the preferred creditor A creditor is entitled to safeguard his rights by obtaining a transfer from his debtor even *if he knew* that the necessary result would be that other creditors would be defeated.**(10)** Thus, transfer of building in favour of the wife in consideration of her outstanding loan against the husband could not be avoided though it amounted to preference of one creditor over other.**(11)**

(3) But where the transaction, in addition to its being a preference of one creditor to another is intended to *benefit the debtor* in some way, it would be fraudulent **(12)** Thus, a transfer even to a creditor has been held to be a fraudulent one under the section where the document beyond merely

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pany ** (1869) 38 LJ Ch 669 (671) 4 Ch 622, Alton v Harrison ** (1852) 68 ER 826 (832) 10 Hare 30 22 LJ Ch 289, Smith v Hurst ** (1793) 101 ER 236 (239) 5 Term R 420, Estwick v Caillaud ** (1793) 101 ER 132 (134) 5 Term R 225 Holbird v Anderson **(1699) 24 ER 51 (51) : 1 Eq Cas Abr 149, Dewkner v. Freeman.**

[**See also** AIR 1937 Nag 400 (401) ILR (1937) Nag 452 (Transfer by debtor to one creditor for adequate consideration — Whole consideration spent in satisfaction of debtor's dues without leaving anything for his benefit — Transfer is not fraudulent) ** AIR 1927 Nag 166 (167)]

7. **AIR 1916 PC 238 (240) : 44 Cal 662** ** (1960) 73 Mad LW 195 (197) (Transfer made to avoid an impending execution by another creditor) ** AIR 1947 Cal 154 (155) (DB) ** AIR 1943 Nag 129 (136) ILR (1943) Nag 42 (DB) ** AIR 1941 Oudh 457 (463) 16 Luck 832 (DB) (A Mahomedan gifting property to wife in lieu of her dower debt) ** AIR 1938 Lah 156 (158) (DB) (The circumstance that the debtor's action was prompted by revenge against the creditor who got him imprisoned was irrelevant) ** AIR 1924 Mad 450 (453) (DB) ** (1861) 158 ER 333 (334) 6 H & N 807, Dorvill v Terry ** (1925) 95 LJ Ch 140 (143, 144) 1925 Ch 853, In re Lloyd's Furniture Palace Ltd , Evans v The Company.

8. AIR 1973 Mad 222 (228, 229) (1973) 1 Mad LJ 116 (DB)

9. **AIR 1916 PC 238 (240) : 44 Cal 662 ** AIR 1981 SC 1556 1561, 1562) : 1981 UJ (SC) 578** (Trust property consisting of income from companies share dividends - Beneficiaries, trustees under trust deed — Assignment of trust property to two creditors — Notice of assignment given by first creditor to trustee He will have priority in receiving trust income — His failure to notify companies, not material) ** **AIR 1944 Nag 44 (52) : ILR (1944) Nag 342 (FB)** ** (1960) 73 Mad LW 195 (197) ** AIR 1939 Bom 508 (512) ** AIR 1938 Oudh 44 (45) · 13 Luck 655 (DB) (Wife as a creditor for dower debt was preferred) ** AIR 1930 Lah 1027 (1028) 12 Lah 194 (DB) ** 1925 95 LJ Ch 140 (143) · 1925 Ch 853 (861) In re Lloyd's Furniture Palace Ltd , Evans v The Company

[**See also AIR 1929 PC 279 (281) : 56 Ind App 379** (AIR 1915 PC 115, Followed)]

10. AIR 1943 Nag 129 (136) ILR (1943) Nag 42 (DB) ** AIR 1937 Rang 471 (471) ** AIR 1934 Lah 161 (162) ** AIR 1934 Mad 587 (592) ** AIR 1930 Mad 665 (667, 668) ** AIR 1927 Mad 278 (279 280) (DB) ** AIR 1914 Low Bur 180 (182) (In his case a proof of valuable consideration is sufficient.)

11. **AIR 1972 Raj 67 (68) : 1971 WLN 289 (DB).**

12. **AIR 1919 PC 6 (9) : 15 Nag LR 68 ** AIR 1944 Nag 44 (52) : ILR (1944) Nag 342 (FB).** (Partition between members of joint family — A, a member, was assigned properties which A's creditors would not be able to touch and which A would be able to keep for himself — Properties against which A's creditor could proceed before partition given to B — **Held**, A retained a benefit for himself and therefore partition was liable to be set aside at the in-

preferring a creditor, goes further and secures debts *not due* **(13)** or states a consideration larger than the debt due to the creditor on the understanding that the rest of the consideration should be for the benefit of the debtor and that the transfer should be used as a shield against the other creditors.**(14)**

See also the undermentioned case.(15)

The principle that a transfer to a creditor in preference over another or others is not, unless it secures a benefit to the debtor, bad, applies only where the creditor takes the transfer for his *pre-existing* debts. It will not apply to a case where the transferee becomes a creditor for the first time by advancing money to the debtor *at the time* of the transfer **(16)**

21. Transferee from a transferee.

Where the first transferee is a *bona fide* transferee for consideration, he gets a good title and even a fraudulent transferee from such transferee will be protected **(1)** A *bona fide* transferee from a fraudulent transferee would also be protected **(2)** Where, however, fictitious mortgage was ex-

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stance of A's creditors.) ** (1956) 2 All ER 537 (544) ** AIR 1943 Nag 129 (131, 136) ILR (1943) Nag 45 (DB). Sale to one creditor with a clause of reconveyance after other creditors settled their claims — Arrangement is not illegal but might be attacked under S. 53 because it could be argued that the debtor had retained a benefit for himself.) ** AIR 1939 Bom 508 (512, 513). (In such a case assignment should not be upheld even to the extent of amount which was actually due to creditor.) ** AIR 1939 Mad 745 (749, DB) ** AIR 1929 Lah 409 (413) (DB) ** AIR 1928 Mad 793 (793, 794) (DB). (Fraud must be distinctly alleged and proved by the creditors.) ** AIR 1924 Nag 318 (3, 9) ** (1907) 34 Cal 999 (1018, DB) ** (1923) 92 LJ Ch 400 (407, 408). (1933) 2 Ch. In Cases. Ex parte Trustees ** (1876) 45 LJ QB 498, 499. (PD) 265. Blackstock v. Dobie ** (1878) 45 LJ Ch 293 (294, 295). 2 Ch D 104. Middleton v. Pollock. Ex parte Elliott ** (1869) 38 LJ Ch 669 (67.) 4 Ch 692. Aston v. Harrison ** (1852) 68 ER 826 (832). 10 Hare 30. Smith v. Hurst. (Creditor becomes a party to the fraud of the debtor and being a party to this fraud he cannot be in any better position than the debtor who has perpetrated it.) ** (1913) 20 Ind Cas 349 (350) (DB). (Low Bur.) ** (1910) 5 Low Bur Rul 195 ** (1601) 76 ER 809 (814) **3 Coke Rep 86, Twyne's case.**

13. (1960) 73 Mad LW 195 (197). (Fictitious debt.) ** AIR 1941 Cal 378 (382). ILR (1941) 1 Cal 526 ** (1900) 23 Mad 184 (189) (DB). (Inclusion of such debts in a document which would otherwise not be within the section is prima facie evidence of an intention to defeat **or delay the creditors.)**

14. (1960) 73 Mad LW 195 (197). (So also sale of land more than is necessary to satisfy the debt enables the debtor to keep property out of reach of creditors.) ** AIR 1932 Mad 182 (184) (DB). (In such cases whole document must be set aside.) ** AIR 1927 Mad 7[illegible] (726) **(DB) ** (1910) 5 Low Bur Rul 195 (197)**

15. AIR 1933 Rang 191 (192). (Absence of cash or any proved prior consideration and absence of pressure from transferee — *Prima facie* transfer is voidable.) ** 1975 MPLJ 556 **(DB).**

16. AIR 1935 Lah 404 (406) : 16 Lah 680 (DB).

[See also AIR 1933 Mad 653 (654, 655). (Transfer of whole property not merely for existing debts but also fresh loans advanced — Transfer is voidable under S. 54 Provincial **Insolvency Act.)]**

Section 53 — Note 21

1. See (1738) 26 ER 359 (359) : 1 Atk 571. Brandlyn v. Ord.

2. AIR 1940 Lah 198 (199) ** AIR 1938 Lah 73 (75). ILR (1938) Lah 439. (Fraudulent transfer by insolvent in favour of his wife more than two years before his adjudication — B purchasing property in execution of mortgage decree against her — Application by Official Receiver to avoid transfer — Transfer in favour of B stands.) ** AIR (1936) Lah 286 (289) DB) ** AIR 1930 All 438 (439, 440). (Person whose claim is defeated is estopped

ecuted by *A* in favour of *B* in order to defeat the creditor of *A* and *B* assigned his rights under the mortgage in part satisfaction of her dower debt, to his wife *C*, who had no knowledge of the fictitious nature of the mortgage, it was held that as *B* acquired no interest at all by the mortgage in his favour the last paragraph of the old S 53 would not help *C* (3)

22. Questions of intent and good faith are questions of fact.

The question with what intent a document was executed(1) or whether the transferee acted in good faith and without knowledge of the transferor's fraudulent intention(2) is generally one of fact, but may be a question of law(3) or a mixed question of law and fact(4) if it involves legal inferences to be drawn from other facts See also the undermentioned cases (5)

23. Frame of suit under the section.

A suit under this section is one for a *declaration* under S 42 of the Specific Relief Act, 1877, that the transfer by the debtor is not binding on the creditors It is not a suit for cancellation of the

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in equity from denying such third person's title) ** AIR 1929 Lah 1 (4) 10 Lah 447 (DB) ** AIR 1928 All 29 (31, 32) (DB) ** AIR 1923 Mad 558 (560) 46 Mad 478 (DB) ** 1864 Suth WR 225 (225) (DB) ** (1916) 85 LJ Ch 677 (681) (1916) 2 Ch 544, Pearce v Bulteel ** (1891) 60 LJ Ch 181 (185) (1891) 1 Ch 31 (39) Halifax Joint Stock Banking Co. v Gledhil ** (1805) 127 ER 492 (493) 1 Bos & PNR 332 Deo v Martyr

[See also AIR 1924 Mad 67 (69) (DB) (Person with voidable title can give good title to the transferee — See S. 8 of the Transfer of Property Act.)]

3. (1908) 30 All 297 (308)

Section 53 — Note 22

1. AIR 1965 Mad 337 (338) ILR (1965) 1 Mad 691 (Finding on the question is conclusive in second appeal) ** AIR 1948 Nag 110 (115) ILR (1947) Nag 510 (DB) (Finding that sale was not fraudulent and not made to defeat or delay creditors is one of fact and binding in second appeal in absence of any vitiating circumstance) ** AIR 1942 Mad 522 (523) (Whether alienation was in fraud of creditors is pure question of fact — Finding is conclusive in second appeal) ** (1921) 63 Ind Cas 169 (170) (DB) (Cal) (Do) ** AIR 1939 Oudh 230 (231) 14 Luck 621 (DB) ** AIR 1926 Oudh 501 (502) ** AIR 1920 Lah 24 (25) ** (1907) 30 Mad 6 (9) (DB) ** (1928) 107 Ind Cas 490 (491) (DB) (Lah) ** (1911) 9 Ind Cas 1018 (1018) (Lah) (Hence they cannot be disturbed by the High Court on the revision side.)

[See also (1889) 18 Bom PJ 37 (DB).]

2. AIR 1926 Lah 25 (26) (DB) ** (1977) 2 Mad LJ 431 (438) 90 Mad LW 543 (DB) ** AIR 1924 Lah 707 (709) (DB) ** (1901) 25 Bom 202 (228) (DB)

3. AIR 1939 Sind 97 (98) ILR (1939) Kar 269 (DB) ** AIR 1938 Sind 215 (216) ILR (1939) Kar 136 (DB) (Whether, for instance the possession is adverse or not whether a transfer is made with intent to defeat or delay within the meaning of S 53, are questions of law.) ** 1908 Pun Re No. 81, p. 381 (386) (DB).

4. AIR 1923 Nag 124 (125).

[See also AIR 1928 Pat 199 (200) (DB)]

5. **AIR 1944 Nag 44 (52) : ILR (1944) Nag 342 (FB).** (Where the lower appellate Court holds that a transaction is bogus and at the same time says that it can be set aside under this section, the High Court in second appeal is justified in declining to accept the finding as a proper finding of fact and is empowered to record its own conclusion) ** AIR 1943 Nag 129 (131) ILR (1943) Nag 42 (DB) (A finding that a transaction is unreal is inconsistent with a finding that the transaction amounts to a sale with a clause for reconveyance) ** (1928) 110 Ind Cas 868 (869) (Nag) (Facts warranting inference of bad faith — No explanation or contradiction by party — Conclusion indicated by the proof must be adopted)

document under S 39 of the Specific Relief Act **(1)** (See now Ss 34 and 31 of the Specific Relief Act of 1963) The reason is that the plaintiff is in such cases, not a party to the document and cannot obtain the *cancellation* of the document which may be good between the parties to it **(2)** It was, however, observed a *obiter* in the undermentioned Rangoon case **(3)** that the plaintiff in a suit under this section, must ask for the cancellation of the document under S 39 of the Specific Relief Act It is submitted that this view is not correct But even according to the Rangoon High Court where a suit is brought under O 21, R 63 of the Code of Civil Procedure, and a transfer by the debtor is attacked as a frudulent transfer under S 53 of the Transfer of Property Act, it must be regarded only as a suit for a bare declaration under S 42 of the Specific Relief Act **(4)**

A claim that the transfer is made to defraud the creditors in the alternative to the claim for declaration that the transfer is *non est* is maintained.**(5)** similarly, a creditor can assail a transfer as a fraudulent transfer under Sec 53 by attaching the transferred property in execution of his decree **without filing a regular suit (6)**

It is well settled that the attaching creditor need not file a separate suit under S 53 in a representative capacity to put forth his case, that the transfer was in fraud of creditors and that he is entitled to plead by way of defence in the claim proceedings In fact filing of a separate suit is barred after the Madras amended provisions of O 21 R 58 CPC **(7)**

See also the undermentioned cases **(8)**.

Section 53 — Note 23

1. AIR 1939 Mad 894 (896) ILR (1940) Mad 73 ** AIR 1969 Bom 66 (69) ** (1967) 8 Guj LR 946 : ILR (1967) Guj 735 (746)
2. AIR 1939 Mad 894 (896) ILR (1940) Mad 73 ** AIR 1930 Rang 27 (29) 7 Rang 477 (DB). **(Correctness doubted in AIR 1931 Rang 310)**

   [But see AIR 1941 Bom 65 (66) (DB) (Assumed that the Court could cancel the document — **Case was of moveable property))]**
3. **AIR 1931 Rang 310 (311) · 9 Rang 367**
4. AIR 1934 Rang 332 (333) 12 Rang 670 Suit by attaching decree holder under O 21 R 63 Suit for mere declaration lies — Court fee of Rs 10 is sufficient Value for court fee and jurisdiction would be different) ** AIR 1931 Rang 310 (311) 9 Rang 367
5. **AIR 1968 Punj 479 · ILR (1968) Punj 10 (DB)**
6. **AIR 1971 Punj 325 (326, 327) (DB).**
7. **2000 (1) Mad LW 713 (718)**
8. AIR 1963 Andh Pra 6 7) ILR (1963) Andh Pra 403 DB) (Execution of money decree against father — Pending execution partition decree passed — Objection by one of the son to attachment of property in his hands allotted by partition allowed Suit by decree holder under O 21 R 63 Civil P C challenging decree under S 53 T P Act is maintainable) ** ILR (1975) 1 Ker 621 (An attaching creditor who is defeated in a claim petition can still maintain a suit to establish his right to proceed against property by establishing that in spite of purported transfer the property is still owned by judgment-debtor) ** AIR 1973 Ker 125 (127) 1973 Ker LT 31 (Dismissal of suit of creditor under O 21 R 63 of C P C for setting aside order in claim petition — Fresh suit under S 53 in representative capacity under O 1 R 8 is maintainable) ** AIR 1962 Madh Pra 363 (364) (DB) (Plaint alleging that transfer was made for purpose of delaying the plaintiff and other creditors and has not the effect of binding the plaintiff — It also contains statement that it is filed on behalf of plaintiff and other creditors — Suit is clearly only under S 53 even though no mention of the section is made in the plaint) ** AIR 1962 Andh Pra 25 (29) (Decree obtained by creditor against debtor who has cerated a sham or collusive transaction Proper remedy for creditor would be to attach property in execution and file a suit for declaration that the transaction is not binding on him if any claim is allowed — He cannot file such suit directly whether by a resort to this section or S 42 Specific Relief Act -

24. Suit must be a representative one.

In England a creditor who has not secured a judgment on his debt has to sue on behalf of himself and of all the other creditors of the transferor.(1) But a creditor who has obtained a judgment on his debt may sue on his own behalf and not in a representative character (2)

In this country there was, in cases arising under the old section, a difference of opinion on the point (3) In some cases (4) it was held following the English law that a creditor should sue only in a representative character In others, that this was not necessary (5) In a third class of cases it was

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Remedy provided by S 39 is not also available to him) ** 1955 Raj LW 316 (317) (Creditor relying on alternative pleas namely that sale was made with intent to delay or defeat and also that it was fictitious He cannot be non-suited merely because he has failed to establish the latter plea) ** AIR 1954 Cal 440 (441) (DB) A suit in which the plaint does not aver that it is being filed on behalf of the plaintiff and all other creditors of the debtor cannot be regarded as one under this section) ** AIR 1953 Mad 545 (548) (Sale of property to defraud creditors — Fraud not carried out Sale is not void but voidable by transferor — Transferor cannot recover without getting sale deed set aside upon a mere declaration of his title) ** AIR 1926 Pat 404 (407) (DB) (Plaint by widow entitled to dower alleging that transfers by the husband were made with intent to defeat her claim and of the other creditors - Suit falls under S 53 and decree made in the suit has only the effect of declaring that the transfers were fraudulent — It has no effect of creating a charge in favour of the plaintiff widow) ** AIR 1918 Mad 225 (228) (DB) (Any creditor can avoid under this section a transfer by his debtor but his plaint must allege that the transfer was intended to defraud him and others similarly placed)

Section 53 — Note 24

1. Halsbury, Laws of England, Vol. 15, p. 89.
2. Halsbury, Laws of England, Vol. 15, p. 89.
3. See AIR 1940 Mad 789 (790) ILR (1940) Mad 808 (DB) (The conflicting cases have been referred to in this case)
4. AIR 1932 Bom 498 (504) 56 Bom 595 (DB) ** AIR 1921 Pat 53 (53) 60 Pat LJ 48 (DB) ** AIR 1918 Mad 697 (DB) (27 Bom 146 and 31 Mad 206 Followed) ** AIR 1914 Low Bur 180 (182) (Objection on this ground must be raised in first Court) ** (1907) 34 Cal 999 (1006) (DB) ((1932) Cal 198 32 Ind App 1 (PC) Explained) ** (1903) 27 Bom 146 (150) (DB) ** (1892) 16 Bom 1 (20)

   [See also AIR 1926 Pat 404 (407) (DB) (Plaint by widow entitled to dower alleging that transfers by husband were made with intent to defeat her claim and of other creditors - Suit falls under S 53) ** AIR 1918 Mad 225 (228) (DB) (Plaint must allege that transfer was intended to defraud the plaintiff and other creditors similarly placed) ** 1912 Pun Re No 74 (DB) (Decree-holder suing under O 21, R 63 for declaration - Suit must be on behalf of all creditors — Judgment-debtor becoming insolvent Decree passed declaring rights of all the creditors in the property)]
5. AIR 1931 Lah 70 (2) (71) 12 Lah 262 (DB) (Right under section is an individual right — But when exercised it enures for the benefit of the general body of creditors — AIR 1926 Mad 66 Foll) ** AIR 1928 Rang 1 (3) 5 Rang 588 (DB) (Attachment raised — Creditor suing under O 21, R 63 - Action need not be on behalf of other creditors — AIR 1919 Mad 257 followed) ** AIR 1926 Mad 66 (69, 72) (DB) (An individual right is conferred upon each creditor by S 53 of the T P Act and the inaction or laches or one creditor cannot deprive the others of their rights Consequently, the failure of one creditor to file a suit within 6 years under Art 120 of the Limitation Act does not debar the general body of creditors) ** AIR 1920 Nag 80 (81, 83) 16 Nag LR 3 (AIR 1919 Mad 257 Followed) ** AIR 1919 Mad 257 (258, 259) 42 Mad 143 (DB) ** AIR 1917 Mad 519 (522) (DB) (But the decree obtained would enure to the benefit of all creditors like himself — Per Seshagiri Ayyar, J) ** (1908) 11 Oudh Cas 197 (205) (DB) ** (1896) 18 All 432 (434) (DB).

held that a *judgment-creditor* whose attachment has been raised and who is under O 21, R 63 of the Code of Civil Procedure could bring his suit otherwise than in a representative character **(6)** In the undermentioned case.**(7)** Coutts-trotter J, expressed the opinion that a judgment-creditor who had not taken out execution could not invoke the provisions of this section at all In Lahore to which province this Act does not apply it was held that a suit by creditor should be brought in a representative capacity **(8).** The view that a suit under O 21, R 63 by a judgment-creditor whose attachment has been raised need not be in a representative character was followed in the undermentioned case **(9)** of the Peshawar Court.

The last paragraph of sub-section (1) now makes it quite clear that a suit by a creditor, whether he is a *judgment creditor* or not and whether he has or has not applied for execution of decree, to avoid a transfer executed with intent to defeat or delay the creditors shall be brought in a representative capacity that is to say, in accordance with the procedure prescribed by O 1, R. 8 of the Code of Civil Procedure **(10)**

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6. AIR 1959 Andh Pra 280 (284) (DB) ** AIR 1934 Rang 200 (201) (DB) (No reference was made to the present section AIR 1928 Rang 1, was simply followed ** AIR 1928 Rang 1 (3) : 5 Rang 588 (DB) **(AIR 1919 Mad 257, Followed)**

7. **AIR 1917 Mad 519 (520) (DB), (1838-3 Myl & Cr 407, Followed)**

8. AIR 1926 Lah 167 (168) 7 Lah 12 (It is not clear from the judgment whether the creditor **had obtained a judgment on his debt.)**

9. (1923) 71 Ind Cas 20 (22) (Pesh) (AIR 1919 Mad 257, Followed)

10. **AIR 1963 SC 1150 (1160)** ** (1975) 1 Mad LJ 236 ** AIR 1971 Orissa 156 (157, 158) (1970) 1 Cut WR 43 ** AIR 1963 Andh Pra 6, 71 ILR (1963) Andh Pra 403 (DB) ** AIR 1963 Guj 276 (276) (Suit to declare partition to be fraud on creditors — Suit when not filed in representative capacity, is not maintainable) ** AIR 1963 Ker 356 (357) (Suit under O 21 R 63 Civil P C) ** AIR 1962 Madh Pra 363 (365) (DB) Express permission of Court not obtained — Notices under O 1 R 8 Civil P C not issued — Everybody concerned including Court forgetting about it — These points raised for first time in appeal — Omission could not be condoned under S 99 Civil P C at appellate stage but could be remedied by granting permission to plaintiffs and by issuing notice to creditors if nature of suit is not changed) ** AIR 1959 Andh Pra 280 (283) (DB) ** (1958) 2 Mad LJ 540 (543) (Suit under O 21 R 63 Civil P C on grounds falling under S 53 T P Act) ** 1957 MPLJ 107 (108) (Basis of suit under O 21 R 63 Civil P C S 53 T P Act — Suit must be in representative character — Stand taken being sham character of suit — Section 53 does not apply) ** AIR 1955 Madh Bha 159 (160) ILR (1955) Madh Bha 297 (DB) (But this requirement could not apply if his suit is based on the allegation that the transaction is sham and colourable and the creditor decree holder is entitled to bring his suit under O 21 R 63 on that allegation) ** AIR 1954 Cal 440 (441) (DB) (A suit in which the plaint does not aver that it is being filed on behalf of the plaintiff and all other creditors of the debtor cannot be regarded as one under this section) ** AIR 1946 Mad 25 (30) ILR (1946) Mad 486 (DB) (The conditions laid down in S 53 that the suit should be on behalf of all the creditors apply only to a case where all the other creditors are not made parties to the suit) ** AIR 1944 All 214 (215) ILR (1944) All 325 ** AIR 1944 Nag 133 (134) ILR (1944) Nag 125 ** AIR 1943 Lah 96 (97) (DB) (Suit under O 21, R 63 without obtaining leave of Court under O 1, R 8 C P C — Mere assertion in plaint that suit is representative and is laid under S 53 in order to avoid an alienation intended to defeat not only the claim of plaintiff but of other creditors will not make it a representative suit) ** AIR 1943 Mad 531 (534) (DB) (Suit under S 53 on behalf of plaintiff alone without following the procedure under O 1, R 8 — Suit is liable to be dismissed summarily) ** AIR 1941 Oudh 457 (465) 16 Luck 832 (DB) (Prior test to apply in determining whether a suit comes within the purview of S 53 is to see whether if the plaintiff succeeds in the action the property claimed would be available to general body of creditors) ** AIR 1941 Rang 76 (77) (1940) Rang LR 777 (DB) (Even if plaintiff is the only creditor he can bring a suit in a representative

The reason of the rule is, firstly, that the debtor(**11**) or the transferee(**12**) should not be harassed by a multiplicity of suits(**13**), and, secondly that the primary object of an action under this section is to make the assets of the transferor available to the general body of creditors (**14**) A view has been expressed in the undermentioned cases,(**15**) namely that a creditor suing under O 21 R 63 of the

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capacity) ** AIR 1940 Mad 789 (790) ILR (1940) Mad 808 (DB) (Case law discussed) ** AIR 1936 Cal 783 (784) (It will be unjust to grant decree under S 53 in a suit not so instituted) ** AIR 1936 Pesh 15 (16) (DB) ** AIR 1936 Rang 117 (118) 14 Rang 81 (DB) (AIR 1935 Rang 489 Followed) ** AIR 1935 Rang 489 (490) (Where a Court has inherent jurisdiction to try a particular suit but its jurisdiction is irregularly invoked a litigant by his conduct may be precluded from maintaining in the circumstances of the case that the suit was not maintainable as framed a *fortiori* in a case where the irregular institution of the suit was due to a failure on the part of the plaintiff to conform to an enactment passed for the benefit to a particular class of persons) ** AIR 1935 Rang 275 (275) (Where defendant elected to go to trial on footing that plaintiff was entitled to bring suit and had been content that the suit should be heard on merits on that basis he was not entitled in the appellate Court to claim that the suit as framed was not maintainable by reason of S 53 T P Act) ** AIR 1934 Rang 302 (302 303) 12 Rang 666 (The transferee and the judgment-debtors as transferors will be necessary defendants in such a suit) ** AIR 1934 Rang 332 (332) : 12 Rang 670 ** AIR 1933 Nag 169 (170) : 29 Nag LR 246

[**See also** ILR (1979) Bom 212 (239) (DB) (A representative suit under S 53 of T P Act if filed by or on behalf of Government is not excluded from the purview of Art 149 of Lim Act 1908 See now Art 112 of Lim Act 1963) ** (1977) 2 Mad LJ 55 (57) 90 Mad LW 684 (Where a suit under S 53 was filed by the Deputy Commercial Tax Officer for cancellation of a sale deed executed by the assessee who was in default in payment of tax payable by him on the ground that the said sale was in fraud of the creditors as it was in favour of his own wife the suit would not be maintainable at all in the absence of any attempt on the part of the plaintiff to make the cause as one filed on behalf of the general body of creditors) ** AIR 1963 Mys 257 (260) (A relief given under S 53 enures to the benefit of all the creditors of the transferor whether those creditors are parties to the benefit of all the creditors of the transferor whether those creditors are parties to the suit wherein alienation is challenged or not) ** AIR 1962 Mad 189 (191) (Representative suit by creditor of insolvent under S 53 T P Act — No notice to Official Receiver Decision in suit not binding on Official Receiver — Subsequent petition under S 54 Provincial Insolvency Act not barred) ** AIR 1960 Punj 417 (418) (DB) (Suit by one creditor under O 21, R 63, Civil P C. — Permission under O 1 R 8 not obtained Suit cannot be considered to be representative within the scope of S 53, T P Act) ** AIR 1953 Mad 619 (619) (Suit originally laid under O 21 R 63 Civil P C Application by plaintiff made to trial Court to amend plaint so as to comply with requirements of O 1, R 8 of that Code Held application should be allowed.)]

11. AIR 1965 Andh Pra 68 (69) (DB) ** AIR 1955 Madh Bha 159 (160) ILR (1955) Madh B 297 (DB) ** AIR 1939 Bom 508 (512) (But this does not mean that the creditor even when he is defendant, must defend the suit on behalf of the whole body of creditors)

12. AIR 1955 Madh B 159 (160) ILR (1955) Madh B 297 (DB) ** AIR 1921 Pat 53 (53) 6 Pat LJ 48 (DB) ** (1907) 34 Cal 999 (1007) (DB)

13. (1958) 2 Mad LJ 540 (541) ** AIR 1943 Mad 531 (536) ILR (1944) Mad 153 (DB)

14. AIR 1965 Andh Pra 68 (69) (DB) ** (1958) 2 Mad LJ 540 (541) ** AIR 1921 Pat 53 (54) 6 Pat LJ 48 (DB).

[**See AIR 1939 Pat 5 (6) (DB)**]

Also see Note 6

15. AIR 1946 Sind 78 (80, 81) ILR (1946) Kar 98 (DB) (The mere fact that the plaintiff is a suit under O 21 R 63, Civil P C to remove the bar imposed by the decision of the execution Court, states that the impugned transfer was made for the purpose of deceiving and

Civil Procedure Code to establish his rights against the transferee from the judgment debtor need not sue in a representative capacity. This view must be held to be no longer good law in view of the Supreme Court decision in *Abdul Shukoor v. Aji Puppa Rao* **(16)**.

As seen in Note 6 it has been held in some cases that the benefit of this section cannot be denied to a defeated and delayed creditor on the ground that at the time of the institution of the suit by him the debtor has no other creditor in existence than himself. It has been held that a creditor who when proceeding under O. 21, R. 63 of the Civil Procedure Code does not know the existence of other creditors, is not bound to bring a representative suit, and that it is for the defendant to object that there are other creditors and that a representative suit should be filed **(17)**. See also the observation in the undermentioned Madras case **(18)** and the undermentioned Punjab High Court decision to a similar effect **(19)**. In the undermentioned cases **(20)** while taking the same view it has been observed that where as a result of a claim order made against him, a decree-holder seeks to enforce his individual rights on the ground that the transaction in question which has adversely affected his rights is a sham and colourable one, he is entitled under law to bring a suit under O. 21, R. 63, Civil Procedure Code without complying with the requirements of this section as to the frame of suit. It has also been held in the undermentioned case **(21)** that a dismissal of a suit under Order 21, Rule 63 of C.P.C. for setting aside an order in the claim petition does not preclude the plaintiff from instituting a fresh suit under Sec. 53. It will be seen from Note 5 that this section does not apply to sham transaction and therefore it seems that a suit of this type will not be governed by the abovementioned Supreme Court decision.

A suit which is not meant to be for the benefit of all the creditors is not a suit under this section and need not be brought in a representative capacity **(22)**. See also in a suit which does not

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putting to loss not only the plaintiff but other creditors and for defeating the claims of not only the plaintiff but of other creditors does not necessarily make the suit one under S. 53, T.P. Act and in such a suit the procedure laid down in O. 1, R. 8 will not apply. — AIR 1938 Bom 289 and AIR 1937 Bom 476, Foll.) ** AIR 1938 Bom 289 (291). — ILR (1938) Bom 445 (Following AIR 1937 Bom 476.) ** AIR 1934 Rang 200 (201) (DB). (Appeals to have been decided with reference to the old section.) ** AIR 1951 Lah 430 (431). — 52 PLR 2[illegible] (DB).

[See AIR 1939 Pat 138 (139). — 17 Pat 588 (DB). (In this case there was only one creditor hence question was not decided.)]

16. AIR 1963 SC 1150 (1160).

17. AIR 1940 Oudh 200 (202) : 15 Luck 503. ** AIR 1974 Guj 153. — 15 Guj LR 253 (DB). ** AIR 1973 Andh Pra 126 (128 to 130) : (1972) 1 Andh LT 263.

18. (1958) 2 Mad LJ 540 (541). (As such a creditor, in this case, representative suit becomes the duty of the Court to see whether it could be proceeded with as a representative suit or not.)

19. AIR 1955 NUC 3428. — (1955-57 Punj LR 366 (368). — Suit by creditor to avoid a transfer by debtor. — No indication that there were other creditors in existence. — In the absence of proof that there are such creditors defence that suit is bad on the ground of it being on behalf of all creditors is not available to the defendant.)

20. AIR 1967 Raj 283 (287, 288). (AIR 1963 SC 1150 has not been noticed.) ** AIR 1973 Ker 214 : 1974 Ker LJ 77.

21. AIR 1973 Ker 125 : 1973 Ker LR 31.

22. AIR 1956 Orissa 58 (60). — ILR (1956) Cut 42 (DB). (Summary order passed against decree holder under O. 21, R. 58. — Suit by decree-holder under O. 21, R. [illegible] protecting his individual right of executing the decree against the property. — Plaintiff [illegible] involving interests of other creditors. — Suit cannot be dismissed for non-compliance with O. 1, R. 8, Civil P.C.) ** AIR 1951 Mys 103 (105). — ILR (1951) Mys [illegible] (DB). — AIR

involve the avoidance of any transfer.(23)

It was held by the Peshwar Court that the technical rule of procedure laid down in the section did not apply to the North-West Frontier Province and that a suit to avoid a fraudulent transfer need not be in a representative character (24) The undermentioned cases of the Pepsu High Court(25) and the Punjab High Court(26) are also to the same effect

The objection as to the non-representative character of the suit must be taken in the trial Court If it is not so taken, it cannot be taken in the appellate Court (27)

25. Leave of Court.

A creditor instituting a suit to set aside a fraudulent transfer must follow the procedure provided by O 1, R 8 of the Civil Procedure Code, that is to say, he must obtain the permission of the Court and the Court must, at his expense, give notice of the institution of the suit to all persons whom it is sought to represent (1) The requirement as to the obtaining of the permission of the Court cannot be waived (2) It has been held in the undermentioned case (3) that where in a suit under this section all the persons interested are made parties to the suit O 1, R 8, Civil PC will not apply and therefore leave of Court need not be obtained under that rule It has been held by the Delhi High Court(4) that even though the heading of the plaint of the suit brought by one of the

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1933 Cal 812 (812) (Though the claim in it proceeds on the principles enunciated in the section) ** (1904) 28 Bom 364 (369)(DB) (Assignment of substantial part of property in trust for creditors — Composition deed not signed by a few creditors — Composition however found to be beneficial for all creditors — Suit by one of the non signatory creditors to avoid the composition — He cannot be considered to be suing for and on behalf of all the creditors — Section 53 will not apply to the case.)

23. 1957 MPLJ 107 (109) (Suit under O 21 R 63 on the allegation that the transaction is a sham and bogus one.) ** AIR 1956 Orissa 58 (60) ILR (1956) Cut 42 (DB) (Action on ground that transaction in favour of defendant is nominal one.) ** AIR 1934 Rang 302 (303) : 12 Rang 666

24. AIR 1936 Pesh 158 (160) (DB).

25. (1949) 1 Pepsu LR 198 (211) (DB).

26. AIR 1961 Punj 398 (399) : ILR (1962) 2 Punj 378 (DB)

27. AIR 1967 Raj 283 (287) ** (1958) 2 Mad LJ 540 (541) ** 1957 MPLJ 107 (110) (Trial Court should permit the plaintiff to set matters right when an objection is raised before it.) ** AIR 1955 Nuc C 3428 (1955) 57 Punj L R 366 (368) ** AIR 1944 All 214 (215) ILR (1944) All 325 (Plea cannot be raised in second appeal for the first time AIR 1940 All 407, Followed.) ** AIR 1938 Oudh 33 (35) (DB) (It makes no difference whether the point was first taken in first appeal or second appeal.) ** AIR 1936 Rang 117 (118) 14 Rang 81 (DB) (AIR 1934 Rang 332 **Not followed.**) ** AIR 1935 Rang 489 (490) ** AIR 1935 Rang 275 (275) ** AIR 1934 Rang 308 (308) (Point raised for first time in appeal as to maintainability of suit — Appellant is not entitled to claim that suit is not maintainable.) ** AIR 1927 Mad 666 (666 667) (Objection not raised in the first appellate Court cannot be raised in the second appeal.) ** AIR 1914 Low Bur 180 (182) ** (1907) 34 Cal 999 (1007 1008) (DB)

Section 53 — Note 25

1. AIR 1934 Rang 302 (303) 12 Rang 666 ** AIR 1934 Rang 332 (332, 333) 12 Rang 670 ** AIR 1927 Mad 666 (666)

   [**See also** AIR 1962 Mad 189 (191) (Representative suit by creditor of insolvent under S 53, T P Act — No notice to Official Receiver — Decision in suit is not binding on Official Receiver — Subsequent petition under S 54 Provincial Insolvency Act not barred.)]

2. AIR 1943 Lah 96 (97) (DB).

3. AIR 1946 Mad 25 (30) : ILR (1946) Mad 486 (DB).

4. AIR 1972 Delhi 122 (124).

creditors did not indicate that the suit was on behalf of all the creditors if the names of the creditors are given in the plaint the plaintiff will have *locus standi*. A suit by which the plaintiff seeks declaration from the Court under S. 42 of the Specific Relief Act, 1877 to the effect that the sale deed in question is a sham and fictitious transaction which conveyed no title to the transferee cannot be dismissed for the non-fulfilment of the requirements of O. 1, R. 8 even though the plaintiff has also made an additional allegation in the plaint that the transferee is not a transferee in good faith and for consideration and that the suit is one instituted for the benefit of all the creditors of the transferor.(5)

The proper course is to obtain the permission of the Court before the suit is instituted. But the permission may, in proper cases, be granted even after the institution of the suit and even though it had been refused on a previous occasion.(6)

26. Defence need not be in representative capacity.

A creditor pleading S. 53 in defence need not do so in a representative capacity. The fourth paragraph of sub-sec. (1) applies only to suits and not to defences.(1)

27. Suit under this section is a "suit for land" within the meaning of the Letters Patent.

A suit to set aside a transfer created in fraud of creditors is a "suit for land" within the meaning of Clauses 11 and 12 of the Letters Patent (Madras).(1)

28. Transferor insolvent — Suit by creditor under this section.

Where an alienation in fraud of creditors is made by a debtor and subsequently the debtor is adjudged insolvent, a suit by a creditor under this section to set aside the transfer is, according to the Madras and Delhi High Courts maintainable without the leave of the Insolvency Court.(1) According to the High Court of Lahore a suit without such leave is not maintainable where the alienation attacked is a mortgage of which the equity of redemption has vested in the Official Receiver.(2)

29. Receiver in insolvency, if can avoid fraudulent transfer under Section 4 of the Provincial Insolvency Act.

A Receiver in insolvency can, as representing the creditors, file a regular suit to set aside a transfer by the insolvent as being in fraud of creditors under S. 53 of this Act.(1) It has been held

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5. 1964 All LJ 1079 (1083).

6. AIR 1953 Mad 619 (619). (Suit originally filed under O. 2, R. 2(3) Civil P.C. — Application by plaintiff made to trial Court to amend plaint so as to comply with O. 1, R. 8. — Application should be allowed.)

See Note 11 on O. 1, R. 8 of the AIR Commentaries on the Code of Civil Procedure, 10th (1985) Edn.

Section 53 — Note 26

1. **AIR 1963 SC 1150 (1160)** ** AIR 1942 Mad 128 (129) ** AIR 1949 Bom 508 (512).

Section 53 — Note 27

1. (1912) 17 Ind Cas 342 (343) (Mad).

Section 53 — Note 28

1. **AIR 1941 Mad 903 (905) : ILR (1942) Mad 1 (FB).** (AIR 1919 Mad 167 **Overruled** and AIR 1929 Mad 323, Approved.) ** AIR 1922 Delhi 122 ** AIR 1946 Mad 25 (29, 30) : ILR (1946) Mad 486 ** AIR 1942 Mad 483 (484) : ILR (1942) Mad 862 (DB). (AIR 1941 Mad 903 : ILR (1942) Mad 1 (FB). Ref. on.)

2. AIR 1938 Lah 856 (857). (Official Receiver is a necessary party to such a suit.)

Section 53 — Note 29

1. AIR 1952 Sau 47 (49) (DB). (Transfer to creditor who had knowledge of the debtor's precarious pecuniary conditions voidable at the instance of the Receiver and other creditors.) ** AIR 1947 Pat (473, 474) : 26 Pat 253 (DB) ** AIR 1926 Mad 826 (827) (DB). (Though he has got another remedy under S. 53 of the Provincial Insolvency Act.)

[**See also** AIR 1926 Mad 66 (67) (DB). (Such a suit is governed by Art. 120 of Limitation Act.) ** AIR 1918 Oudh 29 (30) : 20 Oudh Cas 295. (Receiver can also apply under S. 36 Provincial Insolvency Act, for an annulment of the transfer.)]

that such Receiver can even in a case where a transfer by the insolvent is more than two years before his insolvency, *apply* under S 4 of the Provincial Insolvency Act, 1920 to avoid the transfer as being in fraud or creditors under S 53 of this Act **(2)** In the undermentioned cases**(3)** it was further held that he can do so even if a suit to set aside the transaction would be barred by limitation, though the Court would, in such cases refuse to exercise its jurisdiction except in special circumstances The High Court of Madras has, however, held that the Insolvency Court cannot entertain such application which if filed as a suit under this section would be dismissed as barred by limitation **(4)** The High Court of Patna **(5)** has held that a real transfer in fraud of creditors made by an insolvent beyond two years from the date of his insolvency cannot be annulled either under S 53 of the Provincial Insolvency Act, or under S 4 of that Act under which the insolvency Court has only power to make a declaration but has no power to give consequential relief The relief by way of annulment in such cases can be granted only by a Civil Court in a suit instituted by the receiver under this section In the undermentioned cases **(6)** in England, the Bankruptcy Court was held to have jurisdiction to set aside a transfer as being in fraud of creditors under 13 Eliz , Chap 5 on an application by the trustee in bankruptcy.

30. Distinction between this section and Sections 53 and 54 of the Provincial Insolvency Act.

The following are the main points of distinction between this section and Ss. 53 and 54 of the Provincial Insolvency Act, 1920 :

(1) In a suit under this section it is for the creditor to prove that the transfer was made *with intent to defeat or delay the creditors of the transferor* Until this is established it is not for the transferee to prove good faith and consideration But under S 53 of the Provincial Insolvency Act, if the transfer has been made within two years of the insolvency of the transferor, it is not necessary

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2. **AIR 1944 Nag 44 (54) : ILR (1944) Nag 342 (FB).** (Section 53 Provincial Insolvency Act, is wider than S 53, T P Act, and it gives added benefits to the creditors If they want to avail themselves of these additional benefits they must bring themselves within the two years' rule If not they are left to their remedies under the ordinary law But these remedies can be pursued in insolvency Court under S 4, though it would be open to that Court on grounds of expediency, to refer the parties to a civil suit — AIR 1938 Nag 546 **Overruled.**) ** **AIR 1929 All 105 (107, 112) : 51 All 550 (FB).** (Sen J , contra) ** AIR 1935 Bom 316 (316 317) (DB) ** AIR 1933 Mad 527 528) ** AIR 1932 Cal 642 (647 648) 59 Cal 1135 (DB) ** AIR 1932 Sind 50 (51, 52) : 25 Sind LR 521, (Case under S. 7 of the Presidency Towns Insolvency Act corresponding to S 4 of the Provincial Insolvency Act) ** **AIR 1927 Cal 474 (476) (DB).**

   [See also AIR 1943 Mad 252 (252) (Section 53 of the Provincial Insolvency Act not being exhaustive an application to challenge a transaction as sham and nominal can also **be entertained**)]

3. **AIR 1929 Sind 94 (96).**

   [See also AIR 1922 All 196 (196) : 44 All 71 (DB).]

4. AIR 1943 Mad 252 (252 253) (Where there are a number of creditors, limitation for an application by the Official Receiver under S 4 to set aside the transfer may be computed from the date on which the last of the creditors became aware of the transaction)

5. AIR 1947 Pat 471 (473 474) 26 Pat 253 (DB) (The proper course for the Insolvency Court in such circumstances is first to satisfy itself whether the transfer is really one liable to be annulled under S 53 T P Act and if it decides that it is so then to instruct the **Receiver to file a suit for that purpose in Civil Court.**)

6. (1880) 29 WR (Eng) 876 (877) 14 Ch D 265 43 LT 2, Ex parte **Butters, In re** Harrison

   [See also (1886) 55 AJ QB 558 (561) 17 QBD 290, Ex parte Mercer In re Wise (As sumed)]

for the Receiver to prove the fraudulent intent of the insolvent. It is for the transferee to show good faith on his part and the payment of consideration.(1)

(2) Under this section a *preference* of one creditor over another is not fraudulent whereas under S. 54 of the Provincial Insolvency Act, a preference by the debtor, who is unable to pay his debts, of one creditor over the other creditors, is *deemed* fraudulent if the debtor is adjudged insolvent within three months of the act of preference (2) The object of S. 53 of this Act is to protect the rights of creditors against their debtor, namely that the latter's property should be made available in payment of demands *of them or some of them* for the discharge of their debts (3) It is not the object of this section to secure the *equal distribution* of the property of the bankrupt (4) The object of the S. 54 of the Provincial Insolvency Act is, however, to secure an equal distribution of the insolvent's property among his creditors.(5)

(3) Even though a transfer cannot be avoided under the insolvency law as having been made more than two years before the insolvency of the transferor, it can be avoided under this section (6)

Section 53 of T. P. Act applies to transfer of immovable property only, but S. 54 of the Provincial Insolvency Act is not confined only to the transfer of immovable property. It applies to transfer of both immovables and movables. In addition it also applies to every payment made, every obligation incurred, and every judicial proceeding taken or suffered by a person unable to pay his debts as they become due from his own money in favour of any creditor. The essence of S. 54 of the Provincial Insolvency Act lies in the intention of giving a creditor preference over the other creditors and it applies only if such a person is adjudged insolvent on a petition presented within three months after the date thereof and all these categories of transactions will be deemed fraudulent and void as against the Receiver and shall be annulled by the court (7)

See also the undermentioned (8)

See also Note 20

31. Sub-section (2) — Transfer in fraud of subsequent transferee.

Sub-section (1) deals with transfers made with intent to defeat or delay the creditors. Sub-section (2) deals with transfers made with intent to defraud *subsequent transferees*. The difference between the two provisions is that while any transfer, whether for consideration or not, can be avoided as being in fraud of creditors, only *gratuitous transfer* i.e., transfers for no consideration can be avoided as being in fraud of subsequent transferees.

Section 53 — Note 30

1. **AIR 1944 Nag 44 (53) : ILR (1944) Nag 342 (FB)** ** AIR 1917 All 32 (33, 34) : 39 All 95 (DB) (Scope of S. 36, Provincial Insolvency Act, 1907 and that of S. 53, T.P. Act compared.) ** **AIR 1916 Pat 279 (280) : 2 Pat LJ 101 (DB)**
2. AIR 1938 Sind 215 (216) : ILR (1939) Kar 36 (DB) ** 1937 Mad WN 162 (163) (DB) ** **(1912) 13 Ind Cas 68 (69) (Lah).**
3. **AIR 1915 PC 115 (116) : 43 Cal 521.**
4. (1882) 51 LJ Ch 154 (156) : 20 Ch D 389 : Golden v. Gillan (Case under 13 Eliz. Ch. 5 corresponding to S. 53, T.P. Act.)
5. AIR 1925 Cal 640 (647) (DB) ** (1907) 34 Cal 999 (1015) (DB)
6. AIR 1953 Trav-Co 321 (323) : ILR (1953) Trav Co 326 (DB) ** AIR 1947 Pat 471 (472, 473) : 26 Pat 253 (DB) ** AIR 1929 Sind 94 (96) ** AIR 1922 All 443 (443) (DB) (Transaction being several years old the insolvency Court declined to adjudicate upon. Held that the question was not *res judicata* in a subsequent suit under S. 53, T.P. Act.)
7. **(1988) 2 LS (AP) 342 (347, 348) (DB)**
8. AIR 1955 NUC (Mad) 3168 (Fraudulent transfers coming under S. 60(b), Provincial Insolvency Act are voidable under this section independently of the insolvency of the transferor.) ** **AIR 1952 Sau 47 (48) (DB)**

In England the statute 27 Elizabeth Chap 4 was construed as meaning that a voluntary transfer except where it was in favour of a charity(1) became *ipso facto* void on the subsequent execution of transfer of the same property for consideration whether the second transferee took his transfer with notice or not.(2) By the very fact of the execution of a subsequent transfer for consideration, the former voluntary conveyance was deemed fraudulent This view was followed in this country also before the Act was passed(3) and even in cases under the old section it was held that the presumption was to that effect (4) The second paragraph of sub-section (2) of the present section, however, now makes it clear that the mere fact that the subsequent transfer is made for consideration is not sufficient to enable the Court to deem the prior transfer a fraudulent one

A transfer which is not voluntary, but which is for *some* consideration, however small, is not

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Section 53 — Note 31

1. (1845) 8 ER 1464 (1470 1472) 12 Cl & Fin 402 New Castle upon Tyne Corporation v Attorney General ** (1892) 61 LJ PC 72 (73, 74) : (1892) AC 412 (415, 416), Ramsay v Gilchrist

2. (1812 34 ER 255 (259 11 RR 155 Buckle v Mitchell (Even when the purchaser purchased with notice) ** (1750) 28 ER 1 (7, 11) : 2 Ves Sen 1, Lord Townsend v Windham ** (1875) 44 LJ Ch 487 489) 23 WR (Eng) 944 In re Barker s Estate Jones v Bygott ** (1876) 46 LJ Ch 214 (223) 4 Ch D 483 Price v Jenkins (Voluntary settlement by a father upon his son) ** (1878) 47 LJ Ch 738 (739) 8 Ch D 318 Trowel v Shenton (Post nuptial settlement which was in pursuance of ante nuptial contract by an infant held a voluntary one) ** (1883) 53 LJ Ch 87 (88) 24 Ch D 597, Shurmur v Sedgwick ** (1891) 60 LJ PC 66 (67) 1891 AC 264 De Mestre v West ** (1852) 21 LJ QB 139 (141) 17 QB 723 Doe d Newman v Rusham ** (1852) 51 ER 595 (598) 15 Beav 408 Butterfield v Health, (Post-nuptial settlement of life-estate executed by husband and wife in favour of themselves and their children) ** (1807) 103 ER 495 (500) 9 East 59 Doe d. Otley v Catharine Manning ** (1755) 27 ER 192 (194) Ambl 285 2 Ves 450, Senhouse v Earle ** (1690) 21 ER 815 (815) 1 Nels 160 Wathins v Steevens ** (1775) 98 ER 1085 (1086) 1 Cowp 278 Chapman v Emery (Mortgagee is a purchaser) ** (1727) 21 ER 1084 (1084) 1 Eq Cas Abr 334 Tonkins v Ennis ** (1811) 34 ER 249 (251) 18 Ves 90, Pulvertoft v Pulvertoft ** (1812, 104 ER 1069 (1070) 16 East 212, Doe Lessee of Parry v James ** (1817 35 ER 887 888) 2 Mer 123 Smith v Garland ** (1937) 95 ER 857 (859) 2 Wills 356 (358), Roe v Mitton ** (1590) 77 ER 146 (147) 5 Co Rep 60a Gooch's case

[See (1895) 43 WR (Eng) 657 (659) (1895) WN 85 Attorney-General v Jacobs Smith ("Consideration of marriage extends only to the husband and wife and children of that marriage and that all other persons are volunteers in some sense") ** (1822) 37 ER 1107 (1112) : Turn & R 281, Johnson v. Legard.]

[But see (1776) 98 ER 1171 (1172) 2 Cowp 432 Cadogan v Kannett (A fair voluntary conveyance may be good against creditors notwithstanding its being voluntary) ** (1777) 98 ER 1318 (1321) 2 Cowp 705 Doe d Watson v Routledge (It must also be fraudulent) ** (1738) 26 ER 9 (11) 1 Atk 13 Rusell v Hammand (Voluntary settlement is not fraudulent but an evidence of fraud only) ** (1805) 127 ER 492 (493) 1 B & P 332 Doe v Martyr (Subsequent transferee with notice of prior voluntary transfer not protected) ** (1803) 32 ER 575 (576) 9 Ves 190 (194), George v Milbanke (It is only *prima facie* evidence of fraud) ** (1804) 32 ER 741 (741) 9 Ves Jun 612, Gilham v Licke (Do) ** (1816) 56 ER 152 (154) 1 Madd 414, Holloway v Millard (Do) ** (1736) 26 ER 393 (393) : 1 Atk 625, Oxley v. Lee.]

3. (1874) 22 Suth WR 60 (67) (DB) ** (1895) 22 Cal 185 (200 201) (DB) Per Sale J According to Statute 27 Eliz , Chap 4 a voluntary deed of transfer or conveyance had no effect as against the subsequent purchaser for consideration, 22 Suth WR 60, Followed)

4. (1885) 22 Cal 185 (202, 203) (DB). (Per Sale, J.)

voidable at the option of a subsequent transferee (5)

Under the Statute 27 Elizabeth Chap 4 a judgment-creditor was held not to be a "purchaser" for the purposes of that section (6) Obviously such a person will not also be a "subsequent transferee" within the meaning of this section

See also the undermentioned case (7)

32. Auction purchaser, whether is a subsequent transferee.

An auction purchaser at a sale in execution of a decree, whether he be third party purchaser(1) or the decree-holder himself (2) is not a "subsequent transferee" within the meaning of this section inasmuch as a "transfer" within the meaning of this Act is a transfer by *act of parties* (3) He cannot therefore avoid the transfer under this section in that capacity But if he happens to be also a *creditor* of the transferor, the transfer could according to the Bombay High Court be avoided by him as a creditor, even after he had purchased the property in auction (4) According to the Madras High Court, he cannot, *after* his purchase avoid the transfer as a *creditor* though he could have done so before he became the purchaser and if he had done so he could rely after his purchase upon his avoidance of the transfer before his purchase (5) An auction-purchaser who is not a creditor of the transferor can, if the decree-holder himself had avoided the fraudulent transfer get the benefit of such avoidance.(6)

33. Plea of fraudulent transfer.

In *Bal Gangadhar Tilak v Srinivas Pandit*(1) their Lordships of the Privy Council relied upon the following passage from the judgment of Lord Selborne in *Wauchope v Madras Society* (2)

> With regard to fraud if there be any principle which is perfectly well settled it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice."

Their Lordships further observed that the law in India is in no way different from the principles stated in the passage quoted Order 6 R 4 of the Code of Civil Procedure provides

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5. (1871) 40 LJ Ch 289 (290 291) 6 Ch App 228 Bayspoole v Collins ** (1876) 46 LJ Ch 396 (398), Teasdale v. Brithwaite

6. (1886) 25 LJ Ch 299 (305) 6 De M & G 507 Beavan v Earl of Oxford

7. AIR 1935 Lah 953 953 (Claim under mortgage against *bona fide* purchaser [illegible] Plaintiff has to prove both good faith and actual execution of mortgage [illegible] consideration in the deed [illegible] *prima facie* evidence of good faith [illegible]

Section 53 — Note 32

1. AIR 1958 Pat 568 (569) ** AIR 1954 Mad 173 175 ** AIR 1940 Nag 51 53 ** AIR 1919 Nag 123 (123) ** AIR 1915 Bom 89 (90) : 39 Bom 507 (DB)

2. AIR 1939 Bom 508 (512)

3. AIR 1958 Pat 568 (569) ** AIR 1919 Nag 122 (123).

(See also AIR 1937 Cal 203 (206) (DB) (Property under mortgage sold in execution of a money decree against mortgagor Absence of cogent evidence to show that mortgage was a sham and fictitious transaction Auction-purchaser of property cannot challenge the validity of mortgage on the ground of absence of consideration or the inadequacy of it.)

4. AIR 1939 Bom 508 (512)

5. AIR 1921 Mad 657 (659) (DB)

6. AIR 1954 Mad 173 (176) ** AIR 1936 Mad 408 (410)

Section 53 — Note 33

1. AIR 1915 PC 7 (13) : 39 Bom 441.

2. (1881) 50 LJ QB 49 (54) : 5 App Cas 685.

"In all cases in which the party pleading relies on any . . fraud . . and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars with dates and items if necessary shall be stated in the pleading "(3)

The principle referred to above applies to a plea that a transfer is fraudulent under S 53 of this Act.(4)

In a suit by a third party claimant under Order 21 Rule 63 the judgment-creditor can plead by way of defence that the transfer in favour of the plaintiff was under a collusive decree and not binding.(5)

The plea must be taken in the first Court itself and not in the appellate Court (6)

34. Onus of proof.

The general principle is that the *onus* of proving fraud is on the person alleging it (1) Accordingly the onus of proving a deed as fraudulent is on the person alleging it (2) Fraud alleged by one party in execution of a sale deed is to be proved like a criminal trial by positive and unimpeachable

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3 See the AIR Commentaries on the Code of Civil Procedure 10th (1985) Edn O 6 R 4 Note 2

4. AIR 1933 Rang 169 (172) (AIR 1915 PC 7 Followed) ** AIR 1928 Mad 793 (794) (DB) (AIR 1916 PC 238 Relied on) ** AIR 1920 Oudh 182 (184) (Transfer intending to defeat anticipated execution does not fall under the section.)

5. AIR 1971 Punj 325 (326, 327) (DB).

6. (1843) 49 ER 1006 (1011) : 7 Beav 112, Richardson v. Harton.

Section 53 — Note 34

1. AIR 1958 SC 1 (4) (Application by official receiver to set aside a conveyance by insolvent — Onus is on him to prove that it was not made in good faith and for consideration) ** (1968) 2 Mys LJ 269 (27.) (DB) ** AIR 1928 Mad 793 (794) (DB) ** (1894) 21 Cal 612 (621) (DB) (Party charging fraud is not relieved from this obligation because the other party has told an untrue story) ** (1892) 6 C PLR 19 (21) ** (1913) 21 Ind Cas 333 (334) (Burma) ** (1971) 10 Ind Cas 922 (923) (Burma).

2. (1869) 13 Suth WR 14 (15) (PC) ** (1875) 23 Suth WR 111 (112) (PC) ** AIR 1966 Andh Pra 157 (158) (DB) ** AIR 1961 Punj 361 (363) (DB) ** AIR 1960 Punj 548 (549) (DB) ** AIR 1954 Nag 129 (132) ILR (1953) Nag 937 (DB) ** AIR 1950 Kutch 57 (57) ** (1950 Ker LT 502 (505) (DB) ** AIR 1947 Cal 154 (155 156) (DB) (Onus of proving fraudulent intent within S 53 is on person challenging the transaction) ** AIR 1943 All 2 (5) ** AIR 1941 Mad 690 (693) ** AIR 1941 Oudh 178 (179) (DB) ** AIR 1941 Oudh 205 (210) (DB) ** AIR 1941 Rang 108 (108 109) 1940 Rang LR 659 (DB) ** AIR 1938 Lah 73 (74) ILR (1938) Lah 439 (Fraudulent transfer by insolvent in favour of his wife more than two years before his adjudication B purchasing property in execution of mortgage decree against her — Application by Official Receiver to avoid transfer Onus is on the Official Receiver to prove that it was fraudulent) ** AIR 1938 Oudh 230 (231) (DB) ** AIR 1936 Lah 222 (223) (DB) ** AIR 1934 Rang 308 (308, 309) (It is essential that decision of the Court rests not upon suspicion but upon legal grounds established by legal testimony) ** AIR 1934 Lah 365 (366) 15 Lah 294 (DB) (Application by Official Receiver to declare invalid gift made by insolvent more than two years before insolvency Burden of proof is on the Official Receiver) ** AIR 1934 Lah 136 (137) ** AIR 1930 Mad 665 (667) ** AIR 1929 Lah 409 (413) (DB) ** AIR 1927 Lah 420 (421) 8 Lah 544 (DB) ** AIR 1926 Oudh 501 (502) ** AIR 1925 Rang 227 (228) 3 Rang 71 (Where the execution of a sale deed by a father to his daughter is admitted and there is nothing on the face of it to suggest fraud, the burden of proving that it was a fraudulent conveyance lies on the party who alleges it - As against such party the daughter need not prove consideration) ** AIR 1924 Nag 363 (365) ** AIR 1923 Nag 17 (18) ** AIR 1921 Low Bur 58 (59) 11 Low Bur Rul 89 (DB) ** 1913 Punj LR No 246 page 827 (829) (DB) ** (1909) 1 Ind Cas 795 (796) (DB) (All) ** (1909) 12 Oudh Cas 74 (76) ** (1909) 17 Mad LJ 11 (14) (DB) (In a suit for declaration that a deed of sale is not binding on the plaintiff being in fraud of creditors, it is for the plaintiff to establish affirmatively an intent to defeat or

evidence (3) Further, a charge of fraud must be substantially proved *as laid* and where one kind of fraud is charged, another kind of fraud cannot upon failure of proof be substituted for it (4) But fraud is generally seldom possible to be established by direct evidence, it is usually established by the surrounding circumstances(5) that is, by circumstantial evidence (6) But it is not established by mere suspicion and conjecture (7) Question whether a sale is in fraud of creditors and voidable under S 53 is normally a question of fact.(8) In *Satish Chandra Chatterjee v Satish Kanika Roy*(9) their Lordships of the Privy Council observed as follows :

> "Charges of fraud and collusion like those contained in the plaint in this case must no doubt be proved by those who make them — proved by established facts or inferences legitimately drawn from those facts taken together as a whole Suspicions and surmise and conjectures are not permissible substitutes for those facts or those inferences but that by no means require that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be

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delay creditors) ** (1903) 5 Bom LR 142 (143) (DB) ** (1901) 25 Bom 202 (206 207) (DB) ** 1901 All WN 67 (68) ** (1892 1896) 2 Upp Bur Rul 315 (317) ** (1891 4 CPLR 179 (180) ** (1889) 2 CPLR 63 64) ** (1886) 8 All 178 180 (DB) ** (1884 1 CPLR 59 (62) ** (1938) 42 Cal WN 34 (36) ** (1921) 60 Ind Cas 825 (826) (DB All) ** 19, 3) 20 Ind Cas 355 (356) (DB) (Lah) (Suit for setting aside a decree obtained on award as fraudulent.) ** (1913) 21 Ind Cas 333 (334) (Low Bur) ** (1911) 11 Ind Cas 781 (781) (Low Bur) ** (1910) 8 Ind Cas (205) (206) (Low Bur) (Purchaser not a woman of independent means — Vendor still retaining possession of the property — Onus to prove the sale for consideration and *bona fide* is on the purchaser) ** (1910) 13 Oudh Cas 265 276 281) (DB) ** (1895) 64 LJ PC 136 (136) 1895 AC 625 In re Cook Morris v Morris ** (1881) 51 LJ Ch 503 (503), Golden v. Gillam (Affirming (1881) 51 LJ Ch 154)

3. 2001 (2) (128) Pun LR 571 (572)

4. (1887) 11 Bom 620 (623) . 14 Ind App 111 (PC) ** AIR 1920 Cal 26 32 (DB) ** AIR 1916 Cal 120 (123) (DB) ** AIR 1916 Cal 876 (878) (DB) ** (1911) 10 Ind Cas 922 923, (Low Bur).

   [See also (1940) 42 Punj LR 385 (392) (DB) (Fraud not pleaded and proved cannot be presumed.)]

5. ILR (1962) 12 Raj 517 (521) ** (1949) 1 Pepsu LR 198 204 (DB) (Per Tera Singh C J in his order of reference to a Division Bench) ** AIR 1943 Mad 53, 54 (DB) (Fraudulent intent has to be inferred from the conduct of the party and circumstances proved) ** AIR 1937 Oudh 349 (351) (DB) ** AIR 193 Oudh 405 407) (DB) ** AIR 1931 Oudh 344 (344) (DB) ** AIR 1930 Lah 12 (14) ** AIR 1928 Nag 4 23 Nag LR 143 (DB) ** AIR 1925 Nag 460 (462) (Fraud can be inferred from the conduct of the parties)

   [See also AIR 1925 Nag 427 (431) (Evidence of forgery) ** AIR 1950 Kutch 57 (57 58) (Transfer of immovable property by person in favour of his daughter who was child widow living on maintenance, during pendency of money suit against transferor is significant)]

6. AIR 1932 Cal 434 (435) 59 Cal 180 (DB) ** AIR 1937 Oudh 349 (351) (DB) ** AIR 1931 Oudh 333 (338) 7 Luck 131 (DB) ** AIR 1931 Oudh 256 (259) 6 Luck 546 (DB) (AIR 1923 PC 73, Relied on) ** (1900) 13 CPLR 180 (187) ** (1895) 9 CPLR 142 (144) ** (1893) 7 CPLR 73 (75, 76) ** (1869) 3 Beng LR (AC) 108 110 111) (DB)

7. AIR 1960 Pun 548 (549) (DB) ** AIR 1978 Pat 148 1978 BLJR 277 DB ** AIR 1954 Nag 129 (132) ILR (1953) Nag 937 (DB) ** AIR 1935 All 995 (995) 58 All 342 ** AIR 1932 Mad 182 (184) (DB) ** AIR 1920 Oudh 182 (184) (AIR 19 6 PC 238 Relied on) ** AIR 1918 Pat 632 (633) (DB) ** Bom Unrep Case No 129 of 1872 ** Bom Unrep Case No 185 of 1872 ** (1907) 6 Cal LJ 472 (489) (DB) ** (1892-1896) 2 Upp Bur Rul 318 (321, 322) ** (1874) 22 Suth WR 124 (125) (DB) ** (1866) 6 Suth WR 235 (236) (DB) ** (1869) 3 Beng LR (AC) 108 11 Suth WR 482 (484) (DB)

8. AIR 1968 Mad 256 (258).

9. AIR 1923 PC 73 (76).

completed unravelled and cleared up and made plain before a verdict can be properly found against him If this were not so, many a clever and dexterous knave would escape"

As to the circumstances that may raise a *presumption* of fraudulent intent under this section see Note 6.

Where a transfer is proved to have been made with intent to defeat or delay the creditors, the *onus* will shift to the transferee to show good faith and consideration.(**10**) Question of onus of proof will, however, be academic where the entire evidence is before the Court and will have little significance except in a rare case where the consideration are evenly balanced (**11**) In a suit by a transferee to set aside the order in execution proceedings at the instance of the creditor where the decree-holder challenges the transfer as one to defraud the creditor, the burden is on the transferee to show that it is genuine (**12**) See also the undermentioned cases.(**13**)

As to burden of proof in suits under O 21, R 63 of the Code of Civil Procedure in which the question whether a transfer is fraudulent arises, see Note 19 on that rule in the A.I R. Commentaries on the Code of Civil Procedure, 10th (1985) Edn.

35. Limitation for suit to avoid document under this section.

See Note 23 on Art. 113 of the A.I R. Commentaries on the Limitation Act, (1963) 7th (1997) Edn. See also the undermentioned cases.(**1**)

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10. AIR 1963 SC 1150 (1157) ** AIR 1986 Kant 225 (228) (1985) 2 Kant LJ 389 ** 1984 Ker LJ 885 (888) (DB) ** AIR 1961 Punj 361 (363) (When creditors have established facts which show the *prima facie* intention of the debtor to defeat or delay creditor it is then for the debtor to meet the case made out and to explain the facts) ** AIR 1954 Nag 129 (132) · ILR (1953) Nag 937 ** AIR 1950 Ker LT 502 (505) (DB) ** AIR 1947 Cal 154 (156) (DB) (A mere general knowledge that the transfer was in financial embarrassment would not by itself, establish want of good faith on the part of the transferee) ** AIR 1943 All 2 (5) (DB). (When the person attacking the transfer proves facts which are sufficient to show that *prima facie* the intention of the transferor was to defeat or delay creditors, it is for the transferor to meet the case and to explain the facts Mere mutation in accordance with transfer is not enough to show absence of such intention) ** AIR 1933 Rang 191 (192) ** AIR 1941 Mad 690 (693) ** AIR 1930 Lah 136 (137) ** AIR 1927 Rang 331 (332) ** AIR 1926 Nag 494 (494) ** AIR 1921 Low Bur 58 (58, 59) 11 Low Bur Rul 89 (DB) ** (1913) 21 Ind Cas 333 (334) (Burma) ** (1907-1908) 4 Low Bur Rul 211 (212) ** (1902) 5 Bom LR 142 (143) (DB) ** (1910) 33 Mad 334 (338) (DB) (5 Bom LR 142, Followed)

[**See also** (1866) 1 Agra 79 (81) (DB) (Case before the Act) ** (1900) 23 Mad 184 (189) (DB) ** AIR 1927 Nag 166 (168) (It is necessary for the purchaser to show that there was real intention of the debtor to pass ownership and of himself to acquire it Mere transfer of possession is insufficient)]

11. AIR 1963 SC 1150 (1154).

12. (1970) 2 Andh WR 117.

13. AIR 1963 Mad 450 (452) (Mortgage affected by statutory presumption under S 6 of Madras Indebted Agriculturists (Temporary Relief) Act that it was executed with intent to defeat or delay creditors — Onus will be on judgment-debtor under mortgage decree to prove that there was no such intent) ** AIR 1919 Pat 181 (181, 188) (DB)

Section 53 — Note 35

1. AIR 1953 Trav-Co 321 (323) · ILR (1953) Trav-Co 326 (DB) (No suit under S 53 brought and question whether transactions were fraudulent not arising on pleadings — **Held** to send case back for necessary amendments will be to permit amendments after expiry of period of limitation.) ** AIR 1967 Ker 171 (171) 1967 Ker LT 810 (Suit by creditor for cancellation of the sale deed executed by the debtor — It is governed by Art 120 of the Limitation Act and not Art 91.) ** AIR 1967 Raj 283 . 1967 Raj LW 307 (Suit under Order 21, Rule 63 which was amended as a suit under Section 53 — No addition of parties

[A][53A. **PART PERFORMANCE.**— Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part of performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that [B][* * * *] where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.]

[A] Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 16.

[B] Omitted by the Registration and other Related Laws (Amendment) Act (48 of 2001), S. 10.

— S. 22 of the Limitation Act will not apply. ** AIR (1948) Bom. 265 (268, 271). ILR (1947) Bom. 807 (DB). (Suits under S. 53 — Art. 120 and not Art. 91, Limitation Act governs such suits. — Right accrues when creditor has knowledge of fraud and not when the plaintiff decides to exercise his option of avoiding transfer — View of Lokur J. in AIR 1944 Bom. 267 in so far as it goes against this view not approved on Letters Patent Appeal.) ** AIR 1947 Pat. 257 (260) (DB). (Suit under O. 21, R. 63, Civil P.C. in representative capacity against defendants 1 and 2, husband and wife respectively, alleging transfer by former in favour of latter as fraudulent — Wife by defendant 2 giving property to deity — Defendant 1 appointed shebait — Death of defendant 2. — Deity through defendant 1 as shebait applying to be added as legal representative — Plaintiff objecting. — Application rejected — Plaintiff held could not after limitation ask deity to be brought on record as legal representative. — Shebaits being already on record in another capacity was of no avail. — Application could not be treated as fresh suit under S. 53, T.P. Act, against deity since it would be barred six years having elapsed after the impugned transaction.) ** AIR 1942 Mad. 483 (484). ILR (1942) Mad. 862 (DB). (Application by Official Receiver to set aside transfers by insolvent under Ss. 53 and 54, Provincial Insolvency Act, dismissed. — On appeal by Official Receiver, District Judge directing that proper remedy was suit by creditors under S. 53, T.P. Act, for declaration of transfers as void. — Suit by A, one of creditors under S. 53-A claiming to deduct time spent in prosecution of appeal before District Judge — Section 14, Limitation Act, held did not apply.) ** AIR 1940 Lah. 198 (198, 199). (Though the creditor has to challenge the transfer only within six years, no time limit affects his defence where he has occupied the position of defendant.

Synopsis

1A. Amendment.
1. The English equitable doctrine of part performance.
2. Doctrine of part performance distinguished from the doctrine of Walsh v. Lonsdale, (1882) 21 Ch D 9.
2A. Doctrine of acquiescence and expectation — See S. 51, Notes 22 to 24.
3. Law in India before the introduction of this section.
4. Scope and applicabililty of the section.
5. Section, if retrospective in operation.
6. "Contracts to transfer."
7. Consideration.
8. "Immovable property."
9. Contract must show clearly terms of transfer.
9A. "Writing signed by him or on his behalf."
9B. Oral agreement.
10. Acts of part performance under the section.
10A. Lease.
11. Third paragraph — Transferee's willingness to perform his part.
12. Section applies only if the contract or transfer is invalid for want of completion in the prescribed manner.
13. Transferor debarred from enforcing his right to the property.
14. "Any person claiming under him."
14A. "Any right in respect of the property."
15. Proviso to the section.
16. Contract to transfer — Proof.
16A. Fraud on registration — Effect — See Note 16.
17. This section and S. 27A of the Specific Relief Act (1877), compared.
18. Law in States to which this Act does not apply.
19. Limitation.
20. Plea of part performance.

1A. Amendment.

By Section 10 of the Registration and other Related Laws (Amendment) Act (48 of 2001) the words "the contract though required to be registered has not been registered or" occurring in S 53-A are omitted Certain amendments are also made to the Registration Act (1908)

The cumulative result brought about by the Central Act 48 of 2001 is that 'the documents containing contracts to transfer for consideration, any immovable property for the purpose of S 53A of the Transfer of Property Act, 1882 shall be registered if they have been executed on or after the commencement of the said Central Amendment Act 48 of 2001 and if such documents are not registered on or after such commencement, then they shall have no effect for the purposes of the said S. 53-A :"

Also newly inserted S. 17(1A) and S. 32A in the Registration Act, 1908 provide as follows —

"S 17(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 shall be registered if they have been executed on or after the commencement of the Registration and other Related Laws (Amendment) Act 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said Section 53A ".

(b) in sub section (2), in clause (v), for the opening words "any document" the words, brackets, figure and letter "any document other than the documents specified in sub section (1A)" shall be substituted

"S 32A *Compulsory affixing of photograph, etc* - Every person presenting any document at the proper registration office under Section 32 shall affix his passport size photograph and fingerprints to the document

Provided that where such document relates to the transfer of ownership of immovable property the passport size photograph and fingerprints of each buyer and seller of such property mentioned in the document shall also be affixed to the document.".

1. The English equitable doctrine of part performance.

Where a contract, which was unenforceable under the Statute of Frauds (1677) 29 Car II, c 3

as not being in writing signed by the parties had been *partly performed* and the acts of part performance were such, as unequivocally gave rise to an inference that there must have been such a contract as that alleged, Courts of Equity held that they had power, notwithstanding the Statutes of Frauds to discover by parol evidence the actual terms of such contract and give relief to the parties on that basis. This in short, is the English equitable doctrine of part performance

History of the doctrine.

The Statute of Frauds was passed in England in the year 1677 and S 4 thereof provded *inter alia* that :

> "No action shall be brought whereby to charge any person upon any agreement made in consideration or marriage of upon any contract for sale of lands tenements of hereditaments or any interest in or concerning them unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

It will be noticed that a contract which failed to comply with the requirements of the Statute of Frauds was not *void* but was merely one which could not be proved except by a memo in writing (1) On this principle it was held that if a parol agreement of the nature referred to in the Statute of Frauds was *admitted* by the party bound, it was out of the statute (2) The object of the statute was held to be merely to prevent *fraud* being prepetrated But in the application of the statute it was found in practice that it was sometimes capable of being taken advantage of to *effectuate* a fraud It enabled a person who induced another to *act* upon his promise and change his position subsequently to turn round and repudiate his promise on the ground that it was not reduced to writing Courts of Equity, therefore, sought out means to relieve this difficulty The therory on which they proceeded was that a statute intended to guard against fraud should not be allowed to so operate as to encourage fraud By construction, they limited the operation of the statute to those cases only where the relief was claimed on the *contract itself as alleged* and held that it did not apply to cases where the contract was *partly performed* by the parties and the acts of part performance gave rise to an inference *by themselves* that there must have been some contract between them (3) In other words, where material acts were done in part performance of a contract it was held that it was taken out of the mischief of the statute.(4)

In such cases, the Courts of Equity felt themselves at liberty to receive parol evidence as to the terms of the contract and to grant relief to the parties on the basis of such contract such as by decreeing specific performance of the contract(5) or by granting an injunction preventing a party from acting in breach of the contract In *Caton v Caton*(6) Lord Cranworth, L C observed

> "Though Courts of Equity have held themselves bound by this last enactment (i e the Statute of Frauds), they have yet, in many cases felt themselves at liberty to disregard it when to insist on it, would be to make it the means of effecting instead of preventing fraud This is the ground on

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Section 53-A — Note 1

1. (1883) 52 LJ QB 737 (741 749) : 49 LT 303 Maddison v Alderson ** (1879) 48 LJ Ex 362 (364, 365) 11 QBD 123 (128) Britain v Rossier ** (1805) 102 ER 1419 (1423) 8 RR 566 Crosby v Wadsworth ** (1740) 36 ER 939 (941) 19 RR 254, Pembroke v Thorpe
2. (1801) 34 ER 913 (927) 6 Ves 12 Coothe v Jockson ** (1739) 27 ER 381 (381) Amb 586, Gunter v. Halsey

   [See also (1806) 33 ER 176 (178) 12 Ves 466 8 RR 354 Blagden v Bradbeat]
3. (1807) 33 ER 569 (569, 570) 14 Ves 386 9 RR 304, Frame v Dawson
4. (1784) 28 ER 1205 (1212) 1 Bro CC 404 Whibead v Brockhurst ** (1739) 27 ER 381 (381) : Amb 586, Gunter v. Halsey.
5. (1761) 2 ER 303 (303) 1 Dick 346 Lawson v Laude ** (1739) 27 ER 381 (381) Amb 586 Gunter v Halsey ** (1719) 24 ER 232 (232) Pre Ch 518, Lickey v Lickey
6. (1866) 35 LJ Ch 292 (295) : 1 Ch App 137.

which they decree specific performance of parol contracts for the sale or purchase of land, when the contract has been in part performed The right to relief in such cases rests, not merely on the contract, but on what has been done in pursuance of the contract . The ground on which the Court holds that part performance takes a contract out of the purview of the Statute of Frauds, is, that when one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract, as for instance, by taking possession of land expending money in building or by other like acts then it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced or allowed the person contracting with him to act"

The leading case on the subject is *Maddison v Alerson*(7) Lord Selborne after stating that the equity of part performance rests on the principle of fraud and that Courts of Equity will not permit the statute to be made an instrument of fraud, observed as follows

"In a suit founded on such part performance the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not within the meaning of the statutes upon the contract itself If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow Let the case be supposed of a parol contract to sell land completely performed on both sides, as to everything except conveyance the whole purchase money paid, the purchaser put into possession expenditure by him (say in costly building) upon the property, leases granted by him to tenants The contract is not a nullity, there is nothing in the statute to estop any Court which may have to exercise jurisdiction in the matter from enquiring into and taking notice of the truth of the facts All the acts done must be referred to the actual contract which is the measure and test of their legal and equitable character and consequences It therefore in such a case a conveyance were refused and an action of ejectment brought by the vendor or his heir against the purchaser nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties without taking the contract into account The matter has advanced beyond the stage of contract, and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone The line may not always be capable of being so clearly drawn as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from res gestae subsequent to and arising out of the contract So long as the connection of those res gestae with the alleged contract does not depend upon mere parol testimony but is reasonably to be inferred from the res gestae themselves justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of material errors however clearly proved, in an executed conveyance founded upon an unsigned agreement

It was, however, held that the doctrine of part performance was one which should not be unduly extended,(8) but should be confined within limits intended to prevent the recurrence of the very mischief which the statute was intended to suppress (9)

The following are the limitations :

(a) The act of part performance must unequivocally be referable to the alleged contract

(b) It must be such an act of part performance as to have changed the relative positions of the parties as to the subject-matter of the contract.(10)

(c) It must not be an act *preparatory to* the completion of the contract

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7. (1883) 8 App Cas 467 (475, 476) : 52 LJ QB 737 (742)

8. (1761) 30 ER 126 (127) 2 RR 41, O Reily v Thompson ** (1804) 9 RR 54 (57) 2 Sch and Lefr I. Lindsay v. Lynch

9. (1925) 94 LJ Ch 113 (121) 1925 Ch 96 (112), Rawlinson v. Ames ** (1883) 52 LJ QB 737 (743) 8 App Cas 467 (478), Maddison v Alderson

10. AIR 1923 Bom 473 (475, 476) 47 Bom 621 (DB) ** AIR 1926 Bom 384 (387) (DB)

(A) Act must be unequivocal.

The act of part performance which will take the case out of the Statute of Frauds must unequivocally be referable to the contract alleged. As was obserbed by Lord Hardwick in *Gunter v Halsey*(11) "the acts done in part performance must be such as could be done with no other view or design than to perform the agreement." The mere fact that the act is *consistent* with the alleged contract is not sufficient An act, which though in truth done in pursuance of a contract, *admits of an explanation* withou supposing a contract is not an act of part performance taking th case out of the statute.(12)

The *taking of possession* by the promisee has always been considered a marked circumstance which is unequivocally referable to the contract(13) and which is therefore sufficient to take the case out of the Statute of Frauds "If a Court found a man" said Cotton, L.J. in *Britain v Rossiter*(14)

> "in occupation of land or doing acts with regard to it under circumstances which would *prima facie* render him a trespasser the Court would say that there was strong evidence from the user of the land of the existence of a contract, and would therefore allow parol evidence to be brought to show the real circumstances under which possession was taken"

In *Dale v Hamilton*(15) Sir James Wigram, V C., said .

> "one man without being amenable to the charge of trespass is found in the possession of another man's land. Such a state of things is considered as showing unequivocally that some contract has taken place between the litigant parties, and it has, therefore, on that specific ground been admitted to be an act of part performance."

He relied upon the decision in *Morphett v Jones*(16) where Sir Thomas Plumer, M R , observed :

> "When a person not in possession makes an agreement with the owner, and enters into possession such possession has always been held to be a performance because it is an unequivocal act referable to the contract The act of a stranger on the land cannot be explained except by reference to a contract it has always been considered as evidence of some antecedent contract and lets in the enquiry what that contract was the Court not considering the act to be mere trespass or unauthorised possession"

See also the undermentioned cases.(17)

The mere continuing in possession by a lessee is not an act of part performance of a contract

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11. (1739) 27 ER 381 (381) : Amb 586

12. AIR 1925 Rang 322 (324) 3 Rang 243 (Mortgagee claiming to be in possession under an oral agreement to sell the mortgaged property to him — Possession would ordinarily be refereable to the mortgage and not only to the agreement — Doctrine does not apply — **Overruled** on another point in AIR 1927 Rang 33 (FB)) ** (1846) 67 ER 955 (960) 16 LJ Ch 126 Dale v Hamilton ** (1883) 52 LJ Ch 737 (744) 8 App Cas 467 (479) Maddison v Alderson ** (1807) 33 ER 569 (569, 570), Frame v Dawson ** (1882) 52 LJ QB 140 (143) 10 QBD 148 (154) Humphreys v Green (Payment of part or whole of purchase-money is not sufficient for act of part performance unless shown that it is in respect of particular land which is subject-matter of parol agreement.)

    [See also (1943) 26 ER 803 (805) 3 Atk 1, Lacon v Mestins ** (1896) 65 LJ Ch 754 (756) : 2 Ch 428 (433), Hodson v. Heuland.)

13. AIR 1926 Bom 384 (387) (DB)

14. (1879) 48 LJ Ex 363 (366, 367) : 11 QBD 123 (131).

15. (1846) 67 ER 955 (960) : 16 LJ Ch 126.

16. (1818) 37 ER 45 (49) : 1 Wils Ch 100.

17. (1955) 1 All ER 914 (920, 923) 1955 App Cas 778 ** (1802) 9 PR 3 (9) 1 Sch & Lef 22 Clinan v Cooke ** (1883) 52 LJ Ch 577 (582) 22 Ch D 797 (808) Re Foster Ex parte Foster ** (1811) 34 ER 341 (343) 11 RR 207 Gregory v Mighell ** (1740) 36 ER 939

to grant a fresh lease **(18)** But the continuing in possession by the tenant coupled with the payment of *increased rent* is an act of performance.**(19)** The reason is that former is an equivocal act not necessarily referable to an agreement to grant a lease while the latter acts are such as are referable only to an agreement to grant a fresh lease Where, however, a tenant entered into possession during negotiations for a lease, and continued in possession after the agreement was concluded, it was held that this was a part performance of the contract.**(20)**

The mere *payment of money* even if it be the whole of the purchase-money is not an act of part performance **(21)** It is an equivocal act capable of various explanations **(22)**

(B) The act of part performance must be such as to have changed the relative positions of the parties as to the subject-matter of the contract.

"It is not enough, "said Lord Selborne in *Maddison v Alderson* **(23)**

> "that an act done should be a condition of or good consideration for a contract, unless it is, as between the parties such a part execution as to change their relative positions as to the subject-matter of the contract"

As was stated by Sir William Grant, M R in *Frame v Dawson*(**24**) "the act must be such that the party would suffer an injury amounting to fraud by the refusal to exercute the agreement" **(25)** "It is in general, of the essence of such an act, said Sir James Wigram, in *Dale v Hamilton*(**26**)

> "that the Court shall by reason of the act itself without knowing whether there was an agreement

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(941) 19 RR 254 Pembroke v Thorpe ** (1685) 23 ER 524 (525) 1 Eq Cas Abr 21, Butcher v Stapely ** (1864) 55 ER 626 (627) 11 LT (NS) 360 (361), Millard v Harvey ** (1857) 44 ER 634 (640) 1 De G & J 34 Pain v Coombs ** (1737) 26 ER 9 (9) 1 Atk 12 Clark v Wright ** (1743) 26 ER 803 (805) 3 Atk 1 Lacon v Mertins ** (1876) 46 LJ Ch 189 (191) 4 Ch G 73 (76 78) Ungley v Ungley ** (1797) 30 ER 1063 (1065) 4 RR 26, Wills v Stardling (Payment of increased rent and its acceptance by landlord is strong proof of act of part performance) ** (1921) 90 LJ Ch 373 (375) (1921) 2 Ch 25 (28) Brough v **Nettleton ** (1896) 65 LJ Ch 754 (757) : 74 LT 811, Hodson v. Heuland.**

[**See also** (1914 83 LJ Ch 559 585) (1914) 1 Ch 788 (799) Daniels v Trefusis ** (1887) 56 LJ Ch 662 (666) 35 Ch D 681 (691) Memanus v Cooke (The doctrine of part performance also applied to parol agreement for easements though no interests in land in intended **to be acquired.)]**

18. (1883) 52 LJ QB 737 (744) 31 WR (Eng) 820 Maddison v Alderson ** (1797) 30 ER **1063 (1065) : 4 RR 26. Wills v. Stradling.**

19. (1883) 52 LJ QB 737 (744) 8 App Cas 467 (480) Maddison v Alderson ** (1899) 68 LJ Ch 322 (323) (1899) 1 Ch 622 (625) Miller and aldworth v Sharp ** 1865) 35 LJ Ch 140 **(143) : 1 Ch 35 (40, 41), Nunn v Fabian**

20. (1918) 87 LJ KB 1101 (1103) (1918) 2 KB 314 (318), Biss v Hygate

21. (1917) 86 LJ Ch 726 (729) (1917) 2 Ch 356 (359 360) Chapronière v Lamber ** (1802) 9 RR 3 (8) 1 Sch and Lefr 22, Clinan v Cooke ** (1846) 67 ER 955 (960) 16 LJ Ch 126 Dale v Hamilton ** (1709) 22 ER 40 2 Eq Cas Abr 46, Pengall v Rose ** (1852) 42 ER 907 (910) 21 LJ Ch 761 Hughes v Morris ** (1743) 26 ER 802 (805) 3 Atk 1 Lacon v Mertins ** (1815) 34 ER 593 (594) 13 RR 244, Ex parte Hooper (Payment of whole purchase-money in case of parol contract for sale and mortgage distinguished In former it is part performance, in latter case it is not) ** AIR 1923 Bom 473 (476) 47 Bom 621 (DB)

22. (1883) 52 LJ QB 737 (744) 31 WR (Eng) 820 Maddison v Alderson

23. (1883) 52 LJ QB 737 (744) : 8 App Cas 467 (478).

24. (1807) 33 ER 569 (569, 570) : 9 RR 304

25 See also (1739) 27 ER 381 (381) Amb 586 Gunter v Halsey

26. (1846) 67 ER 955 (960) : 16 LJ Ch 126

or not, find the parties unequivocally in a position different from that which according to their legal rights they would be in if there were no contract."

See also the undermentioned case **(27)** The taking of possession would constitute such an act as would change the position of the parties as to the subject-matter of the contract and it would be a fraud on the other party thereafter to set up the legal invalidity of the contract

(C) Acts preparatory to the contract are not acts of part performance.

The act of part performance must not be an act preparatory to the completion of the contract **(28)** In *Buckmaster v Harrop* **(29)** Sir William Grant M R said " 'that without which there could have been no contract cannot be said to be in part performane of the contract Thus the measurement by a party of the subject-matter of an agreement is not a part performance of the agreement but is only a step towards performance **(30)** The going by a purchaser, to inspect the propety which is the subject-matter of an agreement for sale is not part performance of the agreement **(31)** Where B agreed to grant a lease of certain properties to A, if A procured a certain release from a stranger, and A procured such a release, it was held that the act was merely a preparatory one necessary to be fulfilled by A to entitle him to call for an execution of the contract **(32)**

Under the English doctrine of part performance as stated above, a party to a parol contract may be either as a *plaintiff* or as a *defendant* rely upon part performance **(33)** But the part performance must come from the *party seeking performance* **(34)** The doctrine though generally applied to contracts relating to interests in land, is not confined to such contracts but extends to all contracts required by the Statute of Frauds to be evidenced by a memo in writing **(35)**

Further the taking possession is not the only mode of part performance recognised Where the plaintiff altered her own building in accordance with the wishes and suggestions of the defendant it was held that this necessarily suggested the existence of the alleged contract to take the house on rent, that the plaintiff had changed her position for worse and that the doctrine applied even to the acts of the plaintiff on her own property and no possession was taken by the defendant **(36)**

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27. (1866) 35 LJ Ch 229 (295) 1 Ch 137 148) Caton v Caton ** (1867) 9 RR 3 (9) 2 Sch & Lef 22, Clinan v. Cooke ** (1924) 94 LJ Ch 113 (115) 1925 Ch 96 Rawlinson v Ames

[See also (1875) 24 WR (Eng) 8 (9), Philips v. Alderson.]

28. (1784) 28 ER 1205 (1209) 1 Bro CC 404, Whitbread v Brickhurst

29. (1802) 32 ER 139 (141) 6 RR 132

30. (1740) 36 ER 939 (941) : 19 RR 254, Pembroke v Thorpe

31. (1737) 26 ER 9 (9) : 1 Atk 12, Clerk v. Wright.

32. (1791) 30 ER 126 (127) : 2 Cox 271, O'Reilly v Thompson

33. (1811) 34 ER 341 (342) 11 RR 207 Gregory v Mighell ** (1802) 32 ER 139 (141) 6 RR 132 Buckmaster v Harrop ** (1807) 33 ER 569 (569) 14 ves 386 9 RR 304 Frome v Dawson ** (1701) 1 ER 205 Colles v PC 108 Lester v Foxcroft ** (1857) 44 ER 634 (640) 1 De G & J 34 Pain v Coombs ** (1864) 55 ER 626 (627) 11 LT (NS) 360 36) Millard v Harvey ** (1685) 23 ER 524 (525) 1 Eq Cas Abr 21 Butcher v Stapely ** (1924) 94 LJ Ch 113 (121) : 1925 Ch 96 (109), Rawlinson v. Ames.

[See (1737) 26 ER 9 (9) : 1 Atk 12, Clerk v. Wright]

34. (1802) 32 ER 139 (141) 6 RR 132 Buckmaster v Harrop ** (1924) 94 LJ Ch 113 (121 122) 1925 Ch 96 Rawlinson v Ames ** (1866) 35 LJ Sch 292 (295 1 Ch 134 147) Caton v. Caton

35. (1888) 57 LJ Ch 570 (573) 39 Ch D 508 Lavery v Pursell ** (1887) 56 LJ Ch 662 (665 34 Ch D 681 (690, 691) McManus v Cooke, (Britain v Rossiter ** (1879) 48 LJ Ex 30) Considered. (Applicable to parol agreement for easement.)

36. (1924) 94 LJ Ch 113 (115) 1925 Ch 96 Rawlinson v Ames ** (1904) 73 LJ Ch 701 (703) : (1904) 2 Ch 339 (344), Dickinson v. Barrow

2. Doctrine of part performance, distinguished from the doctrine of Walsh v. Lonsdale, (1882) 21 Ch. D. 9.

It is a maxim of equity in England that "Equity looks on that as done which ought to have been done" In other words, equity will treat the subject-matter of a contract, as to its consequences and incidents in the same manner as if the act contemplated in the contract had been completely executed Thus, a contract to transfer real property did not *at law pass* any title to the property to the transferee but equity acting on the above maxim treated the contract as if it had been executed and regarded the transferee as if he was a transferee at law In other words he obtained an *equitable interest* in the property transferred It was, however necessary for the application of this maxim, that at the time the Court was called upon to apply this maxim, *the right to specific performance of the contract* subsisted For if such right did not subsist as for example, where it had been barred by limitation, it could not be said by the Court that it was one "which ought to be performed by the parties" and it was only if the contract ought to be performed that equity will regard it as performed The decision in *Walsh v Lonsdale*(1), rests upon this principle(2) In that case there was an *agreement in writing* to execute a lease deed by *A* in favour of *B* *B* entered into possession but *A* failed to execute a lease deed He however distrained for rent due by *B* *B* thereupon sued *A* for an injunction that by the non-execution of a lease deed, he was only a tenant from year to year and that *A* could not distrain for rent It was found that the right to specific performance of the contract was subsisting It was held that *A* was *entitled to* distrain on the basis that *B* was a lessee in enquity

It is to be noticed that the rule referred to above presupposes that a valid *contract has been proved or established*, and states that equity will treat it as executed and give relief on that basis, where the right to specific performance of such contract is not barred

The doctrine of *part performance*, on the other hand, applies where a *contract cannot be proved* by reason of its not being in writing as required by the Statute of Frauds In such cases, if acts of part performance have been performed by the parties and the acts by themselves were such that they could not have been done had there been no contract such as that alleged Courts of Equity held that the case was outside the Statute of Frauds and felt themselves enabled to admit proof of the contract, on the ground that a party cannot be allowed to take advantage of even an Act of Parliament to commit fraud on others Having thus come to the conclusion that a contract to transfer had been made, they held that relief could be granted to the parties on this basis They enforced specific performance of the contract where the right to specific performance was subsisting(3) Where a party had changed his position by acting in pursuance of the contract, they prevented the other party from turning round and giving the go-by to the contract on the ground that it was not in writing and this they did whether the right to specific performance did or did not subsist

2A. Doctrine of acquiescence and expectation.

See S. 51, Notes 22 to 24.

3. Law in India before the introduction of this section.

Before the Transfer of Property Act was passed, the English doctrine of part performance was applied to cases arising in this country(1) In *Immudipatian Thiruganga v. Periya*

Section 53-A — Note 2

1. (1882) 31 WR (Eng) 109 (110) : 21 Ch D 9 (14, 15)
2. AIR 1938 Cal 97 (101) : ILR (1938) Cal 607 (DB)
3. AIR 1938 Cal 97 (101, 102) : ILR (1938) 1 Cal 607 (DB)

Section 53-A — Note 3

1. **(1861) 8 Moo Ind App 43 (65) , 4 Suth WR PC 51 (PC) ** (1866) 5 Suth WR PC 111 (112) (PC) ** (1901) 28 Cal 693 (705, 706) : 28 Ind App 211 (PC)** (Contract was before the passing of the Act) ** (1864-65) 2 Bom HCR 168 (175) (DB) ** (1876) 25 Suth WR 335 (339) (DB) ** (1910) 6 Ind Cas 346 (351) (Cal) (Doctrine of part performance not applied as the acts were not unequivocally referable to the contract)

[**See also** (1871) 3 NWPHCR 152 , 155) (DB) ** (1866) 1 Agra 283 (284) (DB)]

Dorasami(2), where the contract to transfer was made *after the passing of the Act* their Lordships of the Privy Council observed as follows :

> "It is contended that though the mortgage may fall short of an actual transfer (for want of registration) it shows a good contract for one and that the defendant may now call upon Ovaiah's heir to implement that contract. Certainly, if such a right exists it would be an answer to the plaintiff's claim' and the exact form in which it could be enforced need not be considered.

The actual decision in the case was, however, that there was no valid contract at all established in the case. The decisions of the High Courts in India expressed conflicting views(3). The matter came up before the Privy Council in *Mahomed Musa v. Aghore Kumar Ganguli*(4) in 1914. In that case, a compromise was entered into between parties by which certain mortgage debts were to be extinguished and certain property divided between the parties in specific shares. No conveyance was executed in pursuance of the compromise but the parties took possession of their respective shares and enjoyed them in accordance therewith. 'The compromise was before the Transfer of Property Act was enacted and under the law then prevailing no written conveyance was necessary to transfer title'. Their Lordships applied the doctrine of part performance as laid down in *Maddison v. Alderson*(5) and held that the actings of the parties were such as to supply all defects. "Their Lordships do not think" said Lord Shaw in delivering the judgment of the Board "that there is anything either in the law of India or of England inconsistent with, but on the contrary that these laws follow the same rule." In *Venkatsvamma v. Appa Rao*(6) A promised to *B* in 1886 to purchase and convey to *B* certain properties in consideration of *B* living with the promisor *A*. The parties acted on this basis for a long time but no conveyance was executed by *A* to *B*. *B* sued *A* for possession of the properties. Their Lordships of the Privy Council held that *B* was entitled to a decree and they referred to the doctrine of part performance as laid down in *Mahomed Musa's case*(7). It may be noted that the transaction in question in the case was subsequent to the passing of the Act.

The conflict of opinion in the High Courts, not unnaturally, continued. In some cases the doctrine of part performance of a contract was applied so as to support a plea in defence to a suit for ejectment, provided that the right to sue for specific performance of the contract still subsisted(8).

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2. **(1901) 24 Mad 377 (385, 386) : 28 Ind App 46 (PC).**

3. In the following cases the doctrine of part performance was applied : **(1894) 16 All 344 (358) (FB).** (Per Banerji, J.) ** (1885) 7 All 482 (488) (Per Petheram, C. J.) ** (1909) 5 Nag LR 70 (72) ** (1904) 17 C PLR 19 (20) ** (1900) 3 C PLR 163 (164) ** (1898) 24 Bom 400 (402) (DB) ** (1912) 17 Ind Cas 180 (184) (DB) (Cal) ** (1910) 5 Ind Cas 562 (564) (Cal).

   [**See also** (1912) 39 Cal 663 (667) (DB) (Principle laid down in Walsh v. Lonsdale (1882) 21 Ch D 9, Foll.) ** (1904) 26 All 266 (269) (DB) ** (1899) 12 CPLR 154 (155).]

   In the following cases the doctrine of part performance was not applied : (1910) 6 Ind Cas 632 (633) (Cal) ** (1909) 36 Cal 926 (922) (DB) ** (1905) 2 Cal LJ 343 (349) (DB) ** (1904) 28 Bom 446 (472) (DB) (Equitable doctrine cannot be applied to override express provisions of statute.) ** (1901) 24 Mad 449 (466) (DB) ** (1892) 16 Mad 464 (466) (DB).

   [**See also** (1906) 3 Nag LR 72 (79) ** (1903) 13 Mad LJ 217 (220) (DB).]

4. **AIR 1914 PC 27 (30) : 42 Cal 801.**

5. **(1883) 52 LJ QB 737 : 8 App Cas 473.**

6. **AIR 1916 PC 9 (13) : 43 Ind App 138.**

7. **AIR 1914 PC 27 : 42 Cal 801.**

8. **AIR 1927 Rang 33 (37) : 4 Rang 368 (FB).** (Mortgagee under a simple registered mortgage subsequently put in possession by the mortgagor can set up plea of subsequent oral agreement of sale in a suit for redemption.) ** **AIR 1924 Mad 271 (273) : 46 Mad 919**

In some cases it was applied without reference to any question as to whether the right to claim specific performance of the contract to transfer was or was not barred by limitation(9)

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(925) (FB). (AIR 1919 Mad 1083 and 29 Mad 336. **Overruled.) ** AIR 1924 Rang 214 (216) : 2 Rang 285 (FB) ** AIR 1916 Bom 1 (4) : 41 Bom 438 (FB)** AIR 1930 Pat 61 (63) (DB) ** AIR 1928 Nag 211 (212) ** AIR 1927 All 355 (357) ** AIR 1927 Cal 954 (956) (DB) (Doctrine of part performance not applied in favour of defendant whose right to specific performance was barred) ** AIR 1927 Cal 365 (370) ** AIR 1927 Nag 353 (354) (A person in possession of the property of another is entitled to retain that possession if he can show that he could successfully maintain a suit against that person for specific performance of a contract that would give him that title) ** AIR 1926 Mad 757 (758) ** AIR 1926 Nag 79 (80) ** AIR 1925 Oudh 120 (125) 27 Oudh Cas 175 (DB) ** AIR 1925 Rang 1 (3) 2 Rang 313 (DB) (Mortgagee in possession under an invalid usufructuary mortgage can resist possession till the loan is paid) ** AIR 1925 Rang 102 (102) ** AIR 1923 Cal 345 (348) (The doctrine of part performance is only applicable where specific performance could have been obtained) ** AIR 1919 Cal 710 (716) (DB) ** AIR 1915 Mad 807 (807, 808).

[**See also** AIR 1929 Cal 186 (187) (DB) (Suit for rent by lessor upon written agreement to lease under which lessee put in possession Decree given because right of specific performance was not barred) ** AIR 1930 Pat 20 (24) (DB) (Case of a lease of a site)]

9. AIR 1930 Mad 1 (3) (Writing is not a necessary preliminary condition before the doctrine of part performance could be invoked) ** AIR 1929 Nag 194 (208) 25 Nag LR 131 (DB) ** AIR 1929 Mad 291 (292) (DB) (Doctrine applied to partition) ** AIR 1929 Rang 251 (252) 7 Rang 288 (DB) ** AIR 1929 Rang 280 (281) 7 Rang 271 (DB) ** AIR 1929 Rang 293 (294) 7 Rang 414 (DB) ** AIR 1928 Sind 61 (63) 23 Sind LR 237 ** AIR 1928 Bom 305 (306) 52 Bom 693 ** AIR 1928 Rang 182 (184) 6 Rang 276 (DB) ** AIR 1928 Rang 237 (238) 6 Rang 315 ** AIR 1928 Rang 321 (323) 6 Rang 270 (DB) ** AIR 1928 Oudh 479 (480) (DB) ** AIR 1928 Rang 124 (124) 6 Rang 125 ** AIR 1927 Rang 234 (235) ** AIR 1927 Mad 830 (833) (Doctrine applied to partition Hindu law) ** AIR 1927 Bom 627 (628, 629) (DB) ** AIR 1927 Nag 402 (403) ** AIR 1927 Oudh 162 (167) (DB) ** AIR 1927 Oudh 570 (571) (DB) ** AIR 1927 Oudh 485 (487 488) (DB) ** AIR 1926 Pat 184 (186) 5 Pat 40 (DB) (Principle applied to unregistered lease) ** AIR 1926 Nag 466 (468) (DB) ** AIR 1926 Rang 81 (82) 3 Rang 608 ** AIR 1926 Bom 384 (387) (DB) (On facts however it was held that the elements necessary to constitute part performance were not established) ** AIR 1925 Mad 763 (764) ** AIR 1925 Mad 965 (967) (DB) (Applicability of doctrine assumed — But on facts held not to apply) ** AIR 1925 Rang 119 (120) 2 Rang 479 ** AIR 1925 Rang 118 (118) (Doctrine applied to unregistered lease) ** AIR 1924 Rang 89 (90) ** AIR 1924 Pat 433 (434) ** AIR 1924 All 772 775) 46 All 759 (DB) ** AIR 1924 All 826 827) 46 All 847 (DB) ** AIR 1924 Mad 296 (297) (DB) ** AIR 1923 Bom 473 (477) 47 Bom 621 (DB) ** AIR 1923 Rang 125 (126 127) 11 Low Bur Rul 462 ** AIR 1923 Rang 222 (223) 1 Rang 261 ** AIR 1923 Nag 177 (179) ** AIR 1923 Pat 492 (505) 2 Pat 607 (DB) (Deed of surrender by Hindu widow without giving possession — Doctrine held inapplicable) ** AIR 1922 Oudh 133 (135) 25 Oudh Cas 83 ** AIR 1922 Oudh 217 (218) ** AIR 1921 Bom 401 (403) 45 Bom 1170 (DB) ** AIR 1921 Low Bur 16 (18) 11 Low Bur Rul 94 (DB) ** AIR 1921 Upp Bur 10 (13) 4 Upp Bur Rul 179 ** AIR 1920 Pat 647 (648) (DB) (Doctrine of part performance not applied where the matter rested in negotiation) ** AIR 1918 Cal 923 (925) (DB) ** (1929) 114 Ind Cas 416 (416) (DB) (Cal) ** (1930) 122 Ind Cas 410 (411) (DB) (All) (Where a member of a joint family conveys a portion of the property belonging to him to another member of the family in lieu of consideration and the transaction has been followed up by the actions of the parties, it is not open to any impeachment by reason of the absence of a registered instrument to support the transaction) ** (1926) 98 Ind Cas 691 (693) (DB) (Mad) ** (1923) 71 Ind Cas 781 (782) (Pesh) (Applicability assumed but held elementts wanting.)

[**See also** AIR 1918 All 211 (213, 214) 40 All 187 (DB) ** AIR 1919 All 302 (303) 41

In some cases(**10**), the possession taken under a contract for sale or lease was held to be a good defence to a suit for ejectment on the principle of *Walsh v Lonsdale*(**11**). In a fourth class of cases(**12**) the doctrine of *Walsh v Lonsdale*(**13**) was mixed up with the doctrine of part performance and both were invoked and applied to the same set of circumstances. In a fifth class of cases(**14**) it was held that the equitable doctrines could not be invoked so as to override the express provisions of the Act.

In *John H. Arseculeratne v J B M Pereira*(**15**), the Privy Council had to decide the question of the applicability of the doctrine to a case to which the Ceylon Ordinance VII of 1840 applied. Under that Ordinance a contract for the purpose of effecting a transfer of immovable property should be made in writing and attested by a notary and in the absence thereof the contract "was of no force or avail in law". Their Lordships held that the doctrine of part performance which had reference to S 4 of the English Statute of Frauds had no application to the stringent provisions of the Ordinance by which the agreement was "of no force or avail in law".

In this state of the authorities S 53-A was introduced by the amending Act of 1929. This section is a partial importation into India of the English equitable doctrine of part performance(**16**).

All 443 (DB) ** AIR 1921 All 248 (253) : 43 All 1 (DB) ** AIR 192 All 333 (333) : 45 All 388 (DB).]

10. AIR 1920 Low Bur 97 (101, 102) : 10 Low Bur 241 (FB) ** AIR 1934 Mad 583 (583) (DB) (Party can take advantage of the doctrine when remedy for specific performance is not time-barred.) ** AIR 1925 Cal 856 (857) : 52 Cal 425 (DB) ** AIR 1924 Cal 484 (484, 485) (DB) (Principle not applied where execution of a decree for specific performance of a contract of lease was barred by limitation.) ** AIR 1921 Cal 519 (519) (DB) (Case.) ** AIR 1919 Cal 607 (611) (DB) (But held that the rule will apply even if a suit for specific performance would be barred.) ** AIR 1916 Cal 376 (377) (DB) (Sale.) ** AIR 1914 Cal 21 (22) (DB)

11. (1882) 31 WR (Eng) 109 (110) : 21 Ch D 9 : 52 LJ Ch 2 : 46 LT 858 (860)

[**See also** AIR 1921 Pat 326 (328) (DB) (This case simply follows Walsh v Lansdale and 20 Ind Cas 803.)]

12. AIR 1930 Pat 53 (54) (DB) ** AIR 1928 Pat 44 (45) : 7 Pat 95 (DB) ** AIR 1923 Cal 130 (133, 134) (DB) ** AIR 1923 Cal 63 (65) : 41 Cal 345 (DB) (AIR 1921 Cal 383 Followed — Where possesssion was obtained in pursuance of an agreement, though document was not executed, held that lease could be executed.) ** AIR 192 Cal 383 (384) (DB) ** AIR 1920 Cal 388 (390) (DB) ** AIR 1919 Cal 845 (846) (DB) ** AIR 1918 Cal 923 (924) (DB) ** AIR 1916 Cal 722 (725, 726) (DB)

13. (1882) 46 LT 858 (860) : 21 Ch D 9

14. AIR 1928 All 641 (649) : 51 All 79 (DB) ** AIR 1919 Mad 1083 (1094, 1095) : 40 Mad 1134 (FB) ** AIR 1931 Oudh 288 (291) : 7 Luck 16 (DB) ** AIR 1931 Mad 580 (586) : 55 Mad 72 (DB) (Per Cornish J.) ** AIR 1931 All 59 (62) (DB) ** AIR 1930 All 175 (177) ** AIR 1929 All 831 (832) (DB) (Provisions of S 107 T P Act and S 17 Registration Act are imperative and cannot be overriden by the doctrine.) ** AIR 1928 All 699 (703) (DB) ** AIR 1922 Cal 436 (439, 442) : 49 Cal 507 ** AIR 1916 Low Bur 38 (39) ** AIR 1916 Mad 821 (822) : 38 Mad 519 (DB) ** AIR 1916 Mad 14 (15) (DB) ** AIR 1915 Bom 22 (23) : 39 Bom 472.

[**See also** AIR 1924 All 396 (397) ** AIR 1930 Mad 84 (90, 97) (DB).]

15. AIR 1928 PC 273 (275).

16. AIR 1964 SC 877 (880) ** AIR 1950 SC 1 (4) ** AIR 1941 Lah 407 (410) : ILR (1942) Lah 79 (FB). (The section is not a reproduction of the English doctrine though it is based upon it.) ** AIR 1964 Cal 235 (237) (DB) (**Reversed** on another point in AIR 1980 SC 226) ** AIR 1963 Mad 310 (311) : ILR (1963) Mad 722 (DB) ** AIR 1961 Punj 378 (382) : ILR (1961) 2 Punj 293 (DB) ** AIR 1959 Andh Pra 568 (570) (DB) ** AIR 1955 Hyd 101

The matter of the applicability of both these doctrines to agreements made before the enactment of the new section directly came into question the next year in *Ariff v Jadunath*(**17**) In that case *A*, the owner, agreed in 1913 to grant a permanent lease to *B* and gave him possession *B* built upon it The performance of the agreement by execution of a registered instrument was refused in 1918 *A* gave notice to quit in 1922 and subsequently sued *B* for ejectment At the date of the suit *B*'s right to have the contract specifically performed had been carried by limitation Their Lordships after reviewing the English law relating to part performance of a contract held that neither the doctrine of *Walsh v Lonsdale*(**18**) nor the doctrine of part performance applied, so as to relieve a transaction from the operation of the statute As to the doctrine of part performance, their Lordships observed as follows :

"Whether an English equitable doctrine should in any case be applied so as to modify the effect of an Indian statute may well be doubted, but that an English equitable doctrine affecting the provisions of an English statute relating to the right to sue upon a contract, should be applied by analogy to such a statute as the Transfer of Property Act and with such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect, to be impossible."

As to the doctrine of *Walsh v Londsdale*(**19**) their Lordships referring to the legal position, if the contract had been, at the date of the suit capable of specific performance observed

"Had he (B) been so entitled, the position would be very different for then the respondent could claim to have executed in his favour by the appellant (A) an instrument in writing which he could duly have registered, 'the appellant's ejetment action being stayed in the meantime'"

It may be noted that their Lordships did not say that if the contract was capable of specific performance, the principle of *Walsh v Lonsdale*(**20**) would apply They merely stated that the fact would enable the defendant in the suit for ejectment to have the suit *stayed* while he filed a separate suit to enforce specific performance of the contract The view was reiterated in *Carrimbhoy v Creet*(**21**) The position was made still more clear in *Pir Bux v Mahomed Tahir*(**22**), where *A* agreed to transfer property to *B* but did not execute a conveyance *B* without any authority from *A* entered into possession and *A* sued for ejectment The ejectment was decreed After observing that a contract for sale of immovable property in India does not of itself create any interest in the property, their Lordships stated as follows :

"The defendant's proper course in the present case as Lord Russell of Killowen points out in *Ariff v Jadunath*(**23**), would have been to have founded on the agreement of sale and to have applied for a

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(102) ILR (1954) Hyd 822 ** AIR 1955 Mys 38 (39) ILR (1955) Mys 234 ** AIR 1954 Mad 702 (703) ** AIR 1952 Orissa 116 (117) (DB) ** AIR 1950 Cal 23 (26) ILR (1950) 2 Cal 443 (DB) ** AIR 1943 Sind 81 (81) ILR (1942) Kar 513 (DB) ** (1941) 45 Cal WN 132 (136) (DB) ** AIR 1939 Cal 163 (166) : ILR (1938) 2 Cal 328 (DB) (There is no bar of defence under limitation to that section) ** AIR 1938 Cal 97 (99 101 103) ILR (1938) 1 Cal 607 (DB) ** AIR 1936 Lah 5 (5) ** AIR 1934 Lah 751 (752) (DB) ** AIR 1934 Pat 301 (302) ** AIR 1932 Sind 42 (43, 44) : 25 Sind LR 433 (DB).

[See also AIR 1944 Lah 179 (180) (DB) (Section 53-A is no way an enactment of the law as stated in AIR 1931 PC 79, but is an extension of it.)]

17. **AIR 1931 PC 79 (82) : 58 Cal 1235.** (On appeal from AIR 1929 Cal 101)
18. (1882) 31 WR (Eng) 109 (110) : 53 LJ Ch 2
19. (1882) 31 WR (Eng) 109 : LR 21 Ch D 9.
20. (1882) 31 WR (Eng) 109 : LR 21 Ch D 9
21. **AIR 1933 PC 29 (32) : 60 Ind App 297.** (On appeal from AIR 1930 Cal 113)
22. **AIR 1934 PC 235 (237, 238) : 61 Ind App 388.**
23. **AIR 1931 PC 79 (82) : 58 Ind App 91 (101).**

stay of the proceedings in order to enable him to compel the plaintiff to execute an instrument in his favour which he could have duly registered. The remedy thus available to the defendant would not have [illegible] on any [illegible] of the agreement [illegible] to the [illegible] but rather [illegible] that the Court [illegible] of [illegible] which [illegible] the same Court [illegible] a decree of specific performance [illegible] [illegible] [illegible]

"The [illegible] appropriate [illegible] present case [illegible] the existence of a contract of sale whether with or without an averment of possession [illegible] upon the [illegible] not a [illegible] defence [illegible] of ejectment [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] which [illegible] protect [illegible] from ejectment. But [illegible] part performance will not avail him to any effect."

See also the undermentioned cases(24) to a similar effect.

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24 AIR 1951 SC 469, 474 [illegible] ** AIR 1938 Mad 358, 359 : ILR 1938 Mad 829 (SB) [illegible] [illegible] property [illegible] [illegible] property — [illegible] Doctrine of part performance does not apply. ** AIR 1935 Pat 291, 296 : 14 Pat 672 (FB) [illegible] before S. 53-A was enacted [illegible] not available in view of AIR [illegible] PC [illegible] ** AIR 1935 Rang 230, 232 : 13 Rang 274 (FB); AIR 1924 Rang [illegible] AIR 1925 Rang [illegible] AIR [illegible] Rang [illegible] AIR [illegible] Rang 33; AIR 1928 Rang [illegible] and AIR [illegible] Rang [illegible] **Held wrong law.** ** AIR [illegible] Nag [illegible] ILR 1947 Nag 447 [illegible] Delivery of possession [illegible] of registered sale deed [illegible] the [illegible] [illegible] [illegible] of part performance [illegible] the [illegible] [illegible] [illegible] permanent lease of [illegible] S [illegible] B [illegible] let into possession — B [illegible] substantial [illegible] S — No lease executed — [illegible] **Held** S [illegible] applicable — Suit was governed [illegible] — Further, B was not [illegible] them under S [illegible] ** AIR [illegible] Bom [illegible] agreement [illegible] Person put in possession — Suit for possession [illegible] Doctrine of part performance does not apply. AIR [illegible] PC [illegible] — **Reversed** on another point in AIR [illegible] ** AIR [illegible] The [illegible] doctrine of part performance is not available [illegible] under provisions of S. 53-A of the Transfer of Property Act [illegible] applicable. ** AIR [illegible] DB [illegible] S. 53-A — [illegible] ** AIR 1936 Oudh [illegible] (DB) Lease executed [illegible] S. 53-A [illegible] the doctrine of part performance applies. AIR [illegible] PC [illegible] ** AIR [illegible] Nag [illegible] Doctrine of part performance not applicable apart from provisions of S. 53-A. ** AIR 1936 Bom 29[illegible] (DB) ** AIR 1936 Nag [illegible] ILR [illegible] Nag [illegible] Case before S. 53-A was introduced — [illegible] part performance [illegible] applicable except under S. 53-A. ** AIR 1935 Cal 54[illegible] 542 : [illegible] Cal [illegible] ejectment of lessee under an unregistered lease brought before enactment of S. 53-A — Lease [illegible]

4. Scope and applicability of the section.

As has been seen in Note 3, this section partially imports into this country the English equitable doctrine of part performance. Apart from this section and except as provided therein the doctrine of part performance is not applicable in India(1).

The chief differences between the English doctrine of part performance and the present section are as follows :

(1) The contract to which the English doctrine is applicable may be *oral*. The contract to which this section applies must be in *writing* signed by the transferor(2). (See Notes 9 and 9a)

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be ejected and doctrine of part performance is not available to him.) ** AIR 1935 Rang 84 (86) : 12 Rang 589 (DB) (AIR 1931 PC 79 : Foll.) ** AIR 1935 Bom 208 (211) (DB) ** AIR 1934 Pat 546 (548) (DB) (Suit before enactment of S. 53-A. — Doctrine of part performance cannot operate to nullify statutory requirement of a registered instrument. AIR 1931 PC 79 : Foll.) ** AIR 1934 Mad 583 (583) (DB) (AIR 1930 Mad 1021. **Reversed.**) ** AIR 1933 Cal 393 (396) ** AIR 1933 Pat 485 (486) ** AIR 1916 Mad 14 (15) (DB) ** (1935) 37 Bom LR 246 (247) (DB) (Case before S. 53-A was introduced. AIR 1934 PC 235 : Foll.) ** (1934) 67 Mad LJ Jour (SN) 62 (62) (DB) (Even if at the date of the suit by the legal owner the defendant in possession had an enforceable contract of sale in his favour he cannot rely upon the fact as a defence to the claim for ejectment — He could at best only only apply for stay of the ejectment suit till he could obtain a decree for specific performance in proper proceedings.)

[**See also** AIR 1941 Cal 32 (37) (Where provisions of Registration Act were applicable doctrine of part performance not applied.)]

[**See however** AIR 1934 Cal 235 (238) : 60 Cal 1372 (DB) (Lease — Contract complete — Agreement registered but formal lease not executed or registered — Lessee in possession under agreement — Material terms performed — Parties are bound in equity by contract to lease. AIR 1931 PC 79, Foll.)]

Section 53-A — Note 4

1. **AIR 1964 SC 877 (880).** (After S. 53A was enacted the only case in which the English doctrine of equity of part performance could be applied in India is where the requirements of S. 53A are satisfied.) ** (1969) 1 Andh LT 150 ** AIR 1961 Punj 378 (382) : ILR (1961) 2 Punj 293 (DB). ** AIR 1958 Pat 133 (140, 141) (DB) (When the doctrine of part performance as laid down in S. 53A is not applicable for want of writing as contemplated in S. 53A, any other defence based on equitable consideration cannot succeed. AIR 1931 PC 72 and AIR 1934 PC 235, Relied on.) ** (1957) 1 Andh WR 366 (368) ** AIR 1957 Andh Pra 854 (855) : ILR (1956) Andhra 1019 (DB) ** AIR 1957 Andh Pra 58 (59) ** AIR 1956 Andh 209 (212) (DB) ** AIR 1950 Nag 403 (405) : ILR (1950) Nag 25 (Right to retain possession on ground of part performance is no longer based on equity — It now rests on express provisions of S. 53A.) ** AIR 1949 Assam 8 (10) (DB) (Where S. 53A in terms applies there is no justification for referring to general discussion on the English doctrine of part performance in order to import into S. 53A limitations not to be found in the statute itself. Hence it is immaterial that defendant could not have sued for specific performance of contract of sale on account of limitation expiring.) ** AIR 1944 Oudh 212 (215) : 19 Luck 565 (DB) (Section defines the limits with in which the English equitable doctrine of part performance can be applied in India.) ** AIR 1938 Mad 746 (748) (This section is generally available to defendant.) ** AIR 1935 Rang 448 (448)

[**See also** AIR 1944 Lah 179 (180) (DB) ("Section 53A creates rights which certainly were not in existence before that enactment was passed — There was previous to that enactment no right to put up an unregistered agreement and part performance under it as a defence to a suit for ejectment.")]

2. AIR 1962 Punj 475 (476) : (The transaction of oral sale requiring compulsory registration under S. 54 is not saved by the doctrine of part performance.) ** AIR 1994 Punj and Har 175 (179) : (1994) 3 Pun LR 186 ** AIR 1947 Cal 353 (361) (DB). (S. 53-A not applicable

(2) Under this section, the transferor is only 'debarred from enforcing any right in respect of the property other than a right expressly provided by the terms of the contract'. The transferee cannot sue for any declaration of his right on the basis of part performance. (See also Note 13.) Under the English law both the parties can claim as plaintiff that the contract be carried into execution, and each can resist a suit by the other claiming rights in violation of the contract(3).

(3) Under the English law, the part performance of a contract gives rise to an *equity* and not to a legal right. But under the present section the part performance gives rise to a statutory right of defence. The right is, however, one, which, but for the lack of some formality, the party would have had, under written agreement. The section does not give any right which the informal agreement itself will not give(4).

Agreement for sale does not create any interest in favour of purchaser. It creates obligation which may be enforced against owner(5).

Here agreement to sell does not confer any interest in the property, where the agreement holder is not put in possession of the property in pursuance of agreement. S. 53-A is not applicable(6). Section 53-A helps the transferee only in protecting his possession and does not confer ownership or title to the property upon him. Even on execution of agreement to sell and handing over possession of land to transferee, the vendor continues to hold the land within the meaning of S. 2(nn) of the T. N. Agricultural Income-tax Act(7).

Even if possession is given to transferee and consideration is paid, title would pass to transferee only on execution and registration of sale deed(8).

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to oral agreement.) ** AIR 1943 Sind 81 (81). ILR (1942) Kant 513 (DB). (Section does not apply to oral contracts.) ** AIR 1941 Bom 346 (348). ILR (1941) Bom 529 (DB). (Or 'signed on his behalf'.) ** AIR 1938 Cal 97 (103). ILR (1938) 1 Cal 607 (DB). ** AIR 1934 Pat 546 (547) (DB). (It is the minimum requirement of the section.) ** AIR 1934 Rang 127 (129). ** AIR 1933 Pat 485 (487). ** AIR 1933 Rang 136 (138).

3. **AIR 1980 SC 226 (233) : (1980) 2 SCJ 1.** ** AIR 1938 Cal 97 (103). ILR (1938) 1 Cal 607 (DB).

4. AIR 1939 Pat 296 (303).

[**See also** (1957) 1 Andh WR 366 (368). (The provisions of S. 53A are not to be applied on equitable considerations. It is a legal right given by a statute.)]

5. 1989 Jab LJ 295 (296).

6. 2000 (1) All Rent Cas 589 (592). ** (1992) (2) Bank CLR 137 (143). (1992) (2) Civ LJ 91 (Kant). ** 1986 Tax LR 456 (461). (1985) 156 ITR 127 (Raj). ** 1985 Tax LR 296 (313). (1985) Taxation 77 (3) (Andh Pra). (S. 53A does not deprive the transferor of his right of ownership.) ** 1984 Tax LR 900 (901). (1983) 15 Taxman 448 (Delhi). (Interest in property by virtue of S. 53A does not amount to ownership. Thus where the assessee entered into agreement to purchase a flour mill and actual possession was taken over by him but no registered sale deed was executed during the relevant accounting year. The assessee could not claim depreciation in respect of the flour mill for the relevant assessment year.) ** AIR 1984 Raj 174 (176). (1983) Raj LW 475. (Thus sale made after the date specified in S. 30-DD of the Rajasthan Tenancy Act could not be recognised for the determination of the ceiling area notwithstanding the fact that agreement was enered into long before the specified date.)

7. 1987 Tax LR 602 (603, 604). (1986) 99 Mad LW 1059. ** 1989 (2) Mad LW 22 (25). (Land covered by the agreement could not be excluded while determining ceiling area of the transferor.) ** (1982) 28 CTR (Guj) 158 (163).

8. 1990 Lab LJ 770 (772) (MP). ** **1987 Tax LR 1259 (1265) : (1987) 2 Ker LT 485 (FB).** (Assessee Trust was in possession of property in pursuance to an agreement which was not executed not registered. In the circumstances the assessee could not claim depreciation in respect of the said property since ownership of the property did not vest in the assessee Trust.)

The necessary conditions for application of S. 53A are that (i) there is a contract to transfer immovable property for consideration (ii) the contract is signed by or on behalf of the transferor, (iii) the terms can be ascertained with reasonable certainty from the document, (iv) the transferee is put in possession or if he has been already in possession, continues in possession, (v) he has done some act in furtherance of the contract, and (vi) the transferee has performed or is willing to perform his part of the contract. If the aforesaid conditions are fulfilled, the transferor or any person claiming under him is debarred from enforcing against the transferee and persons claiming under him any right in respect of the property**(9)**. The right given by Sec. 53A cannot be invoked for enforcement of a right it is a defensive weapon only**(10)**. Where it is proved that a party was not in possession of the suit property, he could not claim benefit of S. 53-A. S. 53-A can be used as a shield to protect possession and not as a sword**(11)**. Benefit of the section goes not only to the party to the transfer for consideration, but also one who is claiming under that party**(12)**. Where the transferee was put in possession of the property in pursuance of a deed of agreement for its sale and continued in possession, he must be deemed to be protected by S. 53A**(13)**. The position of a person who takes possession of the property in part performance of a contract for sale of the said property in his favour fulfilling all the requirements of S. 53-A is analogous to the position of holders of a limited or life estate, mortgagees in possession, lessees having the right to sublet for such a person also holds the property in his own right**(14)**. Where after creation of usufructuary mortgage the mortgagor took fresh loan and agreed that on failure to repay loan, he would sale the property to mortgagee for the loan amount, the document amounted to agreement of sale but being unregistered was of no effect, mortgagor's right to redeem was not extinguished. Section 53-A has no application**(15)**. This section was inserted principally for the protection of ignorant transferees who take possession or spend money in improvements relying on documents which are ineffective as transfers or on contracts which cannot be proved for want of registration. The effect of the section is to relax the strict provisions of the Transfer of Property Act and the Registration Act in favour of

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9. (1967) 2 Andh WR 2 (6) (Further rights of other transferees for consideration without notice should not be affected.) ** **AIR 1970 SC 546 : 1971 (2) SCJ 51** ** 200, (94) DLT 841 ** 2000 (2) MPLJ 460 (468) ** 1999 (1) Rent CR 542 (546) (Punj and Har) ** AIR 1994 Orissa 26 (28) ** 1994 (2) Cur CC 234 ** (1988, 1 Cur CC 551 (553) (Gauhati) ** 1988 (2) Orissa LR 293 (295) ** 1987 (2) Ker LT 762 (764) ** AIR 1984 Kant 50 (54) (1983) 2 Kant LJ 185 ** AIR 1966 Assam 46 (47) ILR (1964) 16 Assam 493 (DB) ** AIR 1959 Andh Pra 534 (535, 536) ILR (1959) Andh Pra 547 (DB) ** AIR 1957 Andh Pra 854 (855) ILR (1956) Andh 1019 (DB) ** AIR 1955 HyJ 101 (102) ILR (1954) HyJ 822 ** AIR 1952 Nag 244 (245) : ILR (1949) Nag 959

[See also AIR 1953 Ajmer 19 (20) (When possession has been given to transferee and he has performed his part of the contract. The transferee or persons claiming under him can defend their possession against the transferor or persons claiming under him even though the document is not registered.) ** AIR 1953 Ajmer 47 (47, 48) (The section envisages a case in which the transferee has obtained possession and has performed his part of the contract. Paragraph 1 of the section envisages the execution of some contract also. Therefore if only the step of registration has not been taken the contract remains only partly performed and the transferee can take advantage of the section.)]

10. (1969) 19 Law Rep 310 (Mys) ** 2000 (2) Rajasthan LR 604 (607) (Raj) ** 1999 (1) Rent CR 542 (546) (Punj and Har) ** 1998 (3) Mad LJ 302 (303) ** (1995) 211 ITR 666 (671) (Delhi)

11. 2001 (4) ICC 757 (761) ** 2002 (1) Cur LJ (CCR) 464 (Punj and Har)

12. AIR 1966 Madh Pra 307 (310) : 1966 Jab LJ 1112.

13. 1999 (2) Gauhati LR 391 (403)

14. 1979 All LJ 823 (826) : (1979) 2 Rent LR 533

15. AIR 1986 Kant 221 (223) : (1985) 2 Kant LJ 364

the transferees in order to allow the defence of part performance to be established(**16**)

The principle of part performance cannot be applied in case of gifts(**17**) If the interest already passes to the purchasers not Section 44 but Section 53A will be applicable(**18**) An alienee put in possession of a service Inam land in pursuance of agreement to purchase such land entered into before coming into force of Karnataka Village Offices Abolition Act 1961 is not entitled to protect his possession under S 53A after coming into force of the Act even if his alienor subsequently obtained regrant of land in question under S 5 or S 6 of the Act(**19**) Where the land sought to be sold under an agreement, was a service Inam land, was inalienable and had vested in State Government, the transferee could not claim protection under S 53A(**20**) Where the agreement of sale of immovable property was in writing and it was proved that the transferee was already in possession of the property and, in part performance of the agreement he had paid two instalments due under the agreement in time, however the third instalment was paid few months after the due date because of the death of one of the transferors and it was accepted by the transferors and the transferee was also willing to perform his part of the contract S 53 A shall be applicable in his case, and the benefit under S 53-A could not be denied to him(**21**) One of the clauses of an agreement of sale provided that the possession of the property shall be handed over by the vendor to the vendee or his nominee on registration of sale deed after the payment of balance consideration by the vendee to the vendor Another clause provided that the vendee has received part payment in advance at the time of execution of the agreement and possession of property is given on the date of agreement itself.

Held that what is contemplated under the former clause is final handing over of possession consequent on registration of sale deed and receipt of balance consideration On the other hand latter clause contemplated interim delivery of possession which is recognised under S 53-A Thus it could not be said that the latter clause does not carry any meaning and should be ignored(**22**) Where the agreement was executed by a person who was not competent to do so the possession in pursuance of such agreement cannot be protected under S 53 A(**23**) Sale of agricultural land by persons belonging to Scheduled Caste in favour of a person of another community is void by virtue of S 42(b) of Rajasthan Tenancy Act (1955), S 53-A is therefore not attracted(**24**) Section 53 A will not be available to a transferee in a case, where it was clearly stipulated in the agreement to sell in favour of the transferee, in respect of attached property that the transferee would be delivered possession of the property after the execution of the sale-deed and it was not in dispute that the judgment-debtor was in actual possession of the property at the time of execution of the agreement and continued to be in possession, and the transferee files an objection petition under O 21, R 59 C P C on the basis of a rent note (Agreement of tenancy) by the judgment-debtor in favour of transferee allegedly executed on the same date on which the agreement to sell was executed(**25**) Transaction of sale dealt with by S 22 of Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (53 of 1961) which as subsequently amended deals not so much with documents or parchments as with real transactions recognizable by law as such must include not merely a regular

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16. (1980) 93 Mad LW 489 (491) ** 972 MPLJ 25 ** 1999 1 Rent C R 542, 546) Punjand Har) ** 1967 Raj LW 413 415, ** AIR 1955 Nag 306 (307) ILR (1956) Nag (DB

17. AIR 1984 (NOC) 67 : ILR (1983) Him Pra 395

18. AIR 1974 Orissa 82 39 Cut LT 689 ** AIR 1978 Orissa 82 44 Cut LT 576 DB

19. (1981) 1 Kant LJ 1 (23) (DB).

20. 1988 (2) Orissa LR 293 (296)

21. AIR 1984 Punj 95 (97, 98)

22. 1996 AIHC 4081 (4086, 4087) : 1996 (1) Ker LJ 656.

23. 1998 (2) All Rent Cas 404 407) The word "person" in S 53A includes his predecessors in-interest.)

24. AIR 1984 (NOC) 295 : 1984 Raj LW 21

25. AIR 1983 Raj 139 (140, 144) : 1982 WLN 572

registered sale by conveyance, but also a sale which is equally effective under the provisions of S 53-A of T. P. Act(26).

The doctrine of part performance cannot be invoked in favour of a rank trespasser of Government land and the Court cannot respect and protect the possession of a rank trespasser of Government land. The petitioner had in instant case encroached upon Government land. It was held that in the facts of the case he could not claim regularisation on basis of possession(27).

Where possession was given under Power of Attorney and not given in terms of agreement, protection under S. 53A could not be claimed(28).

It is only on the facts being found and a finding recorded based thereon in the terms of S. 53A that the Appropriate Authority can arrive at a finding that a transfer within the meaning of Cl. (f) of S. 269-UA of the I.-T. Act had already taken place and therefore the possession of the law are defeated. In the instant case the Authority has in its order nowhere recorded a specific finding that the possession under the agreement of sale had stood transferred to the intending purchaser. Therefore, the Authority could not hold that the statement in Form 37 (under S. 269-UC of the I.-T. Act) in respect of proposed transfer of immovable property was not maintainable and could not be deemed never to have been filed(29).

Where a mother enters into agreement to sell property owned by minors as co-owners and possession is given to the prospective purchaser, and no major co-owner was a party to the agreement, the agreement could not operate as a bar for protecting possession of purchaser in the absence of pleading and evidence of all the four essential conditions necessary for making out a defence of part performance. Besides, the doctrine of part performance was not available against the co-owners, who were not signatories to the agreement nor were consenting parties(30).

When the mortgagor/vendor agrees to sell the mortgaged property to the mortgagee/putative vendee in possession, the mortgagee's status is subsumed or merged in his rights as a putative vendee under S. 53A against the transferor, provided of course the pre-conditions for the application of S. 53A are fulfilled. In such a situation equity of redemption in mortgagor/vendor is lost, he cannot reclaim possession of mortgaged property(31).

Section 53-A cannot be used as a protective equitable title for declaration of possession or to grant a decree for possession on the basis of agreement of sale. The doctrine of part performance is available only so long as agreement can be enforced. But once the sale deed is executed the covenants under the agreement get exhausted and outlive its purpose. The doctrine of merger would apply(32).

Where after the decree for specific performance was passed in favour of vendee prior to the order adjudicating the vendor as insolvent, the vendee who is in possession in pursuance to agreement for sale is entitled to protection under S. 53 A against auction purchaser from Official Liquidator(33).

5. Section, if retrospective in operation.

It has been held that the section is not retrospective in the sense that it can be applied to cases where the act of part performance was before the section came into operation and a *suit was pending* at the time it came into operation(1). But before the decision of the Supreme Court in *Maneklal*

26. (1983) I Mad LJ 261 (265) : 96 Mad LW 180
27. 1995 (2) Cal LJ 79 (87)
28. 2002 (3) Bom CR 611 (618)
29. 1998 (7) Ad (Delhi) 534 (538)
30. AIR 1999 Madh Pra 104 (107, 108) : 1999 (1) Civ LJ 291
31. 2000 AIR SCW 4354 (4357) : 2000 (8) Supreme 268.
32. 1988 (1) Andh LT 230 (237)
33. 1985 (2) Andh WR 456 (463) : (1984) 1 APLJ 229.

Section 53-A — Note 5

1. AIR 1934 PC 235 (238) : 61 Ind App 388 ** AIR 1935 Pat 291 (297) : 14 Pat 672 (FB)

v H J Ginwalia and Sons(2) there was a difference of opinion as to whether it is retrospective in the sense that it will apply to cases where the part performance was before the section came into operation but the *suit is instituted after it came into operation*. According to one line of decisions(3), the section was not retrospective so as to affect acts of part performance which took place before 1st April, 1930 (the date on which the section came into operation) whether the suit was filed before or after that date. In the undermentioned cases(4) the contrary view had been taken namely that the section would apply where the suit was instituted after the 1st April 1930 though the act of part performance took place before that date. This view proceeds upon the ground that this section is not one of the sections referred to in S 63 of the amending Act 20 of 1929 as being not retrospective. As will be seen in Note 13 the section does not create any *title* to or *substantive right* in the property in favour of the transferee. It merely creates a right of *defence* in answer to a suit by the transferor. As pointed out in *Ko Po Mo v Maung Lu Khin*(5) in considering whether a person is entitled to bring such a defence, the date on which the agreement or contract was entered into is

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** AIR 1943 Sind 81 (81) . ILR (1942) Kant 513 (DB) ** AIR 1939 Bom 31 (34) ILR (1939) Bom 71 (DB) ** AIR 1937 All 10 (11) ILR (1937) All 5 (2) (DB) ** AIR 1937 Nag 74 (76) ILR (1936) Nag 1 (5) (DB) ** AIR 1935 Cal 541 (543) 62 Cal 492 ** AIR 1935 Mad 404 (408, 409) (DB) ** AIR 1934 Pat 546 (547) (DB)

[See also AIR 1935 Bom 208 (211) (DB)]

[But see AIR 1961 Manipur 54 (56) Retrospective operation Act extended to Manipur during pendency of suit Court can give relief by applying S 53A AIR 1941 [illegible] (FB). Rel. on. Submitted not good law]]

2. AIR 1950 SC 1 (4).

3 AIR 1956 Mad 354 (362, 363) ILR (1956) Mad 587 (FB) S 63 of Amending Act 20 of 1929 did not by itself make S 53A of the T P Act retrospective. The question whether independently of S 63 of Act 20 of 1929 S 53A of the T P Act is to be held retrospective not considered] ** AIR 1945 Mad 171 (172) (A vendee claiming under an unregistered sale deed executed before the section came into operation cannot be held to plead part performance in a suit for possession by a person having legal title ** AIR 1944 Mad 555 (556) (AIR 1943 Mad 445 (FB) Foll ** **AIR 1943 Mad 445 (448, 449) ILR (1943) Mad 831 (FB).** Approving AIR 1932 Mad 734 ** AIR 1939 Pat 488 (489) (DB) ** AIR 1938 Cal 795 (796) ** AIR 1938 Pat 337 (346, 382) [illegible] Pat 460 (DB) (Construction in order to decide whether an Act is retrospective or prospective stated ** AIR 1936 Mad 916 (926) ** AIR 1936 Nag 282 (283) ILR (1937) Nag 342 ** AIR 1936 Oudh 306 (307) (DB) ** AIR 1936 Oudh 102 (104) (DB) ** AIR 1935 Bom 91 (93) ** AIR 1934 All 701 (701) ** AIR 1932 Mad 734 (736) 56 Mad 169 (DB) ** 1934 18 RD 572 (573).

[See also AIR 1941 Oudh 41 (43) 16 Luck 99 (DB) (Doubtful whether it has retrospective effect) ** AIR 1931 Mad 580 (586) 55 Mad 72 (DB) (Per Cornish J]]

4. AIR 1940 Pat 385 (388, 392) : 19 Pat 752 (FB). (There is no inconsistency in the view that S 53A is retrospective while S 27 Specific Relief Act 1877 is not so) ** AIR 1955 Vindo Pra 15 (16) ** AIR 1953 Ajmer 19 (20) ** AIR 1944 Bom 105 (106) (DB) (**Reversed** on another point in AIR 1950 SC 1) ** AIR 1943 Pat 363 (364) (DB) (**Dissenting from:** AIR 1938 Pat 337 and AIR 1939 Pat 488 AIR 1940 Pat 385 (FB) Expl) ** AIR 1941 Cal 33 (36) (**Overruled** on another point in AIR 1979 Cal 1 (FB) ** AIR 1941 Cal 287 (287) ** AIR 1940 Bom 90 (93) ILR (1940) Bom 50 (DB) ** AIR 1940 Bom 193 (194) (DB) ** AIR 1940 Nag 396 (400) ** AIR 1939 Rang 175 (177) ** AIR 1938 Cal 97 (99, 100, 104) ILR (1938) 1 Cal 607 (DB) ** AIR 1938 Nag 377 (383) ILR (1939) Nag 432 (DB) ** AIR 1937 Cal 467 (467) ** AIR 1937 Pat 36 (37, 38) 15 Pat 786 (DB) ** AIR 1937 Rang 402 (405) 1938 Rang LR 216 (DB) ** AIR 1936 Lah 5 (5) (Obiter) ** AIR 1936 Nag 254 (256) ** AIR 1934 All 768 (770) ** AIR 1933 Bom 381 (384)

5. AIR 1937 Rang 402 (405) : 1938 Rang LR 216 (DB).

really not relevant. What is relevant is really the date on which the suit was filed. The absence of reference to this section in S. 63 of the amending Act 20 of 1929 would also seem to indicate, if anything, that the section would be retrospective in the sense referred to above. The latter view now finds support in the Supreme Court decision in *Manekbai v. H. J. Ginwalla & Sons*(6). See also the undermentioned cases(7) to the same effect. The former view and the decision of the Andhra Pradesh High Court in the undermentioned cases(8) decided after the Supreme Court Judgment must be held to be no longer good law.

6. "Contracts to transfer".

The section applies only where any person *contracts to transfer* property. A document of transfer which is not registered or not completed in the manner prescribed by law may, as will be seen in the Notes on S. 54, operate as a *contract to transfer*. Consequently, the section applies not only to contracts to transfer as such, but also to instruments of transfer. This is made clear by the words "or where there is an instrument of transfer" in the fourth paragraph of the section(1). Thus,

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6. AIR 1950 SC 1 (4).

7. AIR 1955 Hyd 101 (103): ILR (1954) Hyd 822 ** AIR 1955 Madh Bha 49 (52): ILR (1954) MB 237 (DB). (Section 54, Gwalior Transfer of Property Act would apply to all suits instituted after the Act came into force in 1945 in the former Gwalior State although the transaction was effected before its enactment. AIR 1950 SC 1, Foll.) ** AIR 1953 Sau 56 (57) (DB). (S. 53A applied to suits filed after the application of the T.P. Act to Saurashtra even though the transaction may have taken place earlier.) ** AIR 1951 Mys 126 (127): ILR (1951) Mys 414 (DB). (Retrospective effect can be given to S. 53A. (1946) 51 Mys HCR 148 (FB) **held no longer good law** in view of AIR 1950 SC 1.)

8. AIR 1961 Andh Pra 31 (33): ILR (1961) 1 Andh Pra 473 (DB). (Section has no retrospective operation and would not apply to document executed before year 1929.)

Section 53-A — Note 6

1. (1979) 1 Andh LR 13 (17) ** AIR 1971 All 297 (301): ILR (1971) 1 All 31 ** AIR 1965 Punj 117 (118). (The first clause of Section 53A makes it clear that the contract which is sought to be enforced must itself constitute the transaction of transfer. An agreement to raise the rate of interest on the mortgage amount cannot be regarded as an instrument of transfer and therefore the doctrine of part performance has no application.) ** AIR 1963 Andh Pra 239 (240). (S. 53A applies both to cases of out-right sales as also to contracts to sell, provided the other conditions are satisfied. **Reversed** on another point in AIR 1963 AP 489.) ** AIR 1959 Andh Pra 568 (570) (DB). (The most important condition that should be established in order to invoke the section is the existence of a document in writing which constitutes a contract of sale.) ** AIR 1959 Mad 354 (355): ILR (1959) Mad 796. (It is not necessary that a deed of transfer should have been obtained by the party before he could invoke S. 53A. The conditions laid down in S. 53A are fulfilled even though a contract to sell alone was obtained.) ** AIR 1957 Bom 236 (237): ILR (1957) Bom 769. (Sauda Chitti executed — Vendee put in possession of property on payment of consideration — Proper conveyance to be executed later — Transaction held is only a contract and not transfer — Vendee is however, being in possession entitled to the benefit of S. 53A.) ** AIR 1957 Bom 138 (140): ILR (1958) Bom 556 (DB). (Instrument of transfer — Sale deed of property worth less than Rs. 100 — Deed not registered — Transferee in possession — Suit for possession by vendor — Unregistered deed is contract in writing — Defendant can claim benefit of doctrine of part performance — AIR 1943 Bom 431 **Overruled.**) ** 1954 Madh BLJ (HCR) 803 (805) ** AIR 1939 Oudh 85 (86). (A lease on 8 anna stamp paper.)

[**See also** AIR 1964 All 300 (301). (No contract to transfer immovable property — Question of part performance of contract does not arise.) ** AIR 1961 Andh Pra 31 (33): ILR (1961) 1 Andh Pra 473 (DB). (Lessee in possession of land without any agreement for sale of the land in his favour — Continuance of possession not being in pursuance of any agreement for sale. S. 53A not applicable.)]

whether a contract of transfer is specifically enforceable or not has no bearing while considering Section 53A(2).

Where the parties executed unregistered sale deed without prior permission of competent authority (under S. 22 of Orissa Land Reforms Act in instant case), the transaction being void, the transferee could not avail of the benefit under S. 53A(3).

The right of defence under S. 53-A, shall continue to be available to a transferee for consideration, even though his right to sue for specific performance of contract was barred or the contract otherwise became unenforceable(4).

Section does not authorise the transferor to take possession of the property after the period of limitation for suit for specific performance has expired, if the latter did not file the suit. On the other hand, even if a suit for specific performance is not brought by a transferee who is in possession of property in part performance of an agreement of sale, still he can retain the possession under S. 53-A(5). However, contrary view is taken by Karnataka High Court in undermentioned case(6). It is held that a transferee who has obtained possession of immovable property in part performance of the contract cannot resist the suit for possession filed by the vendor, if transferee's right to obtain specific performance is barred by limitation. Once the remedy for acquiring title through specific performance is lost to the vendee, equitable relief of protection to possession comes to an end. Such protection is coterminus and does not survive beyond the span of the agreement. Where the vendee did not offer to pay the balance amount and did not press for execution of the sale deed and his remedy of specific performance got time barred, to allow him to hold possession thereafter would lead to anomalous situation. It would be defeating the doctrine of equity under S. 53A(7).

Where the recitals in a document showed that full consideration was received by vendor and the possession of the property was delivered to the vendee, the two essential ingredients of sale were present. Thus the document was a sale deed and not an agreement to sell. However, it being unregistered document, suit by vendee for specific performance was not maintainable. However, if the vendee was in long possession of the property, then he could claim permanent injunction(8).

In instant case the plaintiffs were in possession of land in pursuance to agreement of sale but prior permission of Tahsildar was envisaged by S. 47 of the A.P. T.A. (Agricultural Lands Act was not obtained. Thus the possession of plaintiffs was unlawful. Therefore they could not claim protection under S. 53A, as a shield. The suit for mere injunction would not be maintainable since the plaintiffs have not filed a suit for specific performance(9).

A lease is a transfer of property, and the section applies to an unregistered instrument of lease(10). But a tenant holding over cannot defend his possession as being in part performance of

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2. AIR 1979 Raj 200 : 1979 Raj LW 212

3. AIR 1994 Orissa 26 (29) : (1994) 2 Cur CC 234

   [**But see** 2001 AIHC 1826 (1830) (Mad) (Where the suit for specific performance filed by agreement holder is dismissed and the dismissal has become final, he has no right to retain or defend possession under S. 53-A.)]

4. AIR 1983 Orissa 107 (111) (1983) 55 Cut LT 77 (DB) ** AIR 2000 Bom 337 (339) (2000) (4) Bom CR 438

5. AIR 1983 Punj 323 (324, 325).

6. 1996 AIHC 2647 (2658) (Kant) (AIR 1983 P and H 323, AIR 1995 AP 102, AIR 1967 Bom 34, AIR 1957 Bom 138 and AIR 1949 Assam 8 **Dissented from.**)

7. 1992 Bom CJ 65 (70).

8. AIR 1988 Madh Pra 152 (153).

9. 1987 (2) All LT 11 (13).

10. AIR 1963 Andh Pra 239 (240, 241) (**Reversed** on another point in AIR 1963 AP 489) ** AIR 1953 Cal 349 (351), ** AIR 1953 Hyd 97 (97), ILR (1955) Hyd 110 ** AIR 1955 Bom

the contract(**11**). A formal lease is not necessary to attract the application of the section. All that is required is that an agreement in writing signed by the transferor can be gathered from the evidence(**12**) In the undermentioned case(**13**) before the introduction of the section, it was held by the Lahore High Court, that in the case of a lease the transaction can never be said to be *completed* and that consequently the doctrine of part performance did not apply This would not be good law under the section.

A grant of a partial and limited interest in immovable property such as a right to dig minerals where the grantor does not exclude himself from working the mines has been held not to be transfer of property so as to make the provisions of this section applicable(**14**)

Mortgage being a transfer of an interest in specific immovable property and for consideration attracts S. 53-A(**15**).

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127 (129) ILR (1951) Bom 692 (DB) (The fact that Section 105 of T P Act defines lease of immovable property as a transfer of a right to enjoy the property does not affect the above position) ** AIR 1951 Nag 285 (287) ILR (1950) Nag 799 (DB) ** AIR 1950 Cal 23 (28) ILR (1950) 2 Cal 443 (DB) ** AIR 1946 Mad 310 (31.) ** AIR 1939 Oudh 85 (86) ** AIR 1937 All 10 (12) . ILR (1937) All 312 (DB) ** AIR 1936 Lah 5 (5) (Lessee under prior unregistered lease – Possession and continuous payment of rent of landlord — **Part performance can be invoked against subsequent lessee.**)

[**See also** (1976) 2 Mad LJ 437 (439) (Rights under fresh lease for three years i e for more than one year not secured by registering lease — Protection of S 53A is not available) ** (1955) 8 Sau LR 378 (381) (Document of lease not signed by lessor — Document is admissible as evidence of part performance of agreement to grant lease under S 53A) ** (1955) 8 Sau L R 1 (1) (There is no difference between a contract to lease and an agreement to lease.)]

11. (1976) 2 Mad LJ 437.

12 **AIR 1950 SC 1 (5)** ** AIR 1965 Pat 467 (468 469) 44 Pat 596 (DB) (AIR 1950 SC 1, Rel on AIR 1960 Pat 354 **Affirmed.**) ** AIR 1956 Mad 693 (694) (Agreement in writing is not required to be in any particular form ** AIR 1944 Pat 35 (36) (Person put in possession under agreement to lease expressed in two registered documents a patta signed by landlord alone and a kabuliyat signed by tenant alone - Transaction does not operate to create a validly executed lease Tenant is however entitled to benefit of S 53A provided he pays rent for period of his occupancy and thus performs his part of contract)

13. AIR 1927 Lah 489 (490).

14. AIR 1944 Pat 261 (266) 23 Pat 115 (DB) (Grant of right to dig mica — Owner not excluding himself from working the mine — **Held,** grant was not a lease but in the nature of an easement)

15. AIR 1963 Andh Pra 489 (490) ILR (1964) Andh Pra 542 (DB) (AIR 1963 AP 239 **Reversed.**) ** AIR 1960 Punj 604 (604) (Unregistered mortgage — Possession delivered to mortgagee — Insolvency of mortgagor — Benefit conferred by S 53A T P Act is available to mortgagee as against Receiver in whom interest of mortgagor vests — Insolvency does not put an end to the possession of a mortgagee under an unregistered document of mortgage) ** AIR 1955 NUC (Mad) 3923 (Unregistered usufructuary mortgage — Mortgagee in possession Part performance Mortgagee is entitled under S 53 A to protect his possession and resist dispossession) ** 1950 Bur LR (HC) 80 (87 88) (Usufructuary mortgage not registered — Mortgagee taking possession in part performance of the contract — **Section applied**)

[**See also** AIR 1950 Trav Co 81 (82) (DB) (Mortgage with possession — Mortgagee retaining portion of mortgage security and surrendering rest to mortgagor in pursuance of arrangement between parties to extinguish mortgage — Subsequent deed of arrangement not registered Suit by mortgagor to redeem mortgage barred by doctrine of part performance)]

A *surrender* by a tenant to the landlord is not a *transfer* and the section has no application to such a case(**16**).

It has been held in the undermentioned cases(**17**) that a relinquishment of a right in property is a transfer within the meaning of the section.

A *family arrangement* cannot be said to operate as a transfer of property or of a contract to transfer property. Such an arrangement may be made only orally, but if in writing registration is necessary for its validity under S. 17 of the Indian Registration Act. Consequently, it has been held that where such arrangement is in writing but not registered, S. 53A has no application to the case and that the defect in the want of registration cannot be cured(**18**). But where under a compromise decree some of the properties are transferred which belonged exclusively to one member to another and such transferee takes possession it is not a merely family settlement and the doctrine would apply(**19**). The view that had been taken in some cases(**20**) before the section was introduced that the doctrine of part performance could be applied to family arrangements also is no longer good law.

Partition of property is not a *transfer* within the meaning of this section and as such the section is not applicable to partition(**21**).

Where under a settlement of a dispute immovable property was taken by one party and movables by other party each party giving up the right to the property allotted to the other. Section 53-A is attracted(**22**).

It is now by amending S. 2(47) of the I. T. Act introduced by sub-clause (v) that a transaction falling within S. 53A has been treated as transfer in relation to capital assets. Such a definition of transfer cannot be applied when we look at S. 53-A independently of the word "transfer" as defined in S. 2(47) of the I.-T. Act(**23**).

A person inducted into possession without his transferor having any right in law cannot claim benefit of this section(**24**).

Where the transfer is not genuine and the transferee is a party to the fraud and his alleged possession is only a ruse to protect the rights of transferor from a person who has obtained an award against the transferor, the transferee has not come to Court with clean hands and is therefore not entitled to protection under S. 53A(**25**).

7. Consideration.

It was held in some cases before this section was enacted that the doctrine of part perform

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16. AIR 1940 Nag 175 (176) : ILR (1940) Nag 177

17. AIR 1966 MP 307 (310) (DB) ** AIR 1953 Hyd 114 (116) : ILR (1952) Hyd 449 (DB)

18. AIR 1937 All 578 (580) : ILR (1937) All 817 (FB) ** AIR 1950 All 700 (704) : ILR (1950) 2 All 703 (DB) ** AIR 1939 All 529 (531) (DB)

19. AIR 1971 Mad 182 (184) : (1971) 1 Mad LJ 225

20. AIR 1933 Lah 648 (650) : 14 Lah 635 (DB) ** AIR 1929 Oudh 323 (325) : 4 Luck 57 (DB) ** AIR 1924 Nag 373 (374).

21. AIR 1954 Sau 46 (48) (DB) ** AIR 1951 Mad 213 (218) : ILR (1951) Mad 607 (DB) ** AIR 1950 Assam 129 (130) (DB)

[See also 1949 RD 373 (374) (Private division of land by mutual consent is not the same thing as a 'transfer for consideration.')]

22. AIR 1966 Madh Pra 307 (310) ; 1966 Jab LJ 1112.

23. (1995) 211 ITR 666 (671) (Delhi).

24. AIR 1969 Mad 191 : ILR (1968) 3 Mad 335.

25. AIR 1966 SC 1088 (1089, 1090) . 1996 AIR SCW 615 . (1995) 7 SCC 690.

ance was applicable even to gifts(1), and in other cases that it did not apply(2). In the case noted below(3), also decided before this section was introduced, it was held that the doctrine of part performance did not apply to a gift by way of *sankalp* at the time of marriage as marriage under the Hindu Law was a sacrament and not a *contract for consideration*. The section makes it clear that it applies only to contracts to transfer for *consideration* and not to gifts(4).

Where the defendant did not pay any consideration and therefore was not put in possession in pursuance of the contract for sale, benefit under S 53A would not be available to him(5).

In the undermentioned case(6), a letter relinquishing right to immovable property did not recite the passing of consideration. It was held that the passing of consideration not being a *term* of the contract could be proved by oral evidence by virtue of proviso 2 to S 92, Evidence Act, and that therefore, this section was applicable if the passing of consideration was proved.

The principle that an unregistered document can be looked into to prove collateral purposes and such a document can become admissible under S 53A of T P Act is not applicable in case of gifts, moreso, where the existence of any document registered or unregistered is not proved although the transferee has entered into possession and further the transferee did not want to prove the document for a collateral purpose but to show that he is the owner of the property by transfer(7).

See also the undermentioned case(8).

8. "Immovable property".

The section applies only to contracts to transfer *immovable* property. It does not apply to contracts to transfer *movable* property(1). Even under the English law, the doctrine was not applicable to contracts relating to movable property(2). In the undermentioned case(3) the immovable property in possession of the transferee was sold for recovery of taxes due on the property and the money realised was deposited in Court. The transferor made a claim to the money. It was held that

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Section 53-A — Note 7

1. AIR 1927 Nag 402 (403) ** AIR 1927 Rang 128 (128) (The rule that where a donee of property is in bona fide possession of it though the gift had not been perfected by a registered instrument in accordance with law, the donor cannot oust the donee is not applicable to a donee from the donee, neither of the deeds of gift being registered.)
2. AIR 1929 Rang 316 (317) ** AIR 1929 Rang 272 (273).

   [See AIR 1928 Bom 250 (252) (DB) (In so far as the decision says that, because specific performance cannot be granted, the doctrine does not apply, it is not correct. See Note 2.)]
3. AIR 1928 All 699 (703) (DB)
4. AIR 1973 Cal 1 (4) : 76 Cal WN 1048 (FB) ** AIR 1984 NOC 67 : ILR (1983) Him Pra 395 (402) ** AIR 1978 (NOC) 11 : 1977 LS (Andh Pra) 118 ** (1959) 2 Mad LJ 502 (506)
5. 1986 Mah LR 230 (233) (Bom)
6. AIR 1946 Mad 452 (453)
7. AIR 1984 (NOC) 67 : ILR (1983) Him Pra 395 (403)
8. AIR 1950 Assam 107 (120) (DB) (Admission in writing by the vendor in mutation proceeding to the effect that he sold the property in question to the vendee could not be a contract in writing transferring the property within S 53A and especially that it contained no averment as to the passing of consideration and that it did not contain all the terms of transfer.)

Section 53-A — Note 8

1. AIR 1957 Manipur 9 (13) ** AIR 1934 Rang 303 (304)
2. See AIR 1930 Mad 84 (95) (DB).
3. AIR 1957 Andh Pra 854 (858, 859) : ILR (1956) Andh Pra 1019 (DB)

it could not be held that this section was inapplicable on the ground that the transferor was enforcing his right against the money and not against the immovable property because unless the transferor could enforce his right against the property he could not enforce it against the money.

9. Contract must show clearly terms of transfer.

It has been seen in Note 1 that the doctrine of part performance in England is applicable only where the acts of part performance *unequivocally* give rise to an inference of a contract. When this is established, the Court could go into parol evidence to ascertain the terms of the contract. Under this section, there is no question of the Court taking any parol evidence as to the terms of the contract. The contract itself must be in writing(1) and must show clearly what are the terms necessary to constitute the transfer(2). It is, however, not necessary that every minute detail of the con-

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Section 53-A — Note 9

1. **AIR 1964 SC 877 (880).** (C bringing in N [illegible] his family under an oral arrangement that latter would marry his wife's sister's daughter and help him in [illegible] and arrangement of his properties in consideration of which N would [illegible] properties on C's death — Alienees from reversioners of C suing for recovery of property in the hands of N's sons — N's sons cannot rely on equitable doctrine of part performance [illegible] claim — Considerations of equity held could not confer on N or his heirs [illegible] the rights which under the statute could be conferred only by a registered instrument — AIR 1956 Andhra 209 **Affirmed.**) ** AIR 1921 Cal 162 [illegible] 28 Cal WN 277 (Kabinnama showing that Mahomedan Lady married on being given property of her mother-in-law in [illegible] — Lady in possession of property — S. 53A is attracted.) ** AIR 1966 Cal 444 (445) [illegible] Cal WN 622 (Memorandum recording fact of taking possession under [illegible] exchange — Memorandum is not contract [illegible] — S. 53A is [illegible] title.) ** AIR 1965 Madh Pra 275 (280) (DB) ** AIR 1962 Punj 475 (Para) ** 1961 MPLJ 1179 (1180) (Where possession of property is [illegible] through [illegible] exchange and it is not proved that the deed of exchange was [illegible] performance under S. 53A of the Act is not [illegible] ** 1960 R [illegible] 1 W [illegible] 104 — A receipt passed by the owner of the house to his tenant for the advance received and [illegible] addressed to the Engineer to arrange water connection in the name of the [illegible] held did not satisfy the requirement of S. 53A.) ** AIR 1958 Mad 526 (527, 528) : ILR (1959) Mad 69 (DB) ** AIR 1958 Pat 133 (140, 141) (DB) ** AIR 1957 Cal 625 (626) : ILR (1957) 3 Cal 636 (An oral lease reserving a yearly rent — Transfer but no permanent structures relying on such invalid lease — Transferee has no defence to the suit for ejectment.) ** AIR 1956 Andhra 209 (212) (DB) (The absence of a written contract would take the case out of the purview of S. 53A.) ** ILR 1955-2 Cal 2[illegible] (23) (DB) ** 1954 Madh BLJ (HCR) 1450 (1453, 1454) ** AIR 1953 Ajmer 47 (47) (Part [illegible] of S. 53A envisages the execution of some contract.) ** AIR 1953 Nag 246 (248) : ILR (1953) Nag 334 ** AIR 1951 Nag 171 (174) : ILR (1950) Nag 618 ** AIR 1951 Assam 102 (10[illegible]) (DB) (Mere admission though in a written by vendor before Revenue authorities [illegible] tion proceedings that land had been sold to vendee cannot be [illegible] as [illegible] tract between the parties.) ** AIR 1948 Nag 67 (68) : ILR (1948) Nag 449 (Unregistered sale deed — Wrong field number given — Delivery of possession of correct property — S. 53A does not apply as there is no contract to transfer in writing the correct property.) ** AIR 1947 Nag 188 (191) : ILR (1946) Nag 991 ** AIR 1944 Oudh 212 (220) : 19 Luck 565 (DB) (There should be a writing signed by the promissor.) ** AIR 1943 Bom 406 (407) ** AIR 1940 Oudh 409 (410) (DB) ** AIR 1937 Nag 402 (406) ** AIR 1936 Nag 282 (282) : ILR (1937) Nag 242

2. 1967 Andh WR 2(7) ** AIR 1962 Cal 502 (503) (Patta for 25 years executed by transferor in favour of transferee — Patta not signed by transferee — Transferee took possession and effected improvements in terms of patta — Patta held though not a lease was a writing within the meaning of S. 53A and the terms necessary to constitute the transfer could be ascertained from it with reasonable certainty.) ** AIR 1960 Cal 609 (618) (DB) — AIR

tract should emerge from the writings signed by the parties. It is quite enough if the essential terms of the contract are capable of ascertainment with reasonable certainty from the writings brought into existence by the parties concerned. In other words, the section is attracted not only in a case where the terms are ascertained but also in a case where the terms are ascertainable with reasonable certainty(3). It is one of the necessary ingredients of S. 53A that the terms of the written contract must be ascertainable with reasonable certainty. The emphasis on the words 'reasonable certainty' presupposes that the Court should be in a position to judge the exact nature of transaction that is the subject matter of the document. This is the foundational basis for S. 53A and in the absence of document and in the absence of secondary evidence from which the Court can ascertain the terms of that document with reasonable certainty. The defendants are not entitled to the benefit of the doctrine of part performance(4).

Where it is established that there was a document of the description envisaged in S. 53-A, the existence of the contents of the document can be established by secondary evidence(5). In the undermentioned case(6), a letter relinquishing right to immovable property did not recite the passing of consideration. It was held that the only term necessary to constitute the contract being explicitly stated in it the passing of consideration could be proved by oral evidence and that therefore this section applied to the case.

Where the vendee alleged that according to the agreement a plot of 224 sq. yards out of a survey number is agreed to be sold to him and in pursuance thereof he was in possession but no dimensions and boundaries of the plot were given in the agreement nor any map annexed, it was not possible to know which piece of land from the said survey number was agreed to be sold. Thus vendee was not entitled to protection under S. 53A and injunction could not be granted to him(7).

Written agreement is a sine qua non for applicability of the doctrine of part performance. Proposed vendee cannot protect his title on basis of oral agreement. Thus a letter written by vendor to his uncle that he has entered into oral agreement to sell his immovable property to proposed vendee cannot be taken as an agreement to sell within meaning of S. 53-A(8).

A document merely referring to a previous oral agreement to transfer and its terms is not a "contract in writing" such as is required by the section, though a document which reduces to writing the terms of a previous oral agreement would be(9). Similarly, an affidavit cannot be considered

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1951 Nag 285 (286, 287). ILR (1950) Nag 799 (DB). (Draft lease deed prepared to avoid any changes of the terms agreed to orally between the parties — All the necessary terms deducible from the draft — Draft, held, was sufficient to attract the section.) ** AIR 1950 Assam 107 (110) (DB). (Admission in writing by the vendor in mutation proceedings that he had sold the property in question to the vendee was held not to be a contract within S. 53A especially since it did not contain all the terms of transfer.) ** AIR 1944 Oudh 212 (220) (DB) ** AIR 1937 All 36 (38) (DB) ** AIR 1933 Bom 381 (384).

3. ILR (1960) 2 All 71 (88, 89) (DB).

4. AIR 1995 Bom 113 (116).

5. AIR 1959 Andh Pra 568 (570) (DB) ** AIR 1956 Mad 693 (694). (Agreement to lease suppressed by plaintiff — Oral evidence can be adduced.)

6. AIR 1946 Mad 452 (453).

7. 1987 (1) Bom CR 419 (424).

8. **AIR 2002 SC 812 (816) : 2002 AIR SCW 471 : 2002 (2) SCC 612.**

9. **AIR 1976 SC 2506 : 1976 UJ (SC) 823** ** (1978) 2 Mah LR 507 (508) ** 1975 UCR (Bom) 22 ** AIR 1968 Andh Pra 291 (297). ILR (1970) Andh Pra 933 ** (1967) 2 Andh WR 2 (7) ** 1954 Madh BLJ (HCR) 1450 (1453, 1454). (What is required to be written and signed is the contract to transfer and not any other paper wherein a reference to such a contract is made.) ** AIR 1938 Rang 356 (357) : 1938 Rang LR 692 (DB). (Confirming AIR 1938 Rang 49.)

as a contract in writing within the meaning of Section 53A(**10**). In the undermentioned decision of the Rangoon High Court(**11**) a document styled a receipt and reciting a previous agreement to sell was held not to be a contract in writing sufficient for the purposes of this section, though from it the terms necessary to constitute a transfer could be ascertained. The same view was expressed in a latter case of the same High Court(**12**) and also in the undermentioned cases(**13**) of the High Courts of Bombay and Madhya Bharat. In the undermentioned cases(**14**), on the other hand, a document styled a receipt but which, in essence, contained all the essential terms of the contract to transfer was held to be sufficient for purposes of this section. The first view must be held to be no longer good law in view of the decision of the Supreme Court in the undermentioned case(**15**) wherein it has been held that the terms of a lease could be gathered from a Government resolution containing a summary of arrangement to grant lease to the defendant.

9A. "Writing signed by him or on his behalf".

This section requires that the contract relied on by the defendant in a suit for possession must be in writing(**1**) signed by the transferor claiming to recover possession, or on his behalf, presum-

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[See AIR 1962 Punj 475 (476) (A reference to an oral sale in a mutation recorded by a **Patwari cannot be equated with a writing of the transaction itself.)** ** AIR 1951 Nag 285 (286) : ILR (1950) Nag 799 (DB). When the terms of an oral contract of disposition of property are reduced to the form of a document the document takes the place of the oral contract or agreement and thus there comes into existence a contract or agreement in writing.)

[See also AIR 1924 Bom 150 (151, 152) (DB) (**Purchases of immovable property under an oral sale followed by delivery of possession can resist a claim to the same property by a subsequent purchaser under a registered sale deed.)**

10. (1978) 2 Mah LR 507.

11. AIR 1938 Rang 356 (357). ** AIR 1939 Rang 36 (37) : 1939 Rang LR 575 (DB). (By merely mentioning the period to pay the balance of purchase money, document could not **be termed as an agreement contemplated by S. 53A.)**

12. AIR 1944 Bom 105 (107) : 212 Ind Cas 544 (DB). Hormasji Jamshedji v. Manek Mansukhbhai. (A Government resolution containing a summary of an arrangement to grant a lease to a person at a certain rate and sanctioning the proposal of a settlement officer, the arrangement to be gathered from correspondence referred to, cannot be regarded as secondary evidence of a contract of lease or as proof of the contract itself within the meaning of **this section. AIR 1938 Rang 356 : 1938 Rang LR 692. Relied on.)**

13. II R (1952) Madh Bha 410 : 414, 415 (DB). (Application of the parties for obtaining the requisite sanction from the Revenue authorities for sale of property is not sufficient to **satisfy the requirements of S. 53-A. AIR 1943 Bom 406 Referred.** ** AIR 1943 Bom 406 (407). (An application by plaintiff to have defendant's name entered in mutation register in respect of certain land on ground that it had been sold to him orally. Application stating terms of sale — **Held,** document was not sufficient to satisfy requirements of this section as it contained only a recital of past event and not the contract of sale.)

14. AIR 1944 Oudh 212 (220) : 19 Luck 565 (DB). (**Affirming** AIR 1940 Oudh 1, on appeal.) **** AIR 1934 Rang 304 (306) : 13 Rang 17.**

15. AIR 1950 SC 1 (4, 5). (AIR 1944 Bom 105, Reversed.)

Section 53-A — Note 9A

1. AIR 1950 SC 1 (5) ** AIR 1998 Andh Pra 285 (285) : (1998) 2 Andh LT 137. (No written paper showing delivery of possession. No agreement. Date on which possession given not mentioned in affidavit — Nor name of person who delivered possession. Plea of part performance not maintainable.) ** AIR 1998 Orissa 19 (22). ** 1992 BBCJ 63 (642). ** (1979) 20 (2) Guj LR 51 (57). (The mutation entry by which the property was mutated to the name of purchaser on the strength of oral statements made by vendor and purchaser

ably by some one who has authority to bind or represent him(2).

In the absence of written contract from which terms necessary for constituting transfer could be ascertained, S. 53-A could not be invoked(3).

Section 53A does not envisage an oral contract but a contract in writing from which the terms necessary to constitute transfer can be ascertained with reasonable certainty(4)

As such, in case of an oral variation or modification of the terms of the contract the equity prescribed under Section 53A cannot be evoked(5) Secondary evidence as to the contents of contract is not admissible even though the opposite party does not object to its admission(6)

Where a party alleged that he had deposited certain amount with Municipal Committee towards part performance of contract of sale of municipal land to him but nothing was brought on record to indicate that the Mpl Committee had ever executed a written contract for the transfer of the land in his favour the doctrine of part performance could not be invoked(7)

The transferee claimed that he was in possession of the suit property in pursuance of the contract in writing He relied upon a money receipt as a contract in writing It appears from the receipt that the transferor has agreed to transfer a plot of land and that he had received certain amount from the transferee However, the receipt did not mention the identity of the plot agreed to be sold nor total consideration for which it was agreed to be sold Thus the first condition under S 53A of a contract in writing wherefrom terms necessary to constitute transfer could be ascertained with reasonable certainty was not satisfied(8)

There is a difference of opinion on the question of the applicability of the section where a contract is signed by a Hindu father or manager of a Hindu joint family It has been held in the undermentioned decisions(9) that the sons or the other members of the family answer the description of the word 'transferor' as used in this section and the sons or the other members of the family are debarred from instituting a suit for recovery of possession from the transferee A contrary view that the transferee cannot avail of this section against the sons or other members of the family has

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cannot give protection under S 53A because such an entry or statement in pursuance of which such entry is made cannot be equated with an instrument of transfer as is referred to in S 53A) ** (1980) 2 Mad LJ 398 (421) (DB) ** 1979 All WC 177 (178) ** AIR 1979 (NOC) 172 (Goa) ** AIR 1978 Orissa 222 46 Cut LT 7 ** AIR 1978 Orissa 219 (1979) 2 Cut WR 589 ** AIR 1959 Assam 60 (61) ILR (1958) 9 Assam 50 (DB) ** AIR 1959 Madh Pra 221 (222) ** AIR 1956 Andhra 209 (212) (DB) ** AIR 1956 Punj 181 (184 185) ILR (1956) Punj 1279 (DB) ** (1954) 20 Cut LT 614 (620 621) ** AIR 1947 Nag 188 (191) : ILR (1946) Nag 991.

2. **1969 U J (SC) 318 ** AIR 1948 PC 95 (96) : ILR (1949) Mad 141.** (Contract for sale by mother guardian on behalf of minor son — Contract within competence of guardian and for benefit of minor — Minor is 'transferor' within meaning of the section — AIR 1944 Mad 337 **Reversed.**) ** 2000 (1) Rent CR 377 (379) (Punj and Har) ** AIR 1956 Punj 184 (184 185) ILR (1956) Punj 1279 (DB) ** AIR 1941 Bom 346 (348)

[But see 1972 MPLJ 25]

3. 1995 (1) Civ CC 384 (387) (Raj)

4. **AIR 1982 SC 989 : (1982) 1 SCC 237 **** 1997 (2) Cal HN 364 (374)

5. AIR 1968 Mad 294 (298) : (1968) 1 Mad LJ 249

6. (1967) 2 Andh WR 444 ** ILR (1975) Kant 968

7. AIR 1994 Punj and Har 175 (179) : (1994) 3 Pun LR 186.

8. 1997 AIHC 3140 (3143) : 1997 (2) Gauhati LR 306

9. **AIR 1967 Andh Pra 237 (243) (FB).** (AIR 1948 PC 95. Foll. AIR 1948 Mad 526. **Dissent:** AIR 1959 Andh Pra 539. **Overruled.**) ** AIR 1963 Mad 310 (314) ILR (1963) Mad 722 (DB) (AIR 1948 Mad 526 **Overruled.**) ** AIR 1961 Bom 215 (217) ILR (1961) Bom 824 (DB) (AIR 1948 Mad 526 and AIR 1959 Andh Pra 534. **Diss.**) * AIR 1948 Mad 526 (527).

been taken in the following case(10).

No written agreement authorising the father by the sons to sell their properties is required if there is sufficient proof that the sons have in fact authorised their father to enter into an agreement for the sale of properties which will enable the defendant to plead successfully the statutory defence under S 53A In instant case held the evidence was lacking to find that father had proper legal authority to bind his sons(11).

If one of the parties to the agreement performs his part of agreement by making payment of money, it would be deemed that he binds himself with the agreement even though he has not signed it(12).

Where the contract is signed by the transferor it is not necessary that the contract should have been signed by the transferee also(13) Thus it is a sufficient compliance with the provisions of this section that an instrument of lease is signed by the lessor alone though under S 107 a lease is required to be executed by both the lessor and the lessee(14) Nor is it sufficient that the contract is signed by the transfeee alone when it is not signed by the transferor(15) Thus a kabuliyat signed by the lessee alone will not attract this section(16).

Where the vendor denied that he had signed the agreement and the Handwriting Expert opined that the thumb impression on the agreement did not belong to vendor the doctrine of part performance would be inapplicable(17) Where a letter is written by the tenant to one of the landlords and there is no writing signed by the landlords S 53A could not be pressed into service(18)

In the undermentioned case(19) *A* and *B* were the owners of certain premises *B* was also a member of a partnership with other persons By a registered lease deed *A* and *B* leased out the premises to the partnership Subsequently the partnership contracted to transfer by an agreement, their leasehold interest to a company There was, however, no registered deed It was held that the company might, under this section, claim to remain in possession of the leasehold premises as against the partners of the firm but not against *B* in his capacity as an owner of the property nor against *A* who was not a party to the agreement at all

Where the terms of the agreement purported to be a deed of lease for manufacturing purpose are silent as to the period of duration and as to the period of notice required for its termination, it is

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10. AIR 1959 Mys 173 (175, 176) : ILR (1957) Mys 108

11. AIR 1990 (NOC) 119 : (1989) 1 Ker LJ 769

12. 1992 Jab LJ 635 (638) (Madh Pra)

13. AIR 1949 Nag 389 (393, 394) : ILR (1949) Nag 849 (DB)

14. AIR 1962 Cal 502 (503) ** AIR (1951) Nag 285 (286, 287) ILR (1950) Nag 799 (DB)

[But see AIR 1975 Pat 58 : 1974 BLJR 757 (DB)]

15. AIR 1960 Cal 40 (42)

16. AIR 1966 Pat 93 (95) (Kabuliyatnama signed only by the lessee) ** AIR 1962 Cal 502, 503 ** AIR 1960 Cal 40 (42) ** AIR 1957 Pat 24 (25) (Section inapplicable to kabuliyat) ** AIR 1954 Cal 207 (208) (DB)

[See also (1959) 63 Cal WN 535 (538, 539) (Lease for five years — Expiry of term of tenancy — S. 53A would not apply.)]

17. AIR 1992 All 346 (350) : 1992 All LJ 1065.

18. 1998 (75) DLT 620 (623)

19. AIR 1963 Cal 198 (202) (DB) (Lease of property by A and B to a partnership of which B was also partner — Agreement by partnership to transfer their leasehold interest to a company — Company could not take advantage of S 53A as against all and as against B in his capacity as owner of property.)

signed by both the lessor and the lessee but is unregistered. It has been found that it was not an instrument of lease but could only be an agreement to lease which could be read as an agreement for the grant of a lease. If the agreement was for the grant of a lease from year to year the lease could only be brought into existence by a registered deed. That was not done but the lessee was put into possession on those terms.

Held, even in such circumstances the possession of the lessee is protected by S. 53A(**20**).

As the Bengal Tenancy Act (1885) is not an exhaustive code as to the immovable property when that is used for agricultural purposes and held by a tenant the provision in S. 53-A which is meant to protect a person from eviction when he has entered into possession in part performance of an unregistered deed of transfer can be extended to agricultural properties and hence is available to the transferee of an occupancy holding who has obtained a deed of transfer but has not got it registered; as required by S. 26-C of the Tenancy Act. Consequently such unregistered deed is admissible in evidence for the purpose of establishing part performance under S. 53-A, T.P. Act(**21**).

9B. Oral agreement.

A tenant alleged that he is in possession of the suit property in pursuance of oral agreement of sale between the parties. No amount was paid as consideration by the tenant to landlord. Tenant was not entitled to benefit under S. 53A(**1**).

Written contract is a sine qua non for applicability of the doctrine of part performance. Defence by tenant in ejectment suit that he is in possession of premises in puruance of oral agreement for sale between himself and the landlord would not be available to tenant(**2**).

Where a lease is entered into orally or by a deed which is unregistered, it cannot be a fixed term lease but monthly lease, Section 53A would not be applicable to such monthly tenancy(**3**).

Where oral agreement for sale is followed by oral sale, oral agreement gets merged with the resultant oral sale and when the latter is void former does not exist independently(**4**).

10. Acts of part performance under the section.

Under the English law, as seen in Note 1, the act of part performance must be not only unequivocally referable to a contract but must have so changed the position of a party as would make it fraudulent on the part of the other party to claim that the contract was not valid for want of writing. Under the present section.

(1) the transferee must have 'taken' possession(**1**), or

(2) if he was already in possession, must have continued in possession 'and' must have

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20. 1983 All LJ 93 (100).

21. AIR 1971 Cal 163 (165) : 75 Cal WN 106 (DB).

Section 53-A — Note 9B

1. AIR 1995 Mad 172 (179).

2. AIR 1993 Pat 1 (11) ** **AIR 2002 SC 812 (816) : 2002 AIR SCW 471 : 2002 (1) JT 465.** (Letter written by vendor to his relative admitting oral agreement to sell property to proposed vendee cannot be taken as agreement to sell within meaning of S. 53-A.)

3. AIR 1994 All 221 (235) : 1994 All LJ 770.

4. 1989 (1) Andh LT 389 (398).

Section 53-A — Note 10

1. **AIR 1950 FC 1 (7) : 1949 FCR 484.** (Pending redemption suit mortgagor executing agreement to sell mortgaged property to mortgagee — Suit dropped — No sale deed executed — Mortgagee never in possession of mortgaged property either actual or constructive — No possession "in pursuance of the agreement" — S. 53-A held had no application.) ** ILR (1980) Madh Pra 504 (509). (Person taking possession of suit property after paying sale price in pursuance of agreement to purchase entered into with plaintiff during pendency of suit, is entitled to invoke provisions of S. 53-A.) ** (1979) 2 Andh WR 427

further done some act in furtherance of the contract(2). Where an act is merely preparatory or introductory to the contract and no connection is established between the act and the contract it is not an act done in furtherance of the contract(3).

In order to avail oneself of the benefit of the provisions of S. 53A it must be shown that the possession refers unequivocally to the contract. The possession must only be referable to the agreements and not be referable to any other title. Where a person is already in possession and continues in possession after the contract for sale, it does not necessarily follow that he continues in possession in performance of the contract. He must show either from the contract itself or from some other evidence that the continuance of his possession was either with reference to or pursuant to and consistent with the contract for sale alone and no other source(4).

The act to be in part performance of a contract must be unequivocally referable to such contract and conversly must not be referable to any other contract or any other understanding. Where a

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. (1979) 2 APLJ 217 (220) ** AIR 1959 Madh Pra 221 (222) ** AIR 1957 Bom 236 (238) ILR (1957) Bom 769 (Vendee in possession of properties under Sale deed — Transaction is only a contract — Vendee entitled to avail of S. 53A.) ** AIR 1955 Pat 126 (DB) (When it is found that the defendant is not in possession of the suit land there is no question of protecting his possession under S. 53A.) ** AIR 1956 Assam 129 (DB) (Per Ram Labhaya J. — Transferee not in possession — It is not necessary to consider whether any other such act has been done.) ** (1936) 62 Ind Cas 88 (88) (Nag) (Where no possession is given or intended to be given to the transferee no reference to the question of retaining it under S. 53A can arise.) ** (1933) 17 RD 201 (2..)

2. **AIR 1982 SC 989 (1000, 1004), (1982) 1 SCJ 386** ** AIR 1983 Andh Pra 177 (178) (Where a transferee, already in possession of a property, purchases that property by a sale agreement which could not be registered resulting in non-payment of the balance sale consideration to the transferor, the fact that he has duly observed all the conditions required of him under the sale agreement amounts to part performance of contract and therefore, enables him to seek protection under S. 53A.) ** AIR 1983 Raj 176 (178) 1982 Raj LW 71 (Mortgagor executing agreement to sell the lands to mortgagee for the same amount of mortgage and agreeing to get sale deed registered after expiry of one year, such an act of appropriation of mortgage money would be an act in furtherance of the contract.) ** 1980 All LJ 1060 (1064) 1980 All CJ 476 ** (1980) 2 Mad LJ 498 (421) ** (19..) 1 Cut WR 212 ** (1968) 70 Pun LR 897 ** AIR 1962 Cal 502 (503) (Patta for 25 years executed by A in favour of B on monthly rental — Patta not signed by B — B going into possession and effecting improvements in terms of patta — Suit for arrears of rent and eviction of B before expiry of patta — There is no implied tenancy from month to month — Doctrine of part performance held applied.) ** AIR 1955 Madh B 94 (95) (The filing of a suit for specific performance of a contract is an act for enforcing the contract and not one done in furtherance of the contract and cannot therefore be an act of part performance.) ** AIR 1955 Hyd 101 (103) ILR (1954) Hyd 822 ** AIR 1954 Ajmer 70 (..) (Usufructuary mortgagee getting rent note executed in respect of house mortgaged to him — It is in assertion of his rights in pursuance of the mortgage.) ** AIR 1954 Madh Bha 128 (129) (In case of usufructuary mortgage interest transferable by the mortgagor not being identical with the property, mortgagee pleading part performance pursuant to sale of equity of redemption in his favour must show some distinct overt act besides his possession.) ** AIR 1953 Hyd 114 (116) ILR (1952) Hyd 449 (DB) ** AIR 1951 Nag 285 (287) ILR (1950) Nag 799 (DB) (Paying Nazul rent and municipal taxes and spending for repairs by a lessee who is already in possession are acts done in furtherance of the contract within the meaning of the section.) ** AIR 1944 Oudh 212 (218) 19 Luck 565 (DB) (Section does not require that the contract must contain a direct covenant regarding transference of possession.) ** AIR 1943 Bom 406 (406).

3. AIR 1965 Madh Pra 275 (281, 282) (DB) ** AIR 1955 Hyd 101 (103) ILR (1954) Hyd 822 ** AIR 1955 Madh Bha 93 (94).

4. 1999 (1) Cal HN 1 (6)

person is not placed in possession of the properties in part performance of the agreement of sale and his possession was merely permissive possession, S. 53-A would not be attracted(5)

Apart from the fact that the defence available under S 55A was not pleaded at all, the same is not available to the defendant in the instant case because there is nothing to show that subsequent possession of the defendant was referable to the agreement of sale. Principles of equity are embodied in Transfer of Property Act in general and in S. 53-A in particular equitable owner cannot seek protection from the Court independent of the provisions of S 53-A(6).

Where there is nothing to indicate in the agreement of sale that the defendant was allowed to continue in possession pursuant to the agreement of sale, S. 53A could not be applied(7).

In the case of a renewal of a lease mere payment of reduced rent is not a step towards part performance in absence of the acceptance of it by the lessor though payment of increased rent in terms of a new agreement could amount to such act(8).

The contract itself, contemplated by the section, being in writing from which "the terms necessary to constitute the transfer can be ascertained with reasonable certainty" it is conceived that the "act in furtherance of the contract" referred to in the second paragraph need not be construed as having the same meaning and limitations as the act of part performance in England It need not, of itself, unequivocally have reference to the contract It may be shown by evidence to be in furtherance of the contract though, of itself it may be equivocal e g , the payment of money(9)

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5. 1983 (1) Bom CR 533 (542).
6. 1983 (1) Bom CR 174 (180).
7. 1982 (5) Kant LJ 284 (287).
8. (1970) 83 Mad LW 761 (2) (DB).
9. AIR 1981 All 373 (375) (Part payment of purchase price is an act in furtherance of contract) ** (1980) 93 Mad LW 489 (491, 492) ** 1977 (U P) RCC 131 (133) ** AIR 1976 Pat 2 1976 BLJR 77 (Consideration under a contract to transfer need not pass in praesenti) ** (1968) 70 Punj LR 897 ** (1967) 2 Andh WR 2 (7) (Oral agreement subsequently reduced into writing — Amount paid after the oral agreement appropriated towards part payment of consideration for agreement to sell — Part payment is an act in furtherance of the contract to sell) ** AIR 1967 Bom 34 (36) ILR (1966) Bom 291 ** 1967 RLW 413 (414) (Payment of balance of sale consideration) ** (1966) 2 Andh LT 416 (Written agreement relinquishing rights in consideration of a particular sum — Consideration received in part — Other party prepared to complete the transaction in compliance with the provisions of S 53A — **Held,** that the requirements of S 53A were fully satisfied.) ** ILR (1965) Guj 490 (494) ** AIR 1965 Madh Pra 275 (281, 282) (DB) (Payment of money can be an act in furtherance of the contract The payment would be an unequivocal act referable to and in furtherance of the alleged contract, if connection is established by evidence between the payment and the contract) ** ILR (1957) 7 Raj 101 (110) ** AIR 1955 Madh Bha 49 (55) ILR (1954) MB 237 (DB) (If a connection is established by evidence between the payment and the contract then the payment would be an unequivocal act referable to and in furtherance of the alleged contract) ** AIR 1955 Mys 38 (40) ILR (1955) Mys 234 (If a mortgagee purchaser under an unregistered deed of sale has paid either the whole or part of the consideration, the same can be said to be in pursuance of the contract of sale) ** AIR 1954 Ajmer 70 (71) (View of Thadani C J to the contrary in AIR 1950 Assam 129, **Not followed.**) ** AIR 1953 Mad 925 (926) ** AIR 1952 Raj 141 (142) ILR (1951) 1 Raj 918 ** AIR 1941 Oudh 41 (43) 16 Luck 99 (DB) (Payment of consideration and mutation are acts in furtherance of contract) ** AIR 1934 Rang 304 (306) 13 Rang 17 (Payment of part of purchase price is act in furtherance of contract of sale by the mortgagee already in possession.)

[**See also** AIR 1950 Assam 129 (131) (DB) (On question whether payment of consideration was an act done in furtherance of contract Thadani, C J , was of opinion that it was not, while Ram Labhaya J., expressed his opinion that it was)]

The possession taken or continued must have been *in pursuance of the contract to transfer*(10)

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10. AIR 1977 SC 1517. (Principal F A No 420 of 1963 Dr 15 10 1969 (Bom) **Reversed.**) ** **AIR 1950 FC 1 (7) . 1949 FCR 484** ** (1981) 2 Ren CJ 62 (65 (All) (Agreement for sale of tenanted portion set up by tenant considered to be forged document — Tenant not filing document to make it part of record — Plea of tenant of part performance cannot be adjudicated) ** (1981) 1 Cal HN 105 (114) (Parties agreement to enter into an agreement for grant of fresh lease for five years subject to finalisation of deed of lease — Terms offered by Corporation landlord not acceptable to tenant — Mere payment and acceptance of monthly rent and acceptance of certain amount as advance would not entitle tenant holding over to protection of S 53A as same is available to a party complying with terms of agreement) ** (1977) (U P) RCC 31 (Tenant inducted on and on the basis of rent deed paying rent and furnishing explanation for default in payment of rent — He is entitled to continue in possession) ** (1977) 1 Ren CJ 1 (4) (Raj) ** 1971 Ker LJ 25 ** AIR 1971 Mad 466 (466 467) 84 Mad LW 513 ** AIR 1969 Andh Pra 129 (129 130) ** (1967) 2 Andh WR 2 (6) ** 1967 Raj LW 413 (414) ** (1964) 2 Andh LT 159 (163) (DB) (Agent's possession of the property of his principal prior and subsequent to the principal's agreement of sale of the property in favour of another person benami for the agent cannot be said to be in part performance of the contract as it was neither in pursuance of the contract nor with the consent of the transferor) ** AIR 1963 Pat 62 (66) ILR 42 Pat 763 (DB) (Certain compromise between defendant and other persons not [illegible] compromise not binding on plaintiff — **Held**, possession [illegible] defendant [illegible] compromise could not be held to be in part performance of the compromise **Overruled** [illegible] point in AIR 1976 SC 807) ** (1962) 64 Pun LR 73 [illegible] ** AIR 1960 Pat 554 [illegible] (The statute does not require that over and above taking possession of the property it must further be established that the transferee has built constructions upon the property transferred) ** ILR (1959) Bom 35 (38) ** AIR 1955 Madh Bha 49 (55 55) ILR (1954) Madh Bha 237 (DB) (Possession transferred to mortgagee under previous mortgage deeds — Subsequent unregistered mortgage deeds in respect of same property not amounting to usufructuary mortgages — Benefit of section cannot be given to mortgagee in respect of the subsequent mortgages because continuance in possession is not in pursuance of such subsequent mortgages) ** (1954) 20 Cut LT 614 (619 620) ** (1954) 20 Cut LT 532 (535 536) ** AIR 1953 Hyd 114 (116) ILR (1952) Hyd 449 (DB) (Plaintiffs who had no right in the property mortgaging the property with N and D — Defendants the owners paying up the mortgage debts to avoid the trouble of litigation — Plaintiffs executing Ext [illegible] in favour of defendants relinquishing their alleged rights — Defendants taking possession and effecting necessary mutation — Possession of the defendants being in pursuance of the contract S 53A is attracted) ** AIR 1952 Orissa 118 (119) ILR (1950) Cut 45 (DB) (Defendant has to establish that there was delivery of possession in pursuance of the contract) ** AIR 1952 Raj 141 (142) ILR (1951) 1 Raj 918 (Transferees already in possession as mortgagees only registration of deed is necessary to convey absolute title — Transferees paying certain amount towards consideration — Transferor mentioning in deed that he is making the sale by executing it — **Held**, that there was part performance of contract and possession of mortgagees was in pursuance of the contract and mortgagor's suit for redemption is therefore not maintainable) ** AIR 1951 Nag 285 (287) ILR (1950) Nag 799 (DB) (Transferee taking possession on the basis of oral agreement to lease — Oral agreeemnt merging into the draft agreement — Possession subsequent to such draft is in pursuance of such written agreement — Transferee paying Nazul rent and Municipal taxes and spending on repairs are further acts done in furtherance of the agreement) ** AIR 1951 Nag 171 (174) ILR (1950) Nag 618 (Mortgagee coming into possession through foreclosure through a Court upon mortgagor's default — Possession is not one in pursuance of the mortgage) ** ILR (1937) 1 Cal 65 (67) (Possession of Court through its Receiver appointed at the instance of decree holder is not an act in part performance of contract) ** AIR 1936 Pat 372 (378) 15 Pat 460 (DB) (Doctrine of part performance cannot be invoked unless possession is in pursuance of a completed agreement — **Reversed** on another

The possession may be either actual or constructive(11) Where the defendant vendee was in possession of suit property in pursuance of a valid agreement of sale, had paid full consideration of the land, and nothing further was required to be done on his part, the suit by the plaintiff vendor for recovery of possession was liable to be dismissed, with costs, since it was filed with dishonest intention(12) A person who is in possession even of a portion of the property agreed to be sold is entitled to protection of this Section(13) Where possession is not taken under the contract, but *dehors* the contract as where the promisee takes possession by trespass, he cannot in a suit for ejectment plead part performance(14).

A Housing Society claimed to be the transferee of property under an agreement to sell executed by the khatedar On the other hand the State Housing Board claimed possession of that property on the basis of notification under S 17(4) of the Land Acquisition Act. The Housing Society did not place copy of agreement on record nor produced revenue entries Thus S 53-A could not be invoked by the Housing Society(15) The plaintiff did not file any document to show that he entered into agreement of sale with the real owners of the property and he was also let in possession by the lawful owner He got possession from the person who had no valid authority Thus he cannot invoke S 53-A Further, possession, if any, given under S 53A can be used as a shield and not as a sword to protest the possession He is only in unlawful possession and therefore not entitled to permanent possession against true owners He can be equated only as a tresspasser(16) In the agreement for sale it was stipulated that the proposed vendee is a tenant and is in possession. As an owner/purchaser possession will be given at the time of sale deed Thus he continued to be a tenant There was nothing to show that the tenant had done anything which could indicate that his status as tenant has ceased He could not therefore take advantage of S 53A Order of eviction passed against him is not illegal(17) Similarly where a tenant alleges that he has entered into agreement with landlady to purchase the rented premises but no further action was taken by the tenant in the matter of purchase of premises, his liability to pay rent does not cease On default in paying rent he is liable to be evicted The tenant could not invoke doctrine of past performance in the facts of the case(18) Unlawful entry in possession cannot be accepted by Courts for applying the doctrine of part performance(19).

Since transfer of Bhumidhari rights by a member of aboriginal tribe to a non-aboriginal is

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point in AIR 1938 PC 20) ** AIR 1934 Cal 235 (237) 60 Cal 1372 (DB) (Lessee in possession under an existing lease — Subsequent agreement to renew lease — Continuation in possession after the expiration of the old lease is only referable to the agreement and therefore an act of part performance of the contract) ** AIR 1932 Sind 42 (45) 25 Sind LR 433 (DB) ** (1936) 40 Cal WN 1176 (DB)

[**See also** ILR (1956) Nag 400 (403) (DB) (Transfer of occupancy holding accompanied by possession — Transferee cannot be regarded as trespasser as S 12 C P Tenancy Act permits transfer by tenant — Transferee can have resort to plea of part performance)]

11. AIR 1968 SC 794 (800) : (1968) 2 SCJ 614 ** AIR 1950 FC 1 (7) : 1949 FCR 484 ** AIR 1957 Bom 138 (140) : ILR (1958) Bom 556 (DB).
12. 1987 (2) Land LR 580 (582) (P & H)
13. AIR 1979 Raj 200 : 1979 Raj LW 212.
14. (1962) 64 Pun LR 731 (733) ** AIR 1956 Pat 308 (311) (DB) ** AIR 1932 Sind 42 (45) 25 Sind LR 433 (DB) ** 1982 Tax LR 1504 (1508) (1982) 138 ITR 168 (DB) (All)
15. 1996 AIHC 3052 (3057) : 1996 Co-op TJ 593 (Raj)
16. 1999 (3) Mad LJ 47 (50).
17. AIR 1999 Punj & Har 65 (67) : 1998 (119) Pun LR 795
18. 1996 AIHC 3097 (3100) : 1996 (1) Mad LJ 666
19. 2000 (2) MPLJ 460 (469).

prohibited, such prohibition covers "agreement to sell" also. Therefore a non-aboriginal claiming possession on basis of such agreement is not entitled to protect his possession on basis of S. 53A(20).

Where the owner of property entered into contract to sale and put the agreement holder in possession and subsequently the agreement holder enforced into contract to sale that property to a third person and handed over possession to him, the original owner was entitled to recover possession from the said third person. The doctrine of part performance could not be invoked by the third person against the original owner as there was no privity of contract between them. The third person was not transferee within meaning of S. 53-A qua the original owner. He did not have equitable right to protect possession against the original owner(21).

Where the plaintiff based his claim for possession on the basis of admission by defendant, injunction could not be granted to him. His possession was held not referable to part performance under S. 53A(22).

Where an agreement of reconveyance is hit by S. 58(c) of the T.P. Act it cannot be used as an agreement of sale under S. 53-A. The transferee under the reconveyance agreement cannot be said to have taken possession in pursuance of the said agreement. Nor the continuance of the previous possession can be ascribed to the agreement of reconveyance(23).

Where the possession of a licensee as such is referable to the agreement creating licence and not to any agreement of sale, the equitable title arising out of such agreement of licence is not enough for the licensee to enter into possession or to defend possession. Protection under S. 53A would not be available in such case(24).

It is not necessary that the transferee should be in possession on the date when the transferor seeks to enforce his right against the property. Once transferee takes possession in pursuance of the agreement subsequent loss of possession does not bar him from invoking the benefit under the section(25). Where the vendor delivered possession of a flat on receipt of consideration in pursuance of an agreement for sale, the same is in part performance of the contract and therefore the vendee is entitled to continue in possession of the flat till her suit for specific performance is disposed of finally(26). But it has been held that possession taken at a time when the contract has become incapable of specific performance by efflux of time is not one in part performance of the contract(27). Where property is entrusted to first defendant for management by giving power of attorney and the property is in possession of second defendant but there is no pleading as to how he obtained possession, nor it is pleaded that possession is in pursuance to contract for sale and he is willing to perform his part of the contract, both the defendants could not claim benefit under S. 53A(28).

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20. 2000 (2) MPLJ 148 (150)
21. 2000 (1) Mah LJ 495 (499)
22. AIR 1989 Madh Pra 128 (132) : 1989 Jab LJ 432
23. (1983) 1 APLJ 297 (299, 300) : 1983 LS (AP) 116
24. (1983) 1 Bom CR 174 (178, 180)
25. (1979) 1 Andh WR 416 (419) ** AIR (95 Andh Pra 554 558 ILR (1956) Andh Pra 1019 (DB).

    [See AIR 1982 All 304 (307). (AIR 1939 All 611. Foll.)]
26. AIR 1992 Cal 47 (58) : (1992) 96 Cal WN 485.
27. AIR (956 Pat 308 (311) (DB) (In order to have the protection of S. 53A, possession must be taken in part performance of the contract before the enforcement of the contract is barred by time.)

    [See also 1982 Cur LJ 738 1983 Rev LR 478 (480) (A forcible possession obtained by vendees without payment of any consideration would not entitle them to retain possession by invoking S. 53A.)]
28. AIR 1990 Ker 186 (188) : (1989) 1 Ker LT 945

Where an agreement of sale stands concluded by subsequent execution and registration of sale deed, there is no question of part performance of the contract and since the contract has been concluded, the question of resorting to protection under S 53A does not arise(29)

Where the plaintiff/agreement-holder had paid some amount as advance to the vendor, but in pursuance of agreement but possession of the land was not given to him and the land came under acquisition, the plaintiff is not entitled to compensation payable under the Land Acquisition Act since he has not done anything in furtherance of the contract as per S 53-A He was entitled to refund of advance only with interest.(30)

See also the undermentioned cases.(31)

S 53(A) of Transfer of Property Act is applicable to an informal or unregistered sale-deed, if such a document has prompted the transferee to enter into possession of property and raise constructions thereon consequently the transferee could maintain action for injunction to defend his possession, by using such document as a shield(32).

The Chief Court of Oudh has held in the undermentioned case(33) that the section does not require any concurrent act or any specific consent on the part of the transferor to the taking or the continuance of possession by the transferee in pursuance of the contract Thus *A* let a house to *B* as a tenant *C* *B*'s wife agreed to purchase the house from *A*, paid consideration, got the house repaired paid municipal taxes, and lived in the house with her husband *B* without payment of rent to *A* It was held that *C* took possession of the house in pursuance of the contract, and that the fact that *A* did not tell *C* that she should take possession was immaterial The view has, however been dissented from in the following decisions(34) where it has been held that consent of the transferor is a primary condition for the taking or continuance of such possession.

Where a person in whose favour a document of sale is written is already in possession of the property though as a tenant, or a licensee or a mortgagee, or otherwise under permission of the vendor it is not necessary that the vendee should be dispossessed and then re-put in possession for the applicability of S 53A All that is necessary to show is that the nature of the possession was changed after the execution of the sale deed This can be shown either by the document itself or from other evidence(35).

In granting relief under S 53-A the question whether a contract is specifically enforceable or not has no bearing at all Where the mortgagee is in possession of the mortgaged property in pursuance of the agreement for sale executed by the mortgagor in his favour, and the mortgagee has

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29. 1990 (3) Cur CC 38 (39) (Orissa).

30. 2001 (2) Andh WR 158 (163)

31 AIR 1976 Pat 2 1976 BLJR 77 ** (1967) 2 Andh WR 2 (7) (Agreement providing that before registration permission under S 47, Hyderabad Tenancy and Agricultural Lands Act will be taken by the parties Application made by the vendor and vendee for such permission constitutes an act in furtherance of the contract for sale.) ** (1966) 2 Andh LT 416

32. 1983 All LJ 405 (408) : (1983) 1 Civ LJ 504.

33. AIR 1944 Oudh 212 (218) 19 Luck 565 (DB) (Part performance must be the act of the person seeking to avail himself of the equity and the acts of the person sought to be charged are of no avail, Affirming AIR 1940 Oudh 1 on appeal.)

34. ILR (1975) 1 Delhi 654 (DB) ** (1964) 2 Andh WR 5 (1964) 2 Andh LT 159 (163) (DB) (Plaintiff was the owner of certain lands Defendant 1 was plaintiff's agent to look after the lands Plaintiff had extended a contract of sale of the lands in favour of defendant 2 The sale was found to be benami for defendant 1 It was held that the possession of defendant 1 as the agent of the plaintiff could not be said to be in part performance of the contract)

35. (1980) 49 Cut LT 297 (301) ** AIR 1979 Mad 47 (50) (1978) 2 Mad LJ 533 ** AIR 1970 Mys 203 (1970) 1 Mys LJ 34 ** 1967 Raj LW 413 ** ILR (1958) 8 Raj 839 (841).

[But see (1982) 1 Kant LJ 284 (287) ** AIR 1981 NOC 177 (1981) 1 Mad LJ 366]

performed his part of the contract under the said agreement, the right of redemption of mortgage under S 60 would not be available to the mortgagor and that right would be deemed as extinguished.(36)

In absence of any contract to the contrary if a landlord agrees to sell his land to a tenant but declined to execute the Sale Deed in terms of the agreement the relationship of landlord and tenant ceases and the further possession of the tenant is not referable to the earlier relationship(37)

The agreement holder had paid full consideration and was put in possession of the property by the transferor pursuant to the agreement of sale and continued to be in possession for the last 60 years Thus the agreement holder had performed his part of the contract in connection with transfer He was thus entitled to protection under S 53-A The suit by the transferor for declaration of title and recovery of possession was liable to be dismissed (38)

10-A. Lease

Agreement to lease confers right to enjoy property It is not transfer of ownership It is doubtful whether S 53-A is applicable as far as cases of lease or agreement of lease are concerned If S 53-A can be applied to the case of a person entering into possession in pursuance of agreement to lease but the same has either not been registered or executed in accordance with law then the benefit that the tenant will be entitled to avail will be that his possession or occupation or enjoyment of the property shall not be deemed to be unlawful illegal or unauthorised under the law But as regards duration of the tenancy the presumption under S 106 of the T P Act will apply (1)

Lease is defined in S 105 as "transfer of a right to enjoy the property which in common parlance is distinguished from transfer of interest in the property to the transferee like in sale mortgage etc The transfer of property envisages transfer of corpus or its part conveying proprietary status to a transferee Lease of an immovable property strictly speaking may not fall within the ambit of the term "transfer of property" envisaged in S 53-A making the said section inapplicable to a lease. But the matter is not free from doubt (2)

In a suit for eviction of tenant when the tenant raises a question of title or even a plea of part performance, the jurisdiction of the court to decide the suit for eviction does not get ousted when such a plea is raised by the tenant the Court can go into the question incidentally for deciding the main question in the suit i e whether there is relationship of landlord and tenant (3)

In the undermentioned case(4), however it was held that in an ejectment suit which otherwise be cognizable by a Small Cause Court, a defence is raised in the written statement under S 53A the suit itself goes out of jurisdiction of Small Cause Court to decide the substantial issues involved in the suit and the Small Cause Court, in such a situation, has to return the plaint with the written statement for presentation to proper regular Court having jurisdiction to decide the suit

Section 53A can be used only as a shield and not as a sword Transferee in possession in part performance of the agreement cannot establish his title on basis of the agreement of sale Thus eviction of tenant under the Rent Control Act could not be inhibited by him by filing of a prior suit for specific performance (5) Unregistered lease deed is admissible in evidence as per the Proviso to

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36. 1999 (2) WLC 450 (460, 461) (Raj)
37. 1973 Pun LJ 641
38. 1997 (1) Orissa LR (2) (SC).

Section 53-A — Note 10-A

1. AIR 1994 All 221 (236) : 1994 All LJ 770
2. 1998 (2) Rent CR 84 (87) (Delhi)
3. 1992 BBCJ 631 (642).
4. AIR 1988 Bom 142 (148) : 1988 Mah LJ 299.
5. AIR 1988 Pat 123 (125) : 1987 Pat LJR (HC) 724.

S 49 of Registration Act as a shield to protect the possession of tenant in the suit filed by landlord seeking tenant s eviction from the suit property, as per the theory of part performance of the contract embodied in S. 53A **(6)**

Oral agreement to sell the leased property to tenant would not terminate the landlord-tenant relationship. Even if the agreement is in writing it must in clear terms specify that the landlord-tenant relationship is being terminated and there would be no future liability on tenant to pay rent. In the absence of such stipulation tenant is liable to be evicted on ground of default in payment of rent.**(7)**

For a tenant continuing in possession of immovable property after a contract to transfer, written and signed by landlord, to get the protection of S 53A, it is necessary to show that he continues in possession in pursuance of the contract (e g stopped paying rent) Mere continuation in possession does not satisfy the requirement under S 53A If a tenant has been in possession in his capacity as a tenant and not in part performance of the contract, he cannot take the plea under S 53-A.**(8)**

A lessee in possession of the property is entitled to defend his possession on the basis of a renewal clause in the lease deed only if the renewal clause is specifically enforceable by him The Court can give protection to such defendant only if the renewal clause is enforceable in law. The terms of the renewed lease must be certain or it must be possible to make it certain from the terms contained in the renewal clause.**(9)**

Where the lease deed stipulated that he can be renewed on old terms but the tenant wanted to add one additional clause with regard to power of sub-letting it cannot be said that the tenant was ready and willing to perform his part of the original contract He would therefore be not entitled to protection under S. 53A.**(10)**

Where on expiry of the original lease, the lessee continued possession under the renewal clause but the rent paid for such period was not shown to be independent of contract, the lessee does not become monthly tenant He is only protected under S. 53 A and becomes trespasser on expiry of renewal period.**(11)**

The purported agreement of sale did not mention that the liability of the tenant to pay rent would cease Moreover, the said agreement was in favour of tenant's wife Therefore the tenant could not claim benefit under S. 53-A for resisting eviction on ground of default in payment of rent **(12)**

Proceedings under S 16 of the U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 were initiated by landlord on ground of bona fide need and alleging that opposite party was an unauthorised occupant of the accommodation The stay application filed by the opp party before the Rent Controller alleging that suit for specific performance filed by him on basis of agreement for sale in his favour was pending. Held that the Rent Controller could not decide the question of title However he could decide whether the opposite party was inducted as tenant prior to agreement of sale or he came into possession in pursuance of agreement of the agreement Thus the refusal by Rent Controller to stay the proceedings needed no interference **(13)**

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6. 2002 AIHC 2966 : 2002 (4) Andh LT 221

7. 1996 (1) LTC 398 (405) (Mad)

8. AIR 1989 Gauhati 39 (41) : (1987) 2 Gauhati LR 402

9. 1990 (2) Ker LJ 437 (447)

10. 1985 (2) Ren CJ 650 (657) (Cal)

11. AIR 1984 Cal 297 (304)

12. 1999 (1) Mad LW 336 (339)

13. 1997 All LJ 1882 (1883).

The lessee in the instant case contended that he had been granted mining lease to collect s nd by the earstwhile proprietor The leased property vested in State by operation of S 3A of the Bihar Land Reforms Act, 1950 Even assuming that the lessee had any right under S. 53 A that right did not survive as an enforceable right after vesting of the property **(14)**

Where the plaintiff is a protected tenant under Hyderabad Tenancy and Agricultural Lands Act and had executed an agreement for sale in favour of the defendant but filed suit for possession, the defendant is not entitled to protect his possession in terms of provisions of S 53A A party cannot be allowed to override the provision of S 50B of the Tenancy Act by a device such as an agreement of sale and continue possession claiming right under S 53 A **(15)**

In a petition by landlord for ejectment of tenant, a plea was raised by the tenant that he was in possession of property not as a tenant but in part performance of the agreement for sale in his favour and therefore was entitled to protection under S 53A However the part that he performed or was willing to perform his part of the contract was not pleaded Therefore he could not claim protection under S 53A and was liable to ejectment **(16)** Where a tenant claimed protection under S 53 A on ground of agreement for sale of rented premises in his favour, but the agreement was found to be not genuine and he had also not filed suit for specific performance, he was not entitled to interim injunction against execution of the decree for his eviction obtained by the landlord validly Balance of convenience was not in favour of tenant.**(17)**

The action initiated by the landlord for eviction of tenant under the Rent Control Act was resisted by the tenant on the ground that he was a partner of the firm with which the landlord has entered into agreement to sell the rented premises Even assuming that he was a partner it was impermissible for him to individually claim all rights of the firm Nor could he protect himself as transferee under the agreement Thus he was not entitled to protection under S 53 A and the landlord could not be non-suited **(18)**

Where the tenant was put in possession of the suit land merely on basis of agreement for sale and no sale deed was executed, a petition by the tenant for acquiring property rights under S 11 of the H P Abolition of Big Landed Estates and Reforms Act (1954) cannot be allowed However by virtue of doctrine of part performance, the plaintiff s possession delivered in part performance of the agreement for sale can safely be protected and relief to that extent can be granted to plaintiff It cannot be said that defence as provided under S 53 A can be availed of as defence only by the defendant and not by the plaintiff Such a bar is neither provided in the section itself nor it could be inferred from S. 53-A No title passes under S 53-A Hence suit for declaration of title cannot be filed **(19)**

Where the agreement of sale between landlord and tenant was cancelled by parties and the relationship of landlord and tenant came into being thereafter the transferee continuing in possession as tenant could not invoke doctrine of part performance **(20)**

The status of tenant after execution of agreement to sell in respect of tenanted premises ceases to be such which is changed to that of a purchaser and when a sale deed is executed of half the share of the said property, he becomes co-owner with the landlord **(21)**

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14. **1995 Supp (3) SCC 461 (461).**
15. 1982 (2) Bom CR 18 (22)
16. AIR 1985 Punj & Har 222 (226) : (1985) 1 Rent LR 491
17. 2001 AIHC 4340 (4345) : 2001 (3) Mad LJ 257
18. **AIR 2002 SC 101 (104) : 2001 AIR SCW 4657 , 2002 AIR Kant HCR 27 , 2001 (8) Scale 152.**
19. 1996 AIHC 2606 (2611) (Him Pra)
20. 1995 Pun LJ 66 (68)
21. **2000 (2) Rent LR 385 (386) (SC).**

On a tenant entering into agreement with the landlord to purchase the tenanted premises, his status as tenant ceases after execution of such agreement and is changed to that of a purchaser. where the tenant agrees to purchase half share, on execution of sale deed he becomes co-owner with the landlord.(22)

Where a cultivating tenant agrees to purchase the land and is put into possession of the land as a prospective purchaser in terms of the agreement entered into between the parties, but the contract is not performed, he does not revert to the position of cultivating tenant (23)

Where the agreement to sell land to the cultivating tenant was executed but sale deed was not executed in pursuance to the agreement nor there was any material to show that the nature of possession as tenant was changed, there was no merger of tenancy rights Thus S 53A could not be invoked.(24)

Where a person continued in possession of property as a tenant and was not given possession in pursuance of agreement of sale, S 53A cannot be invoked (25) Where no evidence was produced by tenant to show that he was put in possession to sell alleged to have been executed between him and erstwhile owner S 53-A is not applicable to facts of case (26)

Relationship of landlord and tenant would not come to an end merely because an agreement to sell tenanted premises to tenant is entered into by the landlord, when possession in pursuance of such agreement is not given Therefore the liability of the tenant to pay rent continues.(27)

In an agreement between landlord and tenant for sale of demised premises to tenant, the tenant agreed to continue to pay rent till full payment of sale price Thus tenant continued in capacity as tenant In the proceedings for his eviction on ground of default in payment of rent, he could not claim benefit of S. 53-A (28)

A Bhumidar entered into contract to sell his land to D and put him in possession subsequently he executed a sale deed in favour of P and thereafter another sale deed in favour of D was executed by the Bhumidar.

Held that D was not entitled to protection under S 53-A When valid title has passed to P, the retention of possession by D would be bad in law in view of S 209 of the U P Z A and L R Act (29)

Where there was an agreement for sale of demised premises in favour of tenant and in pursuance thereof the tenant had paid certain amount as advance, continuation of possession thereafter by the tenant would be in pursuance of the agreement Thus the landlord could not evict him on ground of default in payment of rent.(30)

A tenant who claimed to be a partner of the partnership firm, cannot resist eviction proceedings against him by claiming benefit under S 53-A on ground that landlord has entered into agreement with the partnership firm to sell the tenanted premises to the firm It is legally impermissible for him to individually claim all rights of the firm, assuming that he is a partner Nor can he project himself as a transferee under the agreement (31)

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22. 2000 (2) Mad LW 808 (810)
23. 2001 (2) Mad LJ 19 (31)
24. 2000 (2) Cur CC 36 (42) (Mad)
25. 2000 (1) Mad LW 506
26. 2000 All LJ 2194 (2197)
27. 2000 (1) Rent CR 377 (381) (Pun) & Har).
28. 2001 AIHC 2190 (2194) (Guj)
29. 1985 All LJ 697 (699)
30. 1989 TNLJ 311 (314) (Mad)
31. AIR 2002 SC 101 (103) , 2001 AIR SCW 4657 : 2002 AIR Kant HCR 27 , 2001 (8) Scale 152.

In instant case the jural relationship of landlord and tenant between the parties existed prior to agreement of sale of the rented premises. The suit for specific performance filed by the tenant was dismissed. The plea of part performance was rejected **(32)**

Where a person is in occupation under a void lease, he acquires no interest in the property which was proposed to be demised to him but he may claim equitable right under doctrine of part performance.**(33)**

11. Third paragraph — Transferee's willingness to perform his part.

This is an essential condition before the transferor is debarred from enforcing his rights to the property against the transferee**(1)** "He who seeks equity must do equity". The section being based on equitable principles the transferee, if he wishes to take advantage of it, must also be prepared to do his part. The third paragraph is based on this principle. Transferee having failed in proving such willingness, protection to his possession could not be claimed by reference to S. 53-A nor by pleading equity **(2)** Term "willingness" in S. 53A means "readiness and willingness" as used in S. 16 of the Specific Relief Act (1963) **(3)** The words "has performed" and "or is willing to perform" mean *complete* performance or *complete* willingness. It is not a sufficient compliance with the section that the transferee would have performed his part of the contract to some extent**(4)** The

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32. 2002 AIR Kant HCR 1067 (1017) [illegible]

33. AIR 1984 (NOC) 317 : (1984) 2 Cal LJ 1 (DB)

Section 53-A — Note 11

1. AIR 1981 All 373 (375) (Filing of suit for specific performance of contract [illegible] payment of purchase price — It indicates willingness of transferee to perform his part) **AIR 1999 SC 3248 (3251) : 1999 AIR SCW 3221 : 1999 All LJ 2088 : 1999 (7) SCC 303** ** (1976) 1 Cal LJ 58 (63, 64) (DB) ** ILR (1975) Bin Pra 276 (Defendant [illegible] possession over disputed property by transferring his own to other side — S. 53-A is attracted.) ** ILR (1977) 1 Delh 820 (DB) ** AIR 1966 Assam 46 (47, 48) ILR (1964) 16 Assam 493 ** (1962) 75 Mad LW 746, 747 (DB) (Party failing to perform his part of showing willingness to do so — Doctrine of part performance cannot be availed of by him.) ** AIR 1957 Andh Pra 58 (59) ** (1954) 20 Cut LT 614 (618) (Where the defendants were not willing at any time to do their part of the contract they are not entitled to protection under S. 53A.) ** AIR 1951 Nag 246 (248) ILR (1951) Nag 434 AIR 1944 Nag 188 (191) ILR (1946) Nag 99 (Party resting on section must plead his readiness and willingness to fulfil his part otherwise section would not apply.) ** AIR 1943 Bom 406 (406) ** (1941) 45 Cal WN 132 (136) (DB)

[**See also** (1962) 64 Pun LR 731 (733) (Suit for possession by transferee — Transferee pleading that transferor was entitled to market price which was much below contracted price — **Held**, transferee was not entitled to benefit of S. 53A [illegible] bona fide.) ** AIR 1952 Nag 244 (245) ILR (1949) Nag 959 (Making a false plea that a certain obligation under the contract has been discharged shows an unwillingness on the part of the transferee to abide strictly by the contract entered into between him and the transferor.)]

2. **AIR 1999 SC 3248 (3251) : 1999 AIR SCW 3221 : 1999 All LJ 2088 : 1999 (7) SCC 303** ** 1997 (6) Andh LT 134 (156)

3. AIR 1992 Mad 208 (213) (1992) 2 Mad LW 372 (Where no evidence is adduced by a party to prove his "readiness" to pay balance sale price and to perform his part of contract S. 53A could not be invoked.)

4. **AIR 1970 SC 546 (548) : 1970 All LJ 742 : (1971) 2 SCJ 51** ** ILR (1952) Mad Bha 410 (415) (DB) ** AIR 1941 Bom 346 (348) ILR (1941) Bom 529 (DB) (AIR 1933 Bom 381 **Diss. from.**)

defendant relying on part performance must specifically plead and prove his readiness and willingness to perform his part of the contract **(5)** Transferee is not entitled to benefit under S 53A when he has not pleaded all the necessary ingredients of S 53A It was nowhere pleaded that he was ready and willing to perform his part of the contract and therefore could not avail of protection under S 53A **(6)** But where though the plea has not been raised by the defendant in his pleadings, it has been fully gone into at the hearing the defendant is entitled to avail himself of the provisions of the section**(7)** Even if the defence under Section 53A is not expressly pleaded but there is reference to the agreement in the written statement and evidence led regarding the existence of such agreement the plea must be considered **(8)** Where a party had pleaded that he had performed what all had to be performed by him in terms of the agreement, the absence of specific pleading that he is ready and willing is immaterial He was entitled to benefit of S 53A **(9)** It has been held that the condition as to willingness must subsist up to the date of hearing of the second appeal **(10)** (See also Note 20).

(A) Willingness proved.

A suit for possession was filed by the vendor Averment in the written statement by the agreement holder therein that she had asked the plaintiff and his co-owner to have the property released from mortgage and execute the sale deed shows her readiness and willingness to perform her part of the contract.**(11)**

Where the defendant/agreement holder was in possession of the property in pursuance of the agreement for sale had paid part consideration and was ready and willing to pay the balance the suit by owner/plaintiff for eviction of the defendant and for damages could not be decreed The defendant was entitled to protect his possession.**(12)**

Where the agreement holder is in possession of the property and does not file suit for specific performance after the expiry of the period contemplated for execution of sale deed, it cannot be said that he is ready and willing to perform his part of the contract **(13)**

(**See also** AIR 1966 Assam 46 (48) ILR (1964) 16 Assam 493 (DB) (Contract for resale of property purchased by plaintiff on payment of sale consideration within fixed period — Defendant intimating his intention to take property and offering certain amount — No evidence to show that he was willing to pay entire sale consideration — **Held,** one of the **essential elements of S. 53A not complied with**)]

5. (1980) 2 Mad LJ 398 (420) (DB) ** 2000 AIHC 793 (Mad) (Readiness and willingness not proved — Vendor entitled to recover possession) ** 2000 (1) Rec Civ R 391 (393) (P & H) ** (1966) 2 Andh LT 416 ** AIR 1965 Madh Pra 275 (283) (DB) (Defendant relying on part performance — Defendant's readiness to perform remaining part of contract must be specifically pleaded and proved) ** AIR 1961 Madh Pra 237 (239) ILR (1962) MP 443 ** (1954) 20 Cut LT 532 (536) (Contract for sale — Transferee not proving that he was willing to perform his part of contract — Requirement of S 53A held was **not satisfied.**) ** **AIR 1947 Nag 188 (191) · ILR (1946) Nag 991**

[**But see** AIR 1956 Mad 693 (695) (Absence of averment as to readiness and willingness to perform the unperformed portion of the obligation in the written statement is not fatal to the defence — Such readiness and willingness must, however be proved by evidence AIR 1947 Nag 188, **Diss. from.**)

6. AIR 1997 Hm Pra 12 (14) : 1996 (2) Sim LC 95
7. AIR 1959 Mys 173 (175) : ILR (1957) Mys 108
8. AIR 1979 NOC 172 (Goa)
9. 2000 (1) Ker LJ 504 (507)
10. AIR 1959 Mys 173 (175) : ILR (1957) Mys 108.
11. 1999 (3) Mad LW 775 (780)
12. 1998 (2) Sim LC 389 (397) (Him Pra)
13. 1996 (2) Mad LW 135 (139)

Where the plaintiff paid most of the consideration and was put in possession in pursuance of the agreement to sale, but subsequently the defendant-vendor clandestinely sold the property to the person who had knowledge of the earlier agreement, the plaintiff was entitled to decree for specific performance.(14)

The readiness and willingness to perform part of the contract can be inferred from circumstances and conduct of parties. The transferee took possession of the land as vacant site and put up construction. The averment in the written statement by him that he asked the plaintiff and the 2nd defendant to have the property released from the mortgagee and execute the sale deed is sufficient for holding that the 1st defendant/transferee was ready and willing to perform her part of the contract.(15)

The agreement holder in the instant case was a rustic illeterate villager while the transferor was a Class I Govt. Officer. The transferor not only evaded the receipt of money when it was offered but allured the agreement holder to withdraw his application for correction of revenue entries. The facts revealed that the agreement holder was ready and willing to perform his part of the contract but the transferor evaded execution of sale deed. Thus the agreement holder was entitled to protect his possession under S. 53A.(16)

(B) Willingness not proved

Where the transferee was in possession of the property in pursuance of the agreement for sale, had paid two instalments in time, however the third instalment was paid a few months after the due date because of the death of one of the transferors, it was accepted by the transferors and the transferee was also willing to perform his part of the agreement, the benefit under S. 53A could not be denied to him. Time not being the essence of the contract, the agreement could not be rescinded on ground of delay in payment of instalment. The transferor having accepted delayed payment of instalments will be deemed to have waived his right to insist upon regular payments.(17)

The defendant vendee was in possession of the suit property in pursuance to agreement for sale. On the day fixed for registration of the sale deed, the parties went to Registrar's office but as the staff was out on election duty the sale deed could not be registered. The plaintiff vendor filed suit to recover possession. The defendant pleaded that he was willing to perform his part of the agreement. **Held** that it was not proved that the time was the essence of the contract, since the defendant was willing to perform his part of the contract he was entitled to protection under S. 53A and the plaintiff's suit was dismissed.(18)

Where instead of complying with the requirements of S. 55(1)(d) of the T.P. Act and S. 29(c) of the Stamp Act the transferees, after paying full consideration, remained contended with possession of property, and further failed to send a written notice calling upon the transferors to execute the sale-deed, the failure amounts to their not being ready and willing to perform their part of contract. Consequently transferees are not entitled to the benefit of S. 53-A, T.P. Act.(19)

All the ingredients that are essential for specific performance should be proved in a claim under S. 53-A also. A party who is not willing to take sale deed cannot claim benefit under S. 53A.(20)

Time was the essence of the contract in the instant agreement for sale. The buyer took force

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14. 1999 AIHC 4654 (4673) (Mad).
15. 1999 (3) Mad LJ 633 (637)
16. 1997 (3) Shimla LC 473 (477) (Him Pra)
17. AIR 1984 Punj & Har 95 (98).
18. 1984 Land LR 181 (185) (Punj & Har)
19. AIR 1983 Orissa 107 (113) ; (1983) 55 Cut LT 77 (DB)
20. 1997 (2) Mad LW 820 (827)

ble possession of the property but was not ready and willing to do his part of the contract. Thus he was not entitled to protection under S. 53-A nor for refund of consideration paid since it has become time-barred. The vendor on the other hand was entitled to decree for possession and mesne profits **(21)**.

A suit for permanent injunction by a plaintiff who is in possession pursuant to agreement for sale without seeking relief of specific performance of the agreement of sale is barred under O. 2, R. 2, CPC. Such equitable relief cannot be granted when plaintiff has not established his readiness and willingness to perform his part of the agreement.**(22)**

When the plaintiff seeks to avail protection under S. 53-A, it is absolutely necessary to plead and prove his readiness and willingness to perform his part of the contract. Once the plaintiff is not entitled to file the suit for specific performance as on date, he cannot be allowed to use S. 53A as a shield as he is not having any enforceable right in law under the agreement **(23)**.

Where the transferee failed to perform his part of the contract i.e. in paying the balance of sale consideration to the transferors, he is not entitled to claim protection under S. 53-A **(24)**.

The agreement holder was not in possession of the premises in pursuance to the agreement for sale but was in possession as licensee or tenant. A minor had half share in the property and the Court had refused permission to sell his share. The agreement holder was not ready to purchase another half share. Thus he was not ready to perform his part of the contract. He was not entitled to protection under S. 53-A.**(25)**

After taking possession in pursuance of the agreement, the agreement holder need not take any steps for specific performance of the contract. On the contrary he tampered with the agreement by adding a clause in it. Thus he was not ready and willing to perform his part of the contract. Therefore the vendor was entitled to forfeit the advance, recover possession and claim damages **(26)**.

Where the agreement holder was not in possession of necessary funds, nor tried to get sale deed executed within stipulated time and there was absence of evidence to prove her readyness and willingness, she was not entitled for specific performance of the agreement of sale **(27)**.

The same bundle of facts constitute a valid defence under S. 53-A and a right to seek specific performance under the Specific Relief Act.

Where the vendee refused to pay interest as provided in the agreement, he was not ready and willing to perform his part of the contract. He was therefore not entitled to protection under S. 53A.**(28)**

In a suit for specific performance filed by the agreement holder, the only relief granted by the Court was refund of earnest money paid by him to vendor and the decree for specific performance was denied. The vendor refunded earnest money. In such circumstances the agreement holder was not entitled to defend possession under S. 53A taking recourse to the same agreement on which he had filed suit wherein specific performance was not granted. Thus the vendor was entitled to recover possession.**(29)**

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21. 1998 (2) Mah LR 738 (751) (Bom).

22. 1999 AIHC 2958 (2963) : 1998 (6) Andh LT 40.

23. 1998 (3) Mad LJ 302 (303)

24. 1999 AIHC 2958 (2962) : 1998 (6) Andh LT 40.

25. 1997 (2) Rec Civ R 564 (566) (Punj & Har).

26. 2000 (2) MPLJ 140 (147).

27. 2000 AIHC 62 (67) (Mad).

28. 2002 (3) Andh LD 253 (261).

29. ILR (2002) 3 Kant 3713 (3716)

In a suit for possession by vendor where the vendee filed a suit for specific performance only to counter the claim of possession had paid a very small amount at the time of agreement of sale did not offer any amount during 8 years nor had sufficient means to pay the balance amount he could be said to be ready and willing and was not entitled to protection under S 53A **(30)**

Various documents executed contemporaneously in the instant case showed that it was not a mere construction agreement but was nothing short of the sale The land had received full consideration. Even if the remedy of the builder to file suit for specific performance got barred by limitation, his right was not extinguished It could not be said that the builder was not ready and willing to perform his part of the contract as only things required to be done were to get the property mortgaged in his name and to have title deed registered **(31)**

Where the vendee was not ready to make payment in terms of the contract, did not get the sale deed prepared and never called upon the vendor to execute it nor filed any suit for specific performance, he cannot be said to be ready and willing and is not entitled to protection under S 53-A The vendor was therefore entitled to recover possession **(32)**

Even assuming that a party began to possess suit property in his own right presumably in terms of S 53A, the same loses all its significance in view of the fact that on his own showing he was not ready and willing to perform his part of the contract in terms of the agreement Thus he cannot take advantage thereof **(33)**

Where the defendant denied that he was a tenant and alleged that his possession was in pursuance to agreement for sale but never pleaded in his written statement that he had performed or was ready and willing to perform his part of the agreement, S 53A would not be attracted **(34)**

Where the vendee in possession of the premises in pursuance of an agreement stopped paying monthly instalments, he could not claim protection under S 53-A **(35)**

Where the vendee offered to pay consideration provided the vendor first clears his income tax arrears, the willingness of the vendee is not unconditional He is therefore not entitled to benefit of S. 53-A.**(36)**

Where the mortgagee is already in possession of property in respect of which agreement for sale is executed; no condition is incorporated in the agreement to put mortgagee in possession as owner, balance consideration was never paid and it was not proved that the mortgagee was ready and willing to perform his part of the contract, the doctrine of part performance would not be applicable.**(37)**

Where the petitioner claimed that he deposited certain amount with Municipal Committee in part performance of contract for sale but nothing was brought on record to indicate that the Municipal Committee ever executed a written contract to transfer land in favour of petitioner he could not invoke S. 53A.**(38)**

After inviting tenders a person was allotted a shop on lease by B F S T Undertaking He took possession after making deposit of requisite amount but did not execute registered agreement of lease, nor paid compensation regularly **Held** that he neither performed nor was willing to perform

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30. 2002 AIHC 2973 · 29002 (3) Andh LD 337

31. 2001 (60) DRJ 738 (748).

32. 2002 (1) Orissa LR 303 (307)

33. 1990 BLJR 915 (921).

34. 1985 (2) Cur LC 451 (453) (Punj & Har.)

35. AIR 1989 SC 606 (610) : (1989) 1 SCC 76.

36. AIR 1995 Ker 249 (251).

37. AIR 1993 Ker 335 (339)

38. AIR 1994 Punj & Har 175 (179) : (1994) 3 Pun LR 186

his part of the contract Consequently he could not claim protection under S 53A (39)

12. Section applies only if the contract or transfer is invalid for want of completion in the prescribed manner.

The words "the contract though required to be registered, or" occurring in S 53 A are deleted by the Central Amendment Act 48 of 2001 (See Note 1A ante) Therefore where the agreement to sell immovable property is executed after the commencement of the Central Act 48 of 2001 but is unregistered, the agreement holder will not be entitled to protection under S 53-A

Cases prior to Amendment Act 48 of 2001

The section has no application where the contract to transfer or the instrument of transfer is invalid on any ground other than that it was not completed in the *manner* prescribed by the law for the time being in force Where the flaw in the transferee's position is not a defect of *form* or the absence of some formality, normally necessary, but is one which apart from form, renders the transaction unenforceable, the equitable doctrine of part performance is not applicable.(1) Section 53A postulates taking possession of property or continuing in possession of property in part performance of the contract only in lawful manner Section does not give protection where possession is taken in a manner contrary to the law in force Invalid and unlawful possession is not saleguarded under S 53A (2) Thus, the doctrine of part performance does not apply to the following cases

(1) An agreement to transfer land to a legal practitioner which is void under S 28 of the Legal Practitioners Act(3)

(2) Transfer of *spes successionis* void under S. 6(a)(4)

(3) Contract infringing S 114(1) read with S 115 of the Cantonments Act (1924)(5)

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39. 1981 MCC 134 (136) (Bom).

Section 53-A — Note 12

1. AIR 1981 Andh Pra 38 (41) (1980) 2 Andh WR 197 (DB) (An agreement to sell vacant land in urban area cannot be specifically enforced after coming into force of A P Act 12 of 1972 Doctrine of part performance does not apply) ** AIR 1977 (NOC) 231 (Andh Pra) ** AIR 1968 Mad 294 (298) (1968) 1 Mad LJ 249 (DB) ** (1954) Madh BLJ (HCR) 1450 (1454) (There being no sanction of Subha for sale as required by Land Revenue and Tenancy Act) ** ILR (1954) Mad 537 (564) (DB) (Two out of three trustees selling property There is no valid contract, the foundation upon which the doctrine of part performance could be rested) ** ILR (1954) Madh Bha 162 166 (DB) (Transfer by sale of agricultural holding effected without Subha's sanction is null and void under S 45(2), Indore Land Revenue and Tenancy Act (1931) -- S 53A cannot apply) ** AIR 1947 Nag 188 191) ILR (1946) Nag 991 (Section 53A predicates a valid contract - A contract of a type which could be specifically enforced As a contract by a guardian to sell a minor's immovable property is one which the law does not recognise, the section cannot apply to such a contract) ** AIR 1933 Mad 364 (366) (A contract against a minor) ** AIR 1929 Rang 181 (181) (DB) ** AIR 1927 Nag 177 (179)

   [See also AIR 1956 Punj 181 (185) ILR (1956) Punj 1279 (DB) (Contract statutorily barred — Section not applicable) ** AIR 1954 Pat 41 (42) (Where the instrument of transfer is a registered one and there is no defect in it according to the law in force at the time of its execution, the section has no application.)]

2. 1988 (1) Mad LW 532 (535)

3. AIR 1930 Pat 61 (62) (DB)

4. AIR 1933 Pat 165 (172) (DB).

   [See also AIR 1980 Andh Pra 89 : (1979) 2 Andh WR 247 (DB).]

5. AIR 1974 Andh Pra 240 (244, 245) : ILR (1973) Andh Pra 994 (FB) ** AIR 1957 Andh Pra 859 (861) (DB)

(4) Transfer in violation of the provisions of local Tenancy laws(6)

(5) An agreement to sell agricultural land executed without obtaining sanction under S. 43 of the Bombay Tenancy and Agricultural Lands Act 1948 is invalid and the possession handed over to transferee on strength of such invalid agreement is also invalid and is not protected under S. 53A(7).

(6) Agreement in violation of S. 47(2) of the Punjab Municipal Act (3 of 1911)(8)

(7) Where the parties executed unregistered sale deed without prior permission of the competent authority the sale is void. Benefit under S. 53A could not be claimed on basis of such void transaction(9)

(8) Where an unregistered sale deed is executed without prior permission of competent authority, the transaction is void and therefore the transferee cannot claim benefit under S. 53A on basis of possession(10).

In the undermentioned cases(11) it has been held that a defendant can defend his possession of agricultural lands by availing of the provisions of this section by showing that he was placed in possession by the plaintiff himself, and although such a person cannot claim title in view of the prohibition of alienation under S. 47 of the Hyderabad Tenancy and Agricultural Lands Act he can nonetheless use the contract of sale in support of plea of estoppel which is not denied by reason of S. 47 of the said Act.

Doctrine of part performance is applicable to agreements which though required to be registered are not registered, and to cases where transfer is not completed in a manner required by law unless such a non-compliance with the procedure results in the transfer being void. However, where a vendor agrees to sell his share of property including Sir land, there is an implied term in the contract, that he will apply for sanction to the revenue authorities necessary for such transfers, then it cannot be said that such an agreement is void because no sanction has been obtained(12)

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6. **AIR 1974 Andh Pra 240 : ILR (1973) Andh Pra 994 (FB)** (Agreement for sale of service Inam land without permission of Tahsildar as contemplated by S. [illegible] Madras Hereditary Village Offices Act (3 of 1895) is void.) ** **AIR 1982 Andh Pra 1 (6) (1981) 2 Andh WR 348 (FB)** ** (1982) 2 Bom CR 18 (21) ** AIR 1981 Goa 25 ** AIR 1978 Andh Pra 242 (1978) 1 APLJ (HC) 202 (DB) (1969) 2 Andh WR 31[illegible] (1976) 2 APLJ (03) and S.A. No. 450 of 1976, D. 2-9-1972 (Andh Pra) **Overruled.**) ** 19[illegible] MPLJ 76 ** AIR 1970 Andh Pra 19 (DB) (Case under A.P. (Telangana) Area and Tenancy & Agricultural Lands Act.) ** (1963) 2 Mys LJ 146 (147) (Where agricultural land is sold in contravention of S. 47(1) of the Hyderabad Tenancy and Agricultural Lands Act which requires previous sanction of the Collector, the purchaser cannot invoke the provisions of S. 53A of the Transfer of Property Act to defeat the claim for possession of land by a person claiming proprietary rights therein.) ** ILR (1956) 9 Raj 271 (274) (DB) (Case under Bombay State Tenancy Act S. 20) ** ILR (1954) Madh B. 62 (DB) (Transfer by sale of agricultural holding effected without Subha's sanction as required under S. 42 Indore Land Revenue and Tenancy Act (1931) is null and void.) ** AIR 1949 Pat 464 (465) (28 Pat 351) **(Case under Bihar Tenancy Act (8 of 1885), S. 26A).**

[But see ILR (1974) Andh Pra 119 (125) (DB) ** AIR 1972 Mys 121 (125, 126) (1971) 2 Mys LJ 179 (1963) 2 Mys LJ 146 and (1970) 1 Mys LJ 16 **Held no longer good law** in view of AIR 1964 SC 978 and AIR 1970 SC 546.) ** (1969) 2 Andh WR 5[illegible]7

7. **1995 (1) Mah LJ 80 (85) (Bom).**

8. AIR 1959 Punj 220 (221) ILR (1958) Punj 210 ** AIR 1956 Punj 181 (183) ILR (1956) Punj 1279 (DB)

9. **AIR 1994 Orissa 26 (29) : (1994) 2 Cur CC 234.**

10. **AIR 1994 Orissa 26 (29) : (1994) 2 Cur CC 234**

11. AIR 1973 Mys 307 (308) (DB) (1973) 2 Mys LJ 94 (DB) ** AIR 1963 Andh Pra 232 (234)

12. **1983 Tax LR 488 (493) : 1983 Pat LJR 195 (DB)**

Unregistered document affecting immovable property can be received as evidence of part performance(13) An agreement of sale is required to be registered in Rajasthan Where the plaintiff is in possession of property in pursuance to an unregistered agreement, it does not create an active title or interest in him over the land but create only an estoppel to defend his possession in a suit filed for his eviction (14) Section 53A does not confer a right on a transferee to move an application for temporary injunction under O 34, Rr 1, 2, CPC in a suit for specific performance on the basis of an unregistered agreement for sale which requires compulsory registration in Rajasthan (15) The agreement in the instant case specifically provided for giving on lease a newly constructed building for 10 years It was signed by transferor/lessor and its terms and conditions were ascertainable with reasonable certainty The vendee was in possession of the building in pursuance of the said agreement He was ready and willing to perform his part of the contract Thus the agreement though was not registered was admissible as evidence of part performance and the lessee was entitled to protect its possession.(16)

The non-registration of the agreement of sale has no import on the validity of the agreement relationship between the parties and maintainability of the suit Transferee of flat in possession under agreement of sale is entitled to protection under S 53A, notwithstanding that the agreement is unregistered (17) The document which is not necessarily registrable can be at the option of the executant got registered also, but by act of registration the nature of the document would not change as is clear from S 53A that at the time of agreement to sell entire consideration money can be paid and even possession can be delivered but such a document which is just an agreement of sell would not become a sale deed merely because it is registered (18) Where a deed of transfer has been executed though in violation of the law prescribing for a previous sanction or subsequent validation by a Competent Authority and though not registered would still attract the applicability of the doctrine of part performance (19) Partition of property does not amount to transfer and therefore the doctrine of part performance does not apply to an unregistered deed of partition (20)

Where as per the agreement for sale the purchaser was permitted to enter the properties for the limited purpose of forming lay out etc and the manner in which a line was added in the agreement after its execution revealed interpolation and reciting passing of possession to purchaser, thereby entitling him to claim part performance, the same being material alteration, the purchaser would not claim specific performance of the agreement.(21)

Agreement for sale of minor s property was executed subject to condition of permission of the Court Possession was handed over to agreement holder, since permission of Court was condition precedent and such permission was not obtained, there was no question of specifically enforcing the agreement There was no valid agreement and therefore the possession of vendee was not lawful Doctrine of part performance could not therefore be invaded (22)

Where an agreement for execution of mortgage of property was entered into with a stipulation of transfer of possession to mortgagee for a limited period, subsequent non-execution of mortgage

13. 1997 (1) LJR 106 (109) (Punj & Har.)
14. 1999 (1) Land LR 357 (363) · 1998 (1) Raj LW 440
15. 1991 (5) Rajasthan LR 357 (363).
16. 1999 (1) Rent CR 542 (548) (Punj & Har).
17. 1984 (2) Bom CR 544 (560)
18. 1992 (2) Land LR 147 (151) (Punj & Har.)
19. 1988 MPLJ 781 (784).
20. AIR 1988 Delhi 13 (18) : (1987) 13 DRJ 248
21. AIR 1992 Mad 80 (88) : (1991) 181 Mad LJ 249
22. 1985 (1) Mad LJ 407 (416)

deed by mortgagor, does not entitle the mortgagee to continue in possession beyond stipulated period by invoking doctrine of part performance under S 53A (23)

See also the undermentioned cases(24)

13. Transferor debarred from enforcing his right to the property.

It has been seen in Note 1 that under the English law, a transferee under a parol contract which has been partly performed, can either as *plaintiff* or as a *defendant* claim relief on the basis of a valid transfer The right conferred by this section is a right on the part of the *transferee* to plead *in defence* that the transferor is debarred from enforcing any right in respect of the property transferred(1) As was observed by the Privy Council in *Probodh Kumar v Dantmara Tea Co* (2) the right conferred by

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23. AIR 1993 Ker 242 (246) : 1993 (1) Ker LJ 528

24. AIR 1981 (NOC) 128 (All) (Possession taken in pursuance of unregistered lease deed for 3 years — S 53A is attracted) ** 1995 Tax LR 65 (69) (Raj) (Where sale deed is executed possession of the property was transferred to vendee and he also received income from the property transferred to him, the vendor would not be liable to tax in respect of income from the said property merely because registration of the sale deed was made long after its execution. Transferee would be liable to tax in respect of the income received by him by invoking principle of part performance) ** 1979 U PLT (NOC) 50 (1980 U PLR 24 Possession of tenant unauthorised in view of S 38 of U P Rent Act 1972 — Tenant cannot seek protection of S 53A in suit for eviction by purchaser) ** AIR 1968 Andh Pra 515 (519) (1968) 2 Andh WR 267 (Where the illegal purpose of an arrangement contravening the provisions of a statute carried out in full exception of locus paenitentiae does not apply the Court will not render any assistance in the recovery of the money even if there is a part performance of the illegal contract) ** AIR 1969 Mad 191 (200) (1 L R (1968) 1 Mad 155 (A person inducted into possession without his transferor having right in law to do so cannot claim benefit of S 53A) ** AIR 1967 Cal 423 (428) (Lease on annual rent of Rs 3,200 executed by only the chairman who is one of the Commissioners of the Municipality and not bearing their common seal — Transaction is not transfer at all since it contravenes the mandatory provisions of S 103 of the Bengal Municipal Act — Transaction is therefore not saved by S 53A) ** AIR 1956 Cal 18 (22) (Contract with Corporation — Statutory provisions viz Ss 67 and 68 Calcutta Municipal Act (3 of 1923) regarding agreement not complied with — Agreement is invalid and not binding on either party notwithstanding that there has been part performance of the contract) ** AIR 195 Hyd 42 (44) (DB) (Sale of immovable property of a value less than one hundred rupees is complete by delivery of the property in spite of there being an unregistered deed of sale Where therefore the transferee s claim is that he has become the owner of such a property which he claims for himself by virtue of a contract of sale and delivery of property S 53A has no application) ** AIR 1930 Mad 298 (301) (DB) (The doctrine cannot be used to complete a transaction against an idol of a temple or a cestui que trust or a minor against whom it cannot be regarded as operative) ** AIR 1929 Rang 335 (338) (DB) ** (1934) 18 RD 654 (655) (Landlord and tenant — Suit in ejectment — Compromise — Tenant paying nazarana and landlord promising never to eject tenant — Omission to register or record compromise — Doctrine of part performance applies.)

Section 53-A — Note 13

1. 1981 Tax LR 215 (219) 1981 UPTC 61 (DB) ** AIR 1954 Mad 702 (703)

   [See also AIR 1957 Bom 31 (33) II R (1956) Bom 594 (Agreement to sell by A in favour of B accompanied by delivery of possession — Price received by A towards such agreement is not debt — A cannot under guise of application for adjustment of debts under S 24 Bombay Agricultural Debtors Relief Act claim to recover possession contrary to provisions of S 53A, T P Act) ** (1982) 2 Kant LJ 300 (300) (In a suit by transferee for declaration of title and possession of suit property it is not open to the transferor to take the plea of part performance on ground that she continued in possession)]

2. AIR 1940 PC 1 (2) : 66 Ind App 293. (On appeal from 41 Cal WN 54) ** 1998 (4) Rec Civ R 659 (660) (Punj & Har).

the section is one available only to the defendant to protect his possession(3). The section imposes a statutory bar on the transferor and does not confer any active title or right of action on the transferee. Thus, it is not possible for a person who is entitled to the benefit of the section to bring a suit as

3. *See also the following cases :*

AIR 1978 Pat 172 : 1978 BLJR 32 (FB). (Proceeding under the Bihar Money Lenders Act before the Collector for ejectment of the mortgagee — He can invoke the doctrine of part performance to resist ejectment alleging a contract of sale prior to the Act.) ** AIR 1978 Mad 47 : (1978) 2 Mad LJ 533 (Suit for eviction under the Rent Act — Plea of part performance is available to the tenant.) ** AIR 1976 Andh Pra 395 : (1976) 2 Andh WR (J) (DB) (The right is not available against non-alienating coparcener who is not a party to the agreement.) (AIR 1975 Andh Pra 250) **Reversed;** AIR 1926 Bom 399 **Dissented from.** ** (1970) 74 Cal WN 355 (Agreement for exchange of properties situate in East Pakistan on the one hand and in Hindusthan on the other with a further agreement to execute proper sale deed — Possession of the properties was given to each party — Dispute arising in Hindusthan regarding the Indian properties — Person in possession can defend it under S. 53A.) ** (1968) 2 MLJ 574 ** 1968 Raj LW 334 ** 1967 BLJR 52. (Tenant in possession under an unregistered lease is protected by special equity created by this section.) ** AIR 1967 Bom 34 (36) : ILR (1966) Bom 291 ** 1960 MPLJ (Notes) 137 ** AIR 1959 Andh Pra 568 : 570) (DB) ** AIR 1959 Mad 354 (355) : ILR (1959) Mad 296 (After the introduction of S. 53A a defendant in a suit for ejectment is entitled to rely upon his contract for transfer provided the conditions of the section are fulfilled.) ** AIR 1958 Bom 138 (141) : ILR (1958) Bom 556 (DB) ** AIR 1956 Pun 181 (185) : ILR (1956) Punj 1279 (DB) ** AIR 1955 Nag 306 : 310) : ILR (1956) Nag 10 (DB) (The protection given by this section to the defendant in possession cannot by analogy be extended to the transferee.) ** AIR 1955 Punj 22 : 24 : ILR (1955) 122 (DB) ** AIR 1955 Pun 252 (253) : ILR (1955) Pun 1242 ** ILR (1953) Madh Bha 303 (312) (Mortgagee in possession under an invalid mortgage can retain possession until the mortgage debt is paid off.) ** AIR 1950 Cal 23 (27) : ILR (1950) 2 Cal 443 (DB) (Transferee's possession is protected against any challenge to it by the transferor contrary to tenor of the contract or the instrument of transfer.) ** AIR 1940 Nag 113 (116) (DB) (Section 53A does not enable a person to sue : it only enables him to defend his rights to possession.) ** AIR 1945 All 422 (423) : ILR (1945) All 910 (DB) (Section 53A can be used as shield not as offensive weapon — Plaintiff cannot avail of Section 53A.) ** AIR 1939 Cal 163 (165 166) : ILR (1938) 2 Cal 528 (DB) (Section 53A applies to a contract to transfer occupancy holdings which has not been completed in the manner prescribed by S. 26C of the Bengal Tenancy Act.) ** AIR 1938 Mad 746 (748) (Only in exceptional cases as a suit for specific performance doctrine of part performance can be invoked by plaintiff.) ** AIR 1937 Mad 638 (639) ** AIR 1937 Pesh 58 (60) (DB) (A Mahomedan executed a dower deed in favour of his wife — Deed was not registered — Wife brought a suit for a declaration of ownership of property on the basis of the dower deed, against the mortgagee of the property the mortgage being executed by her husband — **Held,** that if the mortgagee be considered as the representative of the mortgagor he was not enforcing any right against the wife but was only defending his right against the suit brought by her — On the other hand if the mortgagee was not claiming under the mortgagor he was protected by the proviso to Section 53A.) ** (1982) 28 Cur Tax Rep 158 (163) (DB) (Gu) (Receipt of part of the price and parting of possession does not divest the person of his title nor does the purchaser acquire any title over the property.)

[**See also** AIR 1966 Madh Pra 307 (311) (DB) (Transferee of a person who in his turn has got title by part performance protected by S. 53A.) ** AIR 1966 Mys 86 (89) : ILR (1963) Mys 1109 (Contract to sell — Payment of earnest money and vendee put in possession — Contract falling through for non-payment of price — Suit for possession by vendor — Concurrent finding that defendant was always willing to perform his part of contract — Finding being one of fact cannot be challenged in second appeal — Absence of specific plea of

plaintiff for the purpose of enforcing his right to the property(4). As observed by the learned Judges

part performance in written statement — S. 53A can be availed of in second appeal.) ** AIR 1957 Manipur 32 (33). (Where facts constituting the defence of part performance have been pleaded without specific reference to the benefit under S. 53A of T.P. Act, the plea has to be entertained.) ** AIR 1955 Madh Bha 49 (52) (DB). (Written statement stating facts necessary to entitle plea of defence of part performance — Absence of express reference to S. 53A in taking the plea — Relief under the section cannot be denied.) ** AIR 1955 Madh Bha 93 (95). (The defendant claiming the benefit of the doctrine of part performance must raise the plea in his written statement.) ** AIR 1952 Nag 244 (245). (ILR (1949) Nag 959). (Upon the enforceability of the contract. Whether a contract is specifically enforceable or not is not a matter which must be taken into consideration for granting relief under the section.)]

4. **AIR 1977 SC 2425 : 1977 L.J. (SC) 629 : AIR 1996 SC 1088 (1089, 1090) : 1996 AIR SCW 615 : (1996) 7 SCC 690 ** AIR 1968 SC 794 (798) : (1968) 2 SCJ 614 ** AIR 1966 SC 1438 (1440)** ** 1998 (3) Mad LJ 302 (303) ** ILR (1985) Kant 584 (585). (The doctrine cannot be invoked for enforcing rights under unregistered lease.) ** 1982 Tax LR 699 (702). (1982) 133 ITR 55 (DB) (Guj) ** AIR 1981 Guj 243 (245) (DB) ** 1981 Gujt LR 866 ** 1981 MP Rent CJ 204 (209, 210) ** AIR 1981 Mad 310 (1981) TLNJ 189 (DB) ** AIR 1980 Gauhati 44 ** 1978 All LJ (NOC) 44 ** (1976) 3 Cal HN 592 (DB) ** 1976 Tax LR 547 (554). 103 ITR 455 (DB) Delhi. ** AIR 1975 Guj 27 (28). (Lessee in possession under an unregistered lease deed is entitled to prove his possession as a lessee by producing the document for purpose of S. 53A.) ** AIR 1973 Pat 247 (248, 249). 1978 BLJR 703 ** AIR 1972 Raj 83. 1972 Raj LW 103. (S. 53A of Jaipur Transfer of Property Act does not give a right of action by a suit (including a so-called defensive suit) for restoration of possession forcibly taken by the transferor.) ** AIR 1970 Guj 125 (129 to 132). 10 Guj LR 950 (DB) ** (1970) 72 Pun LR 438 ** (1968) 9 Guj LR 939 ** (1968) 2 Mad LJ 574 ** (1967) 2 ITJ 899 : (1967) 65 ITR 67 (DB) (Bom) ** AIR 1964 Raj 11 (12). ILR (1963) 13 Raj 832 ** AIR 1964 Cal 235 (238). (**Reversed** on another point in AIR 1980 SC 226.) ** AIR 1961 Pun 378 (383). ILR (1961) 2 Pun 293 (DB). (In a suit brought by the buyer for the return of the price paid by him to the seller who has agreed to sell his house to the buyer and put the buyer in possession of the house, the doctrine of part performance cannot be availed of by the seller as it does not furnish a cause of action of the claim by him to obtain the full price of the house agreed to be paid to him. AIR 1940 PC and AIR 1956 Pun 181. **Rel. on.**) ** (1960) MPLJ 67 (68, 69). (Unregistered sale by A in favour of B — Gift by B in favour of C — Suit by C against A for possession on allegation of dispossession — C being plaintiff cannot advance plea of part performance under S. 53A, but can succeed only if he can prove oral sale accompanied by delivery of possession in favour of B.) ** AIR 1957 Hyd 37 (40). ILR (1956) Hyd 733 (DB). (When the right to remain on the property can be defended against the true owner, a mere trespasser by show of force cannot defeat such a right.) ** AIR 1956 Punj 181 (185). ILR (1956) Punj 279 (DB). (Tenant cannot apply for fixation of fair rent.) ** AIR 1955 Nag 306 (311). ILR (1956) Nag 10 (DB). AIR 1949 Nag 410 appears to be **no good law**. Rel. on.) ** AIR 1954 Mad 702 (703) ** AIR 1954 Pepsu 42 (43). ILR (1953) Pataria 319. (Doctrine of part performance does not enable a person who has lost possession to sue for recovery of it.) ** AIR 1951 Pat 160 (164) (DB). (Section 53A gives no right to the plaintiff to come to Court as a plaintiff either to maintain his possession or to recover possession if dispossessed. AIR 1939 All 611. **Diss.**) ** AIR 1949 Pat 464 (465). 28 Pat 351 (DB). (Provisions of S. 53A, T.P. Act cannot be availed of by the plaintiff who has to prove his title in a suit for ejectment.) ** AIR 1949 Nag 389 (394). ILR (1949) Nag 849 (DB) ** AIR 1949 Assam 8 (10). ILR (1949) 1 Assam 297 (DB). (Section does not create title. It only bars plaintiff asserting title.) ** AIR 1948 Cal 147 (149). (A transferee in possession under a contract of sale cannot avail himself of the provisions of S. 53A in a suit for specific performance of the contract.) ** AIR 1947 Pat 424 (426). 25 Pat 764 (DB). (The section does not confer any title on the transferee. It can be used not for attack but only in defence, and that too in defence only against the transferor or any person claiming under him.) ** AIR 1946 A 476 (480) (DB). (Un-registered partition deed acted upon — It is doubtful whether a party

of the Chief Court of Oudh in the undermentioned cases(5).

> "the section cannot be used as a weapon of attack — it confers upon the transferee the privilege of invoking the doctrine, embodied therein only as a shield against any invasion of his rights by the transferor or persons claiming under him (6)"

Thus where the owner has filed a suit for permanent injunction simpliciter and the defendant advances a plea in his defence that he came into possession of the disputed land as a result of part performance of the written contract entered into by the parties, and he is continuing in possession of the same. This is a valid defence in the eye of law in view of the statutory provisions of S 53A (7)

It has been held that in land acquisition proceedings in the role of the Government which is acquiring the land is that of a plaintiff and the role of the claimant who is in possession of the land is that of a defendant and the claim can therefore rely on this section(8).

The defendant who is protected under this section does not lose the protection merely because he obtains a registered transfer from the transferor subsequently (9)

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can file suit on basis of it for declaration that he has become the owner of the property (Quaere) ** AIR 1945 All 422 (423) ILR (1945) All 910 (DB) ** AIR 1945 Pat 124 (125) 23 Pat 645 (DB) (Sale of occupancy holding — Sale deed not registered — Vendee subsequently dispossessed — Vendee cannot maintain a suit for ejectment as he has no title deed in his favour) ** 1942 Nag LJ 353 (354) (Section 53A confers no title but merely raises defence Hence a plaintiff claiming possession will fail unless she can pray in aid S 41 of the Act) ** AIR 1942 Mad 125 (127) (He cannot sue for possession) ** AIR 1940 Oudh 409 (410) 16 Luck 191 (DB) ** AIR 1940 Nag 113 (116) ILR (1941) Nag 386 (DB) ** AIR 1939 All 504 (507) ** AIR 1937 Nag 74 (76) ILR (1936) Nag 115 (DB) (Distinction between S 53A T P Act and S 27A Specific Relief Act Discussed) ** AIR 1936 Pat 372 (378) 15 Pat 460 (DB) (Part performance does not convey title to transferee — **Reversed** on another point in AIR 1938 PC 20) ** (1941) 45 Cal WN 132 (136) (DB) (Title can only be transferred in the manner provided by the T P Act read with the Registration Act, because S 53A only gives a right of defence to the defendant in possession in part performance of the contract)

[**See also** AIR 1957 Bom 236 (238) ILR (1957) Bom 769 (Vendee in possession entitled to rights conferred by S 53A — That does not make him transferee of property) ** AIR 1954 Pepsu 133 (135) ILR (1953) Patiala 508 (DB) (Part performance not proof of factum of sale) ** AIR 1951 Nag 403 (406) ILR (1950) Nag 25 (Mere fact that agreement along with fact of possession can be availed of for resisting dispossession does not bring into existence a transfer.)]

[**But see** AIR 1934 Rang 284 (286) (*V* transferred property to *L* and put him in possession — There was no registered deed — *L* transferred his right to *P* — *P* being unable to obtain possession sued *D* who was a purchaser by oral agreement from *V* **Held,** that *P* was entitled to sue — Submitted not correct.)]

5. AIR 1944 Oudh 212 (218) 19 Luck 565 (DB) (Affirming AIR 1940 Oudh 1)
6. **AIR 1955 Nag 302 (304) : ILR (1955) Nag 833 (FB)** ** AIR 1981 Mad 310 (311) 1981 TLNJ 189 (DB) ** AIR 1959 Andh Pra 534 (536) ILR (1959) Andh Pra 547 (DB) ** AIR 1956 Ajmer 22 (23) (Section 53A can be used only as a shield and not as a sword) ** (1952) 2 Cal 135 (136) (DB) ** AIR 1949 Kutch 13 (14, 15) (It cannot be used as a weapon of offence to recover possession even from the contractor, still less can it be used to recover possession from a person who does not claim from the contractor)
7. **1998 AIHC 2461 (2467) (Raj)**
8. **ILR (1960) 2 All 71 (90) (DB)**
9. AIR 1951 Pat 613 (617) (DB) (Unregistered agreement by A to grant lease to B — D entering into possession — C who had notice of agreement taking lease of same property — C suing A for specific performance and obtaining decree — Subsequently A executing

Suppose a transferee under a contract of transfer takes possession of the property in part performance of the contract the property is sought to be taken in execution of a decree for ejectment previously obtained by the transferor against a third person The transferee raises objections in the excution proceedings but does not succeed and is deprived of possession Then he sues under O 21, R. 103 of the Civil Procedure Code for getting rid of the order in execution proceedings and recovering back possession of the property Is he entitled to succeed, relying on the provisions of this section ? It has been held by the Chief Court of Oudh in the undermentioned case(**10**) that the transferee can rely on this section in such a case because he is only *defending* his possession The decision proceeds on the ground that the words of the section do not warrant a conclusion that the plaintiff *as such* is necessarily debarred from the benefit of the rule It was observed

> "Where by the nature of the case as disclosed by the pleadings or otherwise it is apparent that the transferee comes to Court to defend his possession against the invasion of it by the transferor he is entitled to invoke the equitable doctrine therein embodied The present suit under O 21, R 103 Civil Procedure Code is of that nature being in our opinion practically a continuation of the proceedings before the execution Court, wherein the transferor and his representative succeeded in ejecting Mt Firdaus Jahan from possession which she had originally taken in pursuance of the contract of purchase"

The trend of remarks in the judgment of the Oudh Chief Court referred to above seems to imply that a transferee may come to Court to defend his possession against acts of aggression on the part of the transferor or his representative whatever form such aggression may take Thus the decision of the Allahabad High Court in *Ram Chandar v Maharaj Kunwar*(**11**) is referred to apparently with approval In that case, the transferor's acts of aggression were not in the form of any legal proceedings The transferor was trying to disturb the transferee's possession otherwise than in due course of law and the transferee brought a suit for an injunction restraining him from interfering with his possession It was held that the suit was but a form of defence by the transferee to the invasion of his rights by the transferor and as such was competent under this section Again in distinguishing the Privy Council decision in *Probodh Kumar Das v Dantmara Tea Company*(**12**) already referred to the Court points out that there had been no "obstruction" to the transferee in the enjoyment of his rights under the transfer.

The Oudh and Allahabad view has been followed in the following cases(**13**) but has been

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registered lease in favour of B — B filing suit against C for injunction restraining C from executing decree against him.)

10. AIR 1944 Oudh 212 (218 219) (9 Luck 565 (DB) (Affirming AIR 1940 Oudh 15 Luck 43)

11. AIR 1939 All 611 (613) ILR (1939) All 809 (DB)

12. AIR 1940 PC 1 (2) : 66 Ind App 293.

13. (1982) I APLJ 176 (186) ** (1978) 80 Bom LR 315 ** 1978 Mah LJ 442 449 ** 1976 2 Andh WR 117 . (1976) I APLJ 312 (DB) ** 1971 All WR (HC) 528 ** AIR 1917 Orissa 41 43 44) 36 Cut LT 6 3 ** AIR 1967 Bom 34 37) ILR 1966 Bom 29 (AIR 195 Orissa 143 and AIR 1943 Mad 706 Diss from.) ** ILR (1960) 2 All 71 90 (DB) (Even assuming that the claimant in land acquisition proceedings is in the position of a plaintiff he would still be entitled to fall back on S 53A AIR 1944 Oudh 212 Relied on) ** AIR 1957 Andh Pra 859 (860 861) (DB) (Protection is available to the transferee both as a plaintiff and as a defendant so long as he uses it as a shield AIR 1957 AP 854 Followed) ** AIR 1957 Andh Pra 854 (855 858) ILR (1956) Andh 1039 (DB) (S 53A can be invoked by the transferee both as a defendant and as a plaintiff) ** AIR 1956 Ajmer 22 (24 ** AIR 1956 Cal 350 (352) (DB) ** AIR 1954 Mad 702 (703) (In cases under Rules 63 and 103 of O 21 of Civil PC the plaintiff transferee comes to court to defend his possession against the invasion of it by the transferor) ** AIR 1953 Ajmer 19 (21) (The word defendant means a person who pleads S 53A for defending his possession against the transferor and hence a plaintiff can invoke the aid of S 53A) ** AIR 1953 Ajmer 47 (48) ** AIR 1982 A 4 4 (425) ** AIR 1982 All 304 (307) (Plaintiff having valid title to land Defendant obstruct-

dissented from in the undermentioned decisions **(14)**

Where during the pendency of a suit for specific performance, the transferee made an application for temporary injunction for an interim relief to protect his possession from interference of the transferor and obstruction to the peaceful enjoyment of property, such an application cannot be treated as an application for relief of injunction as provided by S 53-A of the Transfer of Property Act Such an application is solely governed either by the Order 39, Rr 1 and 2 of Civil PC or in the alternative by invoking the inherent powers of the Court under S 151 of the Civil PC **(15)**

Where there is an agreement in writing and possession is with the agreement holder it has to be prima facie concluded that his possession is in pursuance to an agreement for sale and in part performance of the agreement for sale, when he has also spent huge amount for reclamation of the property, he is entitled to injunction restraining opp party from interfering with his possession **(16)**

It has been held in the undermentioned case**(17)** that the transferee can sue for declaration of his right to be in possession and for injunction preventing the transferor from intertering with possession The transferor is debarred under S 53 A from enforcing his rights against the transferee This will not only prevent the transferor from enforcing his rights through a Court of law but also from enforcing his rights outside the Court adopting means which cannot be upheld by a Court of law When the transferee comes to Court seeking the aid of the Court to protect his possession it is only a case of using the right conferred on him by S 53-A whether it is an equity or a right as a shield and not as a sword It is only a right of defence that is put forward by him in the garb of a plaintiff Thus he is entitled to injunction restraining the transferor from interfering with his possession **(18)** Though the principle that the right conveyed under S 53-A can be invoked as a shield and not as a sword is beyond any debate or any challenge, the mere position of a party in the heading of a joint is not the determining factor What in essence is the nature of right claimed by the transferee as the crux of the matter So long as the transferee relies on the provisions of S 53 A not for founding any cause of action, but only as a protection he would be entitled to do so, no matter whether he appears as a plaintiff or defendant in an action.

In a suit for specific performance by plaintiff who claimed to be in possession of property in pursuance of an agreement of sale and was admittedly in possession, the plaintiff is entitled to temporary injunction **(19)** Also the Bombay High Court in the undermentioned case**(20)** held that the transferee is entitled to resist any attempt on the part of the transferor to disturb transferee's lawful possession under the contract of sale and his position — either as a plaintiff or as a defendant should make no difference Contrary interpretation viz the transferee can use the shield only as a defendant and not as a plaintiff would defeat the very spirit of S 53-A, for it will be possible for an overpowering transferor to forcibly dispossess the transferee even against the covenants in the contract and compel him to go to Court as a plaintiff Where a suit is filed by the transferee for permanent injunction against the transferor restraining him from disturbing the lawful possession over the suit land, the suit is maintainable It cannot be said that unless and until a decree for

ing him from raising construction on it — Injunction on it — Injunction against defendant could be granted — Plaintiff entitled to protect his title under S 53A) ** AIR 1982 NOC 266 (All)

14. AIR 1964 Raj 11 (13) ILR (1963) 13 Raj 832 ** AIR 1952 Orissa 143 (145) ILR (1949) 1 Cut 705 (DB).

15. AIR 1983 Bom 413 (415) : (1983) 1 Bom CR 374.

16. 1999 (1) Mad LW 484 (490, 495).

17. (1981) 2 Kant LJ 388 (394) (DB) ** AIR 1975 Mad 25 (25, 26) (1974) 1 Mad LJ 499 (DB) (S A No 1752 of 1962 D/- 28-4-1966 (Mad), **Reversed.**) ** (1972) 1 Mad LJ 9.

18. 1987 TNLJ 352 (356) (Mad)

19. 1984 Mah LJ 915 (918) (Bom)

20. AIR 1994 Bom 254 (256) 1994 Bom CJ 470 (AIR 1981 Mad 311, **Dissented from.**)

specific performance of contract is passed in favour of the Transferee he cannot file a suit against the transferor in respect of the suit property for any purpose There may arise situations in which it would be open to a transferee coming under S 53-A to file a suit for injunction to restrain the transferor or person claiming under him from interfering with his possession **(21)** But in a subsequent decision, the Bombay High Court held that the suit simpliciter to protect the possession on the basis of principles laid down under S 53 A without claiming the relief of specific performance of contract or agreement is not tenable in law and naturally therefore the Court is not supposed to pass any interim reliefs or interlocutory reliefs in favour of the plaintiff in such a suit **(22)** The Madhya Pradesh High Court held that it is well settled that a plaintiff cannot bring a suit based on doctrine of part performance in order to protect his possession But a plaintiff in possession suing for specific performance can definitely claim a relief of permanent injunction restraining the defendant from disturbing his possession Here the plaintiff is not relying on mere 'contract for sale' to protect his possession but claiming that contract of sale be enforced and his possession be protected by a permanent injunction.**(23)**

The plaintiff alleging that he was put in possession of the property in pursuance to agreement for sale in his favour filed a suit for permanent injunction restraining defendants from interfering with his possession and also filed an application for temporary injunction Held that temporary injunction could not be granted The plaintiff could not seek his relief of injunction based on S 53-A the plaintiff who has filed the suit mostly basing his claim on S 53-A will not be entitled when his claim itself appears to be based on S. 53-A.**(24)**

The suit filed simpliciter for injunction where the claim is founded purely to claim protection under S 53-A is not maintainable and such a suitor is not entitled to claim relief in view of the provision of S 41(h) of the Specific Relief Act **(25)** However where the plaintiff who has entered into an agreement of sale and was delivered possession of the property in pursuance thereto and was enjoying the same files a suit for specific performance he can seek injunction to protect his possession under S 53 A, provided twin principles of prima facie case and balance of convenience are adjudged in his favour.**(26)**

If the contract of sale is found to be prima facie genuine the plaintiff vendee is entitled to a specific performance and in an appropriate case injunction can be granted to protect the rights of the parties by operation of S 53 A Each case has to be considered on its own facts **(27)**

In a suit for perpetual injunction filed by the owner and also praying for temporary injunction, agreement holder is entitled to defend his possession on ground that the agreement is supported by consideration and he is in possession of the property in pursuance to the agreement prior to institution of the suit **(28)** In pursuance of an agreement to sale the plaintiff vendee paid substantial part of the consideration to the vendor The actual delivery of possession of the property was established and he continued to be in possession of the property The vendee subsequently executed

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21. 1992 (2) Bank CLR 537 (543) : 1992 (2) Civ LJ 91 (Kant)

22. 1999 AIHC 3785 (3787) 2000 (1) Bom CR 153 AIR 1988 Bom 296 **not good law** in view of 1986 (1) Bom CR 533 ** 1988 Mah LJ 55 (Bom) Suit simpliciter for injunction **based on S 53A not maintainable — 1986 (1) Bom CR 533. Foll.)**

23. 1996 MPLJ 748 (754)

24. AIR 1986 Kant 99 (102) : ILR (1986) Kant 171

25. 1988 Mah LJ 55 (58) (Bom)

26. 1989 (2) Andh LT 199 (200) (The view of the Madras HC in AIR 1958 Mad 287 and AIR 1981 Mad 310 that in a suit for specific performance the plaintiff should not be allowed to take shelter under S 53A and should not be granted injunction **Dissented from.)**

27. 1989 (3) Andh LT 498 (500)

28. 1998 AIHC 2461 (2467) (Raj)

a sale deed in respect of the said property in favour of a third party In the circumstances held that all the ingredients of S 53 A were prima facie established and therefore the plaintiff/vendee was entitled to temporary injunction against interference with his possession by third parties That the parties contemplated execution of another document with some more terms will not invalidate the terms already agreed **(29)** In the following case **(30)** it has been held that transferee from one of the caparceners would not be able to maintain such suit against non-alienating coparceners

Where in a suit for prohibitory injunction restraining a co-owner from transferring his share in the family dwelling house in favour of a stranger the order granting mandatory injunction against the buyer for vacating family dwelling house was passed, the same cannot be challenged on ground that he having been in possession of suit house prior to the suit, the said situation cannot be interfered with Section 53-A operates only against the transferor but not against a co-sharer who was not a party to the transfer nor does it have any effect of superseding S 44 The possession even if given pursuant to an agreement, does not confer any absolute right to frustrate S 44 of the Act **(31)**

Plaintiff alleged that he had an agreement of sale in his favour from one of the co-sharers and that in pursuance thereof he was placed in possession of a particular piece of land He filed a suit for permanent injunction stating that he has fulfilled/was willing to perform his part of the agreement Other co-sharers were not parties to the contract Held, that the plaintiff was not entitled to injunction.**(32)**

If there are two agreements of sale of the same property - One in favour of T which was earlier and another in favour of P which was later but P was put in possession, P is not prevented from suing T for permanent injunction **(33)** The agreement of sale cannot be used by the agreement holder against a subsequent purchaser, when the time to enforce the agreement of sale had lapsed and the agreement holder had not filed a suit for specific performance within limitation His right to enforce the agreement stands extinguished.**(34)**

It is submitted with respect that a transferee cannot rely on this section in order to vindicate his right to possession *whenever* such right is invaded or threatened to be invaded by the transferor The transferee's right under the section arises only on the transferor or his representative seeking to 'enforce any right in respect of the property Where the transferor does not seek to 'enforce any right in respect of the property, the transferee has no right under the section to go to Court on his own initiative It is conceived that the 'enforcement contemplated by the section is enforcement by process of law The object of the section is to provide that when the transferor seeks the assistance of the legal establishments of the Government to enforce his right to the property taking advantage of the incompleteness of the transfer under which the transferee claims possession, the latter must be in a position to defeat his attempt by invoking the special provisions of this section In other words the section seems to contemplate that in the procedings started by the transferor the provisions of this section would be an effective defence This means, *firstly*, that the proceedings are legal proceedings and *secondly* that the defence is to be raised in the very proceedings in which the transferee's rights are sought to be interfered with and not by proceedings *aliunde* If the transferor takes the law into his own hands and tries to oust the transferee from possession by force, the transferee will not be entitled under this section to file a suit for injunction restraining the transferor from interfering with his possession In this view, the decision of the Allahabad High Court above referred to, must be regarded as not correct But in cases under the Civil Procedure Code, O 21, R 63

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29. 1999 AIHC 112 (116) : 1998 (3) Mad LJ 398

30. AIR 1976 Andh Pra 395. (AIR 1975 Andh Pra 250, **Reversed.**)

31. 1996 All LJ 1300 (1304).

32. 1985 Mah LJ 84 (94).

33. AIR 1979 Mad 47 (1978) 2 Mad LJ 533 ** AIR 1968 Mys 32 (1967) 2 Mys LJ 77

34. 1998 (4) Rec Civ R 659 (660) (Punj & Har).

or R 103, the suits would, in reality be part of the same proceedings as those in which the transferee's rights are attacked and so may be held to be maintainable under this section

The words "other than a right expressly provided by the terms of the contract" show that the transferor is not debarred from enforcing rights expressly provided by the terms of the contract **(35)** Thus, he can, where the transfer is by way of a lease, sue for damages for breach of an agreement as provided by the terms of the lease,**(36)** or sue for the rent due,**(37)** or enforce the terms of the lease entitling him to re-enter if there is default in payment of rent **(38)** A contrary view has been held in the undermentioned cases,**(39)** where the transferor was held debarred from suing to enforce merely rights given by the contract of transfer The expression "other than a right expressly provided by the terms of the contract" has not been adverted to in the said decisions It is submitted that the said view is not correct.

The section has no operation against *third* persons In *S N Banerji v Kachwar Lime and Stone Co Ltd* **(40)** *A* leased property to *B* with the condition that if *B* transferred his interest the lease would be forfeited *B* transferred his interest to *C* but without a registered instrument and gave him possession of the properties Thereupon *A* purported to forfeit the lease to *B* and granted a fresh lease to D who sued *C* for ejectment It was held that the transfer by *B* to *C* was invalid for want of registered instrument, that the lease to *B* therefore subsisted, that *D* could not invoke the aid of S 53A and claim that by reason of that section *B*'s transfer to *C* was valid and that he was entitled to claim possession from *C* Their Lordships observe as follows

> "The section does not operate to create a form of transfer of property which is exempt from registration It creates no real right It merely creates rights of estoppel between the proposed transferee and transferor which have no operation against third persons and claiming under those persons

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35. AIR 1970 Mys 203 (204) (1970) 1 Mys LJ 34 ** AIR 1962 Cal 502 503 (Patta provided that transferee should not be disturbed until expiry of patta — Suit for eviction before **expiry of patta — Transferee can avail of S 53A — But after expiry of patta, transferor can** enforce his right) ** AIR 1953 Cal 349 352 ** AIR 1941 Bom 346 349 ILR 1941 **Bom 529 (DB) (A suit for damages cannot be founded on S 53A Transfer of Property Act** for breach of contract Note This view of Broomfield J was dissented from by P N Mitra J **in AIR 1950 Cal 23 (28) (DB).)**

36. **AIR 1950 Cal 23 (28) ILR (1950) 2 Cal 443 (DB) (Suit for damages simpliciter for breach of contract need not be rested on S 53A T P Act at all AIR 1941 Bom 346 Dissented from.) ** AIR 1933 Bom 381 (384)**

37. **AIR 1942 Oudh 231 (236) (DB) (AIR 1933 Bom 381, Followed.)**

38. **AIR 1953 Cal 349 (352)**

39. AIR 1954 Mad 702 (704) (The unregistered instrument will not be admissible in evidence in a case where the transferor sues to recover from the transferee arrears of rent at the enhanced rate reserved under such instrument especially when the transferee's possession is referable to an earlier Kychit) ** AIR 1945 Nag 69 (71) ILR (1944) Nag 704 (FB) (Neither under S 53-A T P Act nor under S 49 (amended) Registration Act can a landlord recover rent from a person in possession under an unregistered lease Part performance must be the act of the person seeking to avail himself of the equity and acts of the person sought to be charged are of no avail) ** AIR 1940 Bom 281 (282) ILR (1940) Bom 480 (Suit for rent on unregistered lease partly performed **held** not to lie) ** AIR 1940 All 340 (341) (Transfer by way of unregistered lease — Transferor cannot sue for rent) ** AIR 1939 Rang 188 (189) (Transferee under unregistered usufructuary mortgage put in possession — Transferor sued for redemption — **Held** that he could not sue) ** AIR 1936 Nag 174 (175) (Unregistered lease partly performed — Lessor suing for possession on expiry of lease **Held,** he cannot sue) ** AIR 1936 Cal 628 (629) 62 Cal 294 (Lessor cannot **claim rent from the lessee under S 53-A if the lease deed is unregistered**)

[**See also** AIR 1955 Nag 306 (310) ILR (1956) Nag 30 (DB) (The protection given by this section to the defendant in possession cannot by analogy be extended to the transferor

40. **AIR 1941 PC 128 (130) : 21 Pat 243.**

The agreement holder was in possession of the property in pursuant to the agreement for sale in his favour. The vendor sold the said property to third party by a registered sale deed. The applicant agreement holder filed a suit for permanent injunction restraining any person from disturbing his possession. Held that it was obligatory on him to get the sale deed set aside before he could claim permanent injunction.**(41)**

Even if a tenure holder entered into agreement to sell certain land before the appointed day under the U. P. Imposition of Ceiling on Holdings Act (1 of 1961) and handed over possession to the proposed transferee, the tenure holder continues to be the owner of the land and it is includible in his holding for the purpose of computing ceiling area. The right under S. 53-A to protect possession against proposed vendor cannot be pressed in service against a third party like the State when it seeks to enforce the provisions of the U. P. Act against the tenure holder **(42)**

See also the undermentioned cases to the same effect.**(43)**

Where a guardian contracts to transfer immovable property belonging to the minor and the transfer if completed would be binding on the minor this section will preclude the minor from enforcing his rights in respect of the property as he would be 'a transferor' within the meaning of this section.**(44)**

In the case of a benami transfer the real transferee can claim the benefit of the section **(45)**

14. "Any person claiming under him."

A person claims under another person when he is either an assignee from that person or his

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41. 1997 (2) Jab LJ 138 (140) (Madh Pra).

42. AIR 1997 SC 53 (56, 57) : 1996 AIR SCW 4205 : 1996 All LJ 1904.

43. (1978) 80 Bom LR 315 (317) (The section nowhere speaks about the right of a transferee in possession as against the persons who are entirely unconnected with the transferors or persons claiming through him.) ** AIR 1959 Andh Pra 534 (536) : ILR (1959) Andh Pra 547 (DB) (Section is based on the rule of estoppel and hence the disability attaches to a contracting party and not to any other person.) ** AIR 1955 Hyd 101 (102) : ILR (1954) Hyd 822 (The advantage of S. 53-A could be availed of only by the transferee or a person claiming under him.) ** AIR 1954 Pepsu 133 (135) : ILR (1953) Patiala 508 (DB) (Transferee from a Hindu widow cannot avail of the doctrine against her reversioners since they are not successors-in-interest of the transferor.) ** AIR 1952 Orissa 143 (149) : ILR (1949) 1 Cut 705 (DB) (Transferee cannot invoke S. 53-A as against an attaching creditor of the transferor in a case where the creditor cannot be said to derive any right from the judgment-debtor (transferee).) ** 1950 All WR 447 (449) (Dispute about lease between lessee and third person — Section 53-A does not apply.) ** AIR 1940 Oudh 409 (410) : 16 Luck 191 (DB) (Section 53-A is not available in litigation between transferee and third persons.) ** 1938 Nag LJ 123 (124) ** AIR 1936 All 621 (623) (Family litigation compromised — Maintenance made charge on property — Compromise embodied in decree — Charge not registered — Person not party to compromise cannot enforce charge — Doctrine of part performance as embodied in S. 53-A does not apply to such a case.) ** AIR 1927 Oudh 482 (483) : 3 Luck 107 (DB) (The doctrine of part performance is one of equitable estoppel and a third party not being privy to the transaction on which the estoppel rests can take no advantage of it. The sale, even in the absence of registered deed to evidence it may be an effective sale by reason of the estoppel as a transaction between the vendor and the vendee but there the estoppel ends.)

44. **AIR 1948 PC 95 (97) : 75 Ind App 115.** (Contract for sale by mother guardian on behalf of minor son — Contract within competence of guardian and for benefit of minor — Minor is 'transferor' within meaning of section — He cannot get back possession of property from transferee who is let into it in pursuance of contract and who has performed his part of contract. AIR 1944 Mad 337, **Reversed.**) ** AIR 1951 Nag 403 (405) : ILR (1950) Nag 25 ** AIR 1950 Orissa 217 (218) : ILR (1950) Cal 107 (DB)

45. AIR 1955 Hyd 101 (102) : ILR (1954) Hyd 822.

legal representative **(1)** This is the ordinary meaning of the expression "person claiming under" A person claiming under the transferor is obviously a person who claims under a title derived subsequently to the date of the transfer and not anterior to that date **(2)** A reversioner of a Hindu widow is not a person claiming under the widow for the purpose of this section He is therefore not debarred from enforcing his rights against the transferee from the Hindu widow by virtue of the provisions of this section **(3)** In the undermentioned cases,**(4)** however it was held that a reversioner would be a person "claiming under the widow" where the alienation is for purposes binding on the estate A son is a person claiming under the father where the sale of the Hindu joint family property by the father is for the benefit of the family **(5)** It has been held in the undermentioned Madras case**(6)** that a judgment-creditor, who has attached the property of his judgment-debtor in execution of his decree is a person claiming under the judgment debtor within the meaning of this section The High Court of Madhya Bharat has also taken a similar view **(7)** But a contrary view has been taken by the High Court of Orissa **(8)** Following the Orissa view the Bombay High Court has held that an auction purchaser is not a person claiming under the judgment-debtor **(9)** The successor-in-interest of the lessor can never be a person claiming under the lessee **(10)** A person in possession under an agreement of sale entered into long before the property is attached in execution of a money decree against the vendor is entitled to object to the attachment to defend his possession **(11)** In pursuance of an agrement of sell possession of a piece of land was given to a society

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Section 53-A — Note 14

1. (1980) 1 Rent LR 352 (354) Pun) ** (196) (1 WN 65 (68) ** AIR (1966 Madh Pr 307(310) (DB) ** AIR 1956 Pat 308 (311) (DB) (Where the [illegible] has not acquired any interest in the land from or through the transferor but rather in spite [illegible] land they remained in possession without title adversely to the lessor until the [illegible] became perfect they cannot be said to be persons claiming under the lessor) ** AIR 1943 Cal 344 (345) ILR (1943) 1 Cal 56 (DB) (**Overruled** on another point in AIR 1973 Cal 1 (FB) ** AIR 1922 Bom 9(2) (10) : 24 Bom LR 242 (DB)
2. **AIR 1953 SC 503 (505)** ** 1985 Raj LR 67 (685) Delh
3. (1975) 79 Cal WN 387 (DB) ** AIR 1954 Pepsu 33 (35) ILR (1953) Patna 508 (DB) (The collaterals of a deceased Hindu who desire to set aside a sale by the widow on her death as not binding on them cannot be regarded as her representatives in interest ** AIR 1943 Cal 344 (345) ILR (1943) 1 Cal 56 (DB) (Affirming in Letters Patent Appeal AIR 1941 Cal 287) ** AIR 1939 Lah 57 (57)
4. **AIR 1973 Cal 1 (6) , 76 Cal WN 1048 (FB)** ** AIR 1960 Orissa 170 (17) ILR (1959) Cut 453 (The reversioners though they do not claim through the widow are her successors in title of the estate after the widow's death under the Hindu law in the sense that the extent of the estate which would devolve on them would always depend on the exercise by her of her undoubted right of disposal of the estate for a legal necessity) ** AIR 1959 Andh Pra 568 (570) (DB) ** AIR 1954 Bom 153 (153) ILR (1954) Bom 194 (DB) (AIR 1940 Nag 396, **Relied on** (AIR 1943 Cal 344 **Dissented from**) ** AIR 1940 Nag 396 (397)
5. **AIR 1967 Andh Pra 237 (243) : (1967) 1 Andh WR 333 (FB)**

   [But see AIR 1946 Mad 310 (311).]
6. AIR 1943 Mad 706 (707) (It is only because of his connection with the judgment debtor that he is able to take attachment proceedings at all When the whole basis of the claim of the creditor is the fact that the judgment-debtor owed him money and has not been able to pay it and is now bound by a decree, he is claiming under the judgment debtor)
7. **1954 Mad BLJ (HCR) 803 (806).**
8. AIR 1952 Orissa 143 (149) ILR (1949) 1 Cut 705 (DB) (AIR 1943 Mad 706 **Diss from.**)
9. AIR 1967 Bom 34 (38, 39) ILR (1966) Bom 201 (AIR 1943 Mad 706 **Diss. from.**)
10. **AIR 1980 SC 575 : 1980 All LJ 242 : 1980 UJ (SC) 361.**
11. **AIR 1981 Sikkim 1 (DB)**

by the vendor Time was of the essence of the contract The society allotted plots in the land to its members However, the society failed in getting the sale deed executed after complying with the terms of the agreement In a suit for recovery of possession, filed by vendor, the members could not claim protection under S 53-A They could not assert to be "persons claiming under the transferee" Since the society was not in possession of the land it could not also claim protection under S. 53-A **(12)** See also the undermentiond cases **(13)** See also Note 9A

14A. "Any right in respect of the property."

The transferor or a person claiming under him will be debarred from enforcing not only a right to recover 'possession' from the transferee, but 'any' right Thus a person claiming as an heir under the transferor cannot even obtain a declaration that the transfer is not binding on him **(1)**

15. Proviso to the section.

The proviso saves the rights of transferees without notice of the contract or of the part performance thereof **(1)** But it does not enlarge the content of the defence of equity in favour of the prior transferee If title had passed to the subsequent transferee despite his knowledge of the earlier contract, the prior transferee cannot non-suit the subsequent transferee merely on the ground of the latter's knowledge of the earlier contract The prior transferee can non-suit the subsequent trans-

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12. 2002 (2) Cur CC 330 (340) (Mad)

13. AIR 1967 All 405 (411) (DB) (R granting permanent lease of plot to company and subsequently selling this right to X, who in turn selling it to P — Company going in liquidation and liquidator transferring leasehold rights to a creditor-bank by document which proved invalid — Creditor-bank also going in liquidation and Official Liquidator transferring lease hold rights to defendant — Plaintiff as pre-emptor filing suit for possession of plot on ground that lease hold rights in favour of company had come to an end on its dissolution and lease hold rights reverted to lessor **Held** suit was not barred by S 53 A as plaintiff was not the successor in-interest of the lessor who was ousted by exercising his right of pre emption or of the lessee company so as to be bound by the act of the liquidator **Reversed** on another point in AIR 1980 SC 575) ** AIR 1947 Pat 424 (427) 25 Pat 764 (DB) (Sale of occupancy holding by some members of joint Hindu family Sale deed not registered — Suit by other members of family against vendors and vendees for possession on ground that sale was void — Section 53-A is a bar to their suit and they cannot be granted even declaratory relief as they claim under the tenant as his heirs Case governed by S 11 of the C P Tenancy Act, 1920) ** AIR 1921 Bom 409 (410) (DB) (Where a person entered into a contract to sell immovable property and died before completing the sale but his minor widow delivered possession and received the purchase money and subsequently adopted the plaintiff, the suit filed by the plaintiff to recover possession held was not maintainable.)

Section 53-A — Note 14-A

1. (1967) 71 Cal WN 681 (DB) ** AIR 1947 Pat 424 (427) . 25 Pat 764 (DB).

Section 53-A — Note 15

1. **AIR 1953 SC 503 (505)** (Defendant held, was not a transferee for value who had paid money in good faith) ** 1974 All LJ 955 ** AIR 1957 Andh Pra 58 (59) ** AIR 1952 Nag 244 (245) · ILR (1949) Nag 959 ** AIR 1938 Nag 377 (383) ILR (1939) Nag 432 (DB) ** AIR 1937 Pesh 58 (60) (DB).

[**See** AIR 1954 Trav-Co 10 (17) (DB) (Property in possession of lessee in furtherance of the terms of an unregistered lease — Lessee performing his part under the contract and such performance acquiesced in by the transferor Fact that lessee was in possession on strength of lease deed known to subsequent purchaser even before he entered into agreement for sale — **Held,** the lessee and his assignee were entitled to resist attempt to recover possession by a person having a subsequent contract for sale in his favour by the transferor)]

[**See also** AIR 1974 Raj 188 1973 WLN 890 (Agreement to sell by mortgagor with usufructuary mortgagee — Part performance by mortgagee — Subsequent transferee would

feree only if the former has complied with the conditions laid down under the section (2) When actually the subsequent transferee has notice of the earlier contract the informality of the manner in which he acquired that notice is not material So long as it is credible information, which a person of ordinary prudence will take notice of, he will be bound by it (3) Explanation II to S 3 provides that possession of a person is notice of the *title* of the person in possession

In a sale transaction, possession plays an important role and it is normally expected of a purchaser to enquire about the possession of the property and to find out whether he would get vacant possession or constructive possession from the tenant. The plaintiff in the instant case was a tenant The owner had executed agreement for sale in his favour and had received earnest money The owner thereafter sold the property to a third party The subsequent purchaser/third party did not make any enquiry with the tenant prior to purchasing the property about his possession and was a silent spectator to the repairs and improvements made by the tenant/agreement holder after the sale Thus it could not be said that the subsequent purchaser was a bona fide purchaser without notice (4) Where a transferee does not make proper enquiry as contemplated under S 3 of the T P Act he will not get protection under the proviso to S 53-A (5) In instant case the defendant was in possession of the land since many years The plaintiff did not make any inquiry as required by law before purchasing the land Thus he was not protected under S 53-A and he could not be said to be bona fide purchaser without notice (6) Where the subsequent purchaser had not paid any consideration for the alleged sale deed, he had notice of earlier agreement of sale in favour of plaintiff and thus the subsequent purchaser was not a purchaser for value in good faith without notice it was not open for him to resist the plaintiff's suit for specific performance (7) Where the proposed transferee had paid most of the consideration and was put in possession of the property but the vendor sold the property in a clandestine manner to third party who also had knowledge of the agreement of sale and played fraud on the transferee by evicting her tenants behind her back, held that part performance of the agreement and constructive possession was proved She was therefore entitled to a decree for specific performance The third party/subsequent purchaser was a purchaser for value but with notice of the earlier agreement (8) Where the transferee was well aware that the specific property purchased by him was hypothecated to a Bank by the transferor he had required knowledge not only of the debt but also pendency of proceedings before the Court for recovery of debt from the transferor and purchased such property with eyes wide open it could not be said that he acquired property in goodfaith and for consideration Thus his claim under O 21, Rr 58 59 was

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be deemed to have implied notice of agreement as also part performance ; ** AIR 1964 Cal 235 (238) (DB) (The proviso to the section means that the right of the transferee to hold the transferor to the terms of the transfer is a personal and equitable right and is available against the transferor and all those who claim under him except a transferee for consideration without notice ; **Reversed** on another point in AIR 1960 SC 226 ; ** AIR 1951 Pat 613 (617) (DB) (Subsequent transferee having notice of earlier contract — **Held prior transferee can interpose the shield of S. 53-A .)]**

2. AIR 1960 Cal 541 (542) ; ILR (1961) 1 Cal 30 (DB) ** AIR 1957 Andh Pra 58 (59, 60)

   [See also AIR 1965 Madh Pra 275 (286) (DB) (Unregistered sale deed by mortgagor in favour of possessory mortgagee — Subsequent sale by mortgagor in favour of another who had notice of prior sale — Suit for redemption — Mortgagees can rely on part performance as against mortgagor and his transferee.)]

3. AIR 1953 Mad 923 (926).
4. 1998 (1) Kant LJ 107 (111, 116).
5. 1999 (2) Gauhati LR 391 (403)
6. 1999 (2) Gauhati LR 391 (403).
7. 1996 AIHC 3625 (3627) ; 1996 (27) All LR 673
8. 1999 AIHC 4654 (4673) (Mad).

liable to be rejected.(9)

Where suit property is purchased during pendency of suit by a third person, he cannot claim to be a bona fide purchaser for valuable consideration without notice of pendency of suit. Provisions of Ss. 41 and 53-A would not apply to such a case.(10)

The *onus* is on the person claiming part performance to show that the transferee had notice of the contract or of the part performance thereof (11) The Court would expect that those who allege that the subsequent transferee had notice of the prior contract or of possession thereunder, would make it out not by evidence of any casual conversation but by proof that the mind of the subsequent transferee had in some way been brought to an intelligent apprehension of the nature of the transaction in respect of the property so that a reasonable man or an ordinary man of business would act upon the information and would regulate his conduct by it (12) Explanation II to S 3 provides that possession of a person is notice of the *title* of the person in possession The High Court of Patna has held that although S 53-A does not confer full title to the property, it is nevertheless an interest sufficient to attract the provisions of Explanation II to S 3 The subsequent transferee will therefore be deemed to have notice of the title of the prior transferee and consequently it will be the duty of the subsequent transferee to make diligent enquiries regarding the nature of the equitable interest of the prior transferee in possession (13) It is somewhat difficult to see what cases are contemplated by the Proviso For the applicability of the proviso it must be assumed that the *title* referred to in the said Explanation does not include the right of the transferee under a contract which has been partly performed.

16. Contract to transfer — Proof.

The doctrine of part performance as provided in S 53-A forms part of the substantive law As to how far the writing referred to therein is to be proved is a question to be decided by procedural law.(1)

An agreement in writing of a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent must, under S 17 of the Registration Act be registered But a contract for sale of immovable property is not compulsorily registrable for a valid sale of immovable property of the value of one hundred rupees and upwards there must under S 54 of this Act, be a registered sale deed.

Section 49 of the Registration Act now provides(2) that no document required by S 17 of the Registration Act or by any provision of the Transfer of Property Act, 1882 to be registered shall be received as evidence of any transaction affecting, such property unless it has been registered

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9. 1997 (2) CTC 83 (84) (Mad)

10. 1991 Pun LJ 242 (243).

11. AIR 1982 Mad 281 (286, 287) (1981) 2 Mad LJ 455 (Father transferring his interest in coparcenery property by registered deed to his minor son, only other coparcener — Surrender being out of love and affection, it is relinquishment and would tenant continuing in possession — Character of possession changing from that of a tenant to that of a vendee Mere continuance of possession is not sufficient to change the subsequent transferee with knowledge of prior transfer) ** AIR 1955 Madh Bha 93 (95) ** AIR 1954 Mad Bha 128 (129) ** AIR 1952 Orissa 163 (164) (Mere continuance in possession by the defendant is not enough to charge the plaintiff (subsequent transferee) with notice) ** AIR 1935 Rang 12 (13). (Under S. 27, Specific Relief Act, it is equally so.)

[But see AIR 1965 Pat 467 (469) ILR 44 Pat 596 (DB) (AIR 1935 Rang 12, Diss. from.)

12. (1959) I Orissa JD 362 (365, 367) (DB)

13. AIR 1965 Pat 467 (469) : ILR 44 Pat 596 (DB)

Section 53-A — Note 16

1. AIR 1958 Pat 133 (138) (DB)

2. The section is not retrospective, see AIR 1932 Mad 734 (736) 56 Mad 169 (DB)

provided that an unregistered document affecting immovable property and required either by the Registration Act or by the Transfer of Property Act to be registered may be received as evidence of a *contract*—

(a) in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3) or

(b) as evidence of part performance of a contract for the purposes of S. 53-A of the Transfer of Property Act.(4) or

(c) as evidence of any collateral transaction not required to be effected by registered instrument.(5)

It follows that the contract to transfer may be proved for the purpose of S. 53-A by the production of the written contract itself where there is one, whether such written contract is required to be registered or not. Where there is no separate contract for transfer, the *unregistered instrument of transfer* is itself admissible in evidence in proof of such contract and part performance (6). The principle underlying this, and recognised in numerous cases, is that every transfer is preceded by

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3. 1887 All WN 15 (13) (DB) (Case before the amendment of S. 49 Registration Act.) ** 1885 All WN 329 (330) (DB) (Do.)

4. ILR (1965) Guj 490 (494) ** AIR 1965 Madh Pra 275 (280) (DB) ** AIR 1964 Cal 235 (237) (Agreement to lease for more than 5 years. **Reversed** on another point in AIR 1980 SC 226.) ** 1963 All WR (HC) 734 (739) (AIR 1958 SC 199 **Disting.** AIR 1961 Pat 9 **Dissented from.**) ** AIR 1963 Him Pra 49 (51) ** AIR 1960 Cal 609 (618) (DB) (Unregistered and unilateral lease for ten years.) ** AIR 1955 Madh Bha 49 (51) ** AIR 1954 Madh Bha 237 (DB) ** AIR 1953 Cal 349 (351) (Unregistered lease for ten years.) ** AIR 1953 Hyd 97 (97) ILR (1954) Hyd 110 ** AIR 1951 Pat 277 (283) (29 Pat 628 (DB)) ** AIR 1951 Nag 286 (287) ILR (1950) Nag 799 (DB) ** AIR 1950 Cal 23 (28) ILR (1950) 2 Cal 443 (DB) (Agreement to lease for five years.) ** AIR 1938 Lah 722 (723) (DB) ** (1933) 17 RD 201 (202)

[**See also** AIR 1961 Pat 79 (89) (Compromise — Registration — Compromise itself creating title requires registration — Defect of non-registration cannot be cured by rule of equitable estoppel or part performance.) ** (1955) 8 Saur LR 375 (385)]

5. AIR 1963 Him Pra 49 (51) ** (1957) 1 Andh WR 366 (368) ** AIR 1936 Lah 366 (366) (Where a document purporting to be a sale deed of a house should have been registered but is not registered such document if the person is put in possession of the property can be admitted into evidence for a collateral purpose.)

6. **AIR 1950 SC 1(5)** (An agreement of lease creating a present demise.) ** AIR 1962 Cal 502 (503) (Patta for 25 years executed by A in favour of B on monthly rental. — Patta not signed by B. — B going into possession and effecting improvement in terms of patta. — Patta can be received in evidence as proof of the contract.) ** ILR (1960) 10 Raj 948 (950) (DB) ** AIR 1957 Bom 238 (240) ILR (1958) Bom 556 (DB) (AIR 1943 Bom 431 **Overruled.**) ** AIR 1956 Cal 350 (352) (DB) ** 1954 Madh BLJ (HCR) 803 (805) ** AIR 1952 Orissa 143 (148) ILR (1949) 1 Cut 705 (DB) ** AIR 1952 Assam 28 (30) (DB) (Usufructuary mortgage. — Unregistered endorsement on mortgage by mortgagor relinquishing his interest in mortgaged land in favour of mortgagee for a sum below Rs. 100. — Registration. — Mortgagee continuing in possession in part performance of contract can claim benefit of S. 53-A to resist suit for redemption.) ** AIR 1942 Oudh 231 (236) (DB) (A lease deed which does not comply with the provisions of S. 107 is admissible as evidence of the agreement contained therein and for determining the rights and liabilities of the parties.) ** AIR 1933 Bom 38 (385) (Unregistered lease is admissible also to prove that plaintiff can enforce his right to claim damages for breach of agreement under one of its terms.)

[**See also** AIR 1955 Vind Pra 15 (16) (Under the existing law governing procedure in the State of Vindhya Pradesh there is no provision which makes the unregistered document inadmissible in evidence of purpose of proving part performance.)]

and implies a contract to transfer and that a party to a transfer which cannot take effect as a transfer for want of registration can fall upon the contract for sale implied in the instrument of transfer. Where the original document though in possession of the transferor is not produced by him in spite of a notice to produce it, secondary evidence of the same can be adduced by the transferee in support of his defence of part performance **(7)** See Note 23 on S. 54

It has been held that a document which must be regarded as unregistered on account of fraud on registration committed by the parties cannot be looked at for purposes of giving effect to a plea under S. 53-A **(8)**

Section 53-A is not applicable in J and K Registration of agreement for sale is compulsory Non-State subjects cannot purchase immovable property in J. and K in view of S 138 of the J and K Transfer of Property Act Section 138 is mandatory and thus in the absence of a registered instrument of sale mere possessing right of defendant-vendee will not mature into ownership right **(9)**

Even in a case where the Court comes to the conclusion that there has been part performance of a contract of sale, it cannot use that finding as a proof of the factum of sale in favour of the transferee in possession.**(10)**

16-A. Fraud on registration — Effect.

See Note 16.

17. This section and section 27A of the Specific Relief Act (1877), compared.

Section 27-A of the Specific Relief Act, 1877, ran as follows

"Subject to the provisions of this Chapter, where a contract to lease immovable property is made in writing signed by the parties thereto or on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract if,

(a) where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract, and

(b) where specific performance is claimed by the lessee, he has in part performance of the contract, taken possession of the property or, being already in possession, continues in possession, in part performance of the contract, and has done some act in furtherance of the contract .

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof

The section applies to contracts to lease executed after the first day of April, 1930"

The above section applied only to *contracts to lease immovable property* enable *either party* to the contract to *sue for specific performance* of the contract if it had been partly performed **(1)** Section 27-A of the Specific Relief Act, 1877 in fact created a *ground of claim*, whereas S 53-A of this Act creates merely a right of *defence* **(2)** But S 27-A of the Specific Relief Act did not prevent a lessee from claiming the benefit of S 53-A if the case fell within that section Thus the defence

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7. AIR 1950 SC 1 (4, 5) ** AIR 1956 Mad 693 (694).

8. AIR 1945 Oudh 120 (121) (DB).

9. AIR 1994 J & K 33 (37)

10. AIR 1954 Pepsu 133 (135) · ILR (1953) Patiala 508 (DB).

Section 53-A — Note 17

1. AIR 1952 Orissa 143 (148) ILR (1949) 1 Cut 705 (DB) ** AIR 1937 Nag 74 (76) ILR (1936) Nag 115 (DB) (Lessor and the lessee may enforce specifically a contract to grant a lease by compelling registration, where there is part performance)

2. AIR 1950 SC 1 (4) ** AIR 1960 Andh Pra 83 (89) : ILR (1959) Andh Pra 1107 (FB) ** AIR 1952 Orissa 116 (117) (DB) ** AIR 1952 Nag 115 (117) · ILR (1952) Nag 604 (DB) ** AIR 1937 Nag 74 (77) ILR (1936) Nag 115 (DB)

under S. 53-A is available to a person who has an agreement of lease in his favour, though no formal lease has been executed and registered.(3)

Section 27-A of the Specific Relief Act of 1877 has now been omitted in the Specific Relief Act of 1963 on the recommendations of the Law Commission. The Law Commission in their Report on the Specific Relief Act (9th Report) observe as follows: — "In our report on the Registration Act, we have recommended the exclusion of *agreement to lease* from the definition of lease in Section 2 and the omission of clause (c) from Section 49. The result of those changes will be that an agreement to lease, even if in writing, will not require registration — and, even an unregistered deed of lease will be admissible in evidence to prove an agreement to lease.

In the result, a person will be entitled to enforce specific performance of an agreement to lease even if it has to be gathered from an unregistered lease deed. Hence, Section 27-A of the Specific Relief Act will be unnecessary, whether it is interpreted to be applicable to an unregistered agreement for lease or unregistered deed of lease.

We therefore recommend that Section 27-A be omitted."

18. Law in States to which this Act does not apply.

The principles of this section which is based on equity, are applicable even in the States to which this Act does not apply (1). Even before this section was introduced into this Act, the English doctrine of part performance had been applied in those States as being in conformity with justice, equity and good conscience (2). It was, however, observed by Beckett J., of the Lahore High Court in the undermentioned Full Bench case(3) that unless the section can be taken as embodying some general rule of equity which would prevail in India, apart from the provisions of the Act, it can have no force in the erstwhile State of Punjab and that in any case stress cannot be laid upon the wording of the section but that the rule will have to be applied on general grounds. In a later case(4), it has been held by the same High Court that the section cannot be taken as embodying any general rule of equity pervailing throughout India and hence the principle underlying this section does not apply.

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3. **AIR 1950 SC 1 (4) ** 1983 Pak LD 344 (356) (SC) ** AIR 1953 Hyd 97 (97) — ILR 1953 Hyd 110. (AIR 1950 SC 1, Foll.)**

Section 53-A — Note 18

1. AIR 1957 Manipur 32 (33) (Though provisions of T.P. Act have not been extended to Manipur State, the principles of that Act including those of part performance were followed and given effect to in that State ever since 1947.) ** AIR 1955 Vind Pra 15 (16) (The defence of part performance was open to State of Vindhya Pradesh even before the application of Transfer of Property Act, exactly in the same manner as it is open now.) ** (1955) 8 Sau LR 1(2) ** AIR 1954 Madh Bha 128 (129) ** AIR 1939 Lah 57 (57, 58) ** AIR 1937 Pesh 58 (60) (DB) ** AIR 1936 Lah 5 (5) ** AIR 1935 Lah 955 (955) (DB).

2. AIR 1936 Lah 366 (366) (AIR 1934 Lah 751 Followed.) ** AIR 1934 Lah 75[illegible] (752) ** AIR 1929 Lah 721 (728, 729) (DB) ** (1928) 10 Ind Cas 193 (194) (Lah) ** (1921) 63 Ind Cas 22 (23) (DB) (Lah).

   [**See also** AIR 1934 Pesh 17 (18) (Doctrine of part performance applies to N.W.F. Province but not as to override statutory provision of S. 49 of the Indian Registration Act.) ** AIR 1927 Lah 90 (91) (An unregistered deed of exchange affecting immovable property of more than Rs. 100 cannot be referred to for purposes of title by the application of the equitable doctrine of part performance where the circumstances of the parties have not altered and there is not a series of acts on the part of the parties extending over a considerable time such as would justify the Courts in basing their decree not upon the contract but upon those acts. — The law of registration can be ignored only when the equities on the other side are very clear.)]

3. **AIR 1941 Lah 407 (410) : ILR (1942) Lah 79 (FB).**

4. AIR 1944 Lah 179 (180) (DB).

in the Punjab In a Full Bench decision(5) of five Judges of the same High Court it has been held, overruling the above mentioned two decisions, that this section being based on the equitable principles which were previously applicable in the whole of India including the Punjab, the principles embodied therein are applicable to the Punjab even after the enactment of that section and that therefore the position in the Punjab in respect of defence of part performance is exactly the same as in the States where the Transfer of Property Act is in force.

The Judicial Commissioner's Court at Kutch has held that principles of S 53-A would not apply in the erstwhile State of Kutch since the Kutch law prohibited the use of an unregistered document by the defendant to defend his possession against the vendor and had expressly rendered such document inoperative in a Court in Kutch(6). So also in the erstwhile State of Patiala where the Transfer of Property (Amendment) Supplementary Act, 1929, did not apply, the principle of part performance embodied in S 53-A of the Transfer of Property Act had not been applied(7)

The doctrine of part performance is not applicable to the State of Jammu and Kashmir(8)

Similarly, the section is not applicable to Sikkim nor its principle is applicable on the ground of equity, justice and good conscience. (obiter)(9).

19. Limitation.

Under the well-known principle that the law of limitation does not apply to a defence, a defence raised under this section is not subject to any rule of limitation(1).

Section 53-A does not provide for any limitation on expiry whereof the defence contemplated in the section will be lost or will extinguish Limitation bars the remedy but not the right in possession. Thus law of limitation does not apply to S. 53-A (2)

The right under S 53-A to defend possession is statutory in nature and cannot be whittled down on the equitable concept of laches or implied limitation The failure on the part of the transferee to bring a suit for specific performance of the contract within the period of limitation does not lead to extinction of his statutory right created by the legislature by incorporating S. 53-A in the Act It is well settled that the right and the remedy for enforcement thereof are mutually exclusive jurisprudential concepts Even if a statutory remedy is lost because of limitation or some other procedural bar, the right subsists, notwithstanding the fact that a transferee in possession fails to file

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5. **AIR 1947 Lah 1 (5, 6) : ILR (1947) Lah 449 (FB).** (47 PLR 128, **Reversed.** Per Full Bench, Cornelius, J , contra — AIR 1941 Lah 407 (FB) and AIR 1944 Lah 179. **Overruled.**)

6. AIR 1950 Kutch 64 (65) (AIR 1931 PC 79 and AIR 1934 PC 233 **Rel. on.**)

7. AIR 1950 Pepsu 34 (35, 36) (DB). (AIR 1931 PC 79. **Rel. on.**)

8. **AIR 1978 J & K 88 : 1979 Kash LJ 91 (FB)** ** 1971 J & K LR 268

9. AIR 1980 Sikkim 1 (10) : 1978 Sikkim LJ 23 (DB).

Section 53-A — Note 19

1. (1970) 74 Cal WN 734 ** (1967) 2 Andh WR 2 (5) ** AIR 1967 Bom 34 (35) ILR (1966) Bom 291 ** AIR 1957 Bom 138 (141) ILR (1958) Bom 556 (DB) ** AIR 1955 Hyd 101 (104) ILR (1954) Hyd 822 ** AIR 1951 Nag 403 (405) ILR (1950) Nag 25 ** AIR 1949 Assam 8 (10) ILR (1949) 1 Assam 29 (DB) (Where this section applies, it is immaterial that the defendant could not have sued for specific performance of the contract for sale, on account of the expiry of limitation) ** AIR 1939 Cal 163 (165 166) ILR (1938) 2 Cal 328 (DB) (Bengal Tenancy Act does not exclude a defence provided for under S 53-A of T P Act.)

   [See also AIR 1952 Nag 244 (245) · ILR (1949) Nag 959. (Whether a contract is specifically enforceable or not is not a matter which must be taken into consideration for granting relief under S 53 A)]

2. 1999 (2) WLC 450 (458) (Raj).

a suit for specific performance within limitation, still in law, the contract remains valid and operative, entitling him to exert his right to retain the possession over the property in exercise of his statutory right conferred by S 53-A by way of defence against recovery of possession The law of limitation does not apply to a defence raised under S 53-A, since the section does not provide for any limitation on expiry whereof the defence contemplated in the section will be lost or will extinguish.**(3)**

The right of transferee to defend his possession over immovable property acquired pursuant to contract and sufficient to fulfillment of statutory conditions contained in S 53-A is statutory in nature and cannot be whittled down on the equitable concept of laches and limitation The failure of transferee to bring suit for specific performance within limitation period does not lead to extinction of his statutory right under S. 53-A The law of limitation does not apply to a defence raised under S. 53-A since that section does not provide for any limitation on expiry whereof the defence contemplated under S 53-A will be lost or will extinguish **(4)** Section 53-A does not forbid a defendant-transferee from taking a plea in his defence to protect possession over suit property obtained in part performance of a contract even though the period of limitation for bringing a suit for specific performance has expired Section 53-A also does not expressly provide that he is not entitled to protect his possession, if the period to bring suit for specific performance has expired Limitation Act does not extinguish a defence, but only bars remedy Where the transferee was always and still ready and willing to perform his part of the contract, he is entitled to defence under S 53-A notwithstanding that limitation for filing suit for specific performance has expired **(5)**

In undermentioned case,**(6)** however, it was held that where the remedy of the defendant/vendee to claim specific performance of agreement of sale in his favour is barred by limitation he cannot, in a suit filed by the vendor for recovery of possession claim protection under S 53-A

The doctrine of part performance is a doctrine of equity Delay defeats equity Therefore when the agreement of sale becomes unenforceable by reason of the law of limitation the defence of part performance founded on the agreement cannot be permitted to be enforced as the agreement has lost all its efficacy inasmuch as the right to enforce it is lost by the law of limitation The doctrine of part performance cannot be permitted to be invoked in these circumstances **(7)**

The vendees in the instant case were ready and willing to perform their part of the contract It is not the case of the vendors that either they repudiated the contract with a notice to vendors or called upon vendees to perform the contract and they refused to do so Under these circumstances no limitation began to run for the enforcement of the contract and therefore mere lapse of three years from the date of agreement does not automatically put an end to the contract **(8)**

However in instant case it was held that transferee who is guilty of laches cannot seek relief under S. 53-A **(9)**

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3. **AIR 1998 Kant 389 (396, 399) : 1998 AIHC 4913 : 1998 (3) Kant LJ 73 (FB)** (ILR (1988) Kant 631, ILR (1992) Kant 429, ILR (1994) Kant 1665 **Overruled.**)
4. **AIR 1998 Kant 389 (396, 399) : 1998 AIHC 4913 : (1998) 3 Kant LJ 73 (FB)** (ILR (1988) Kant 631, ILR (1992) Kant 429 ILR (1994) Kant 1665 **Overruled**) ** 1987 (2) Ker LT 762.
5. **AIR 2002 SC 960 ((62) : 2002 AIR SCW 659 : 2002 (1) Supreme 583** (1994 Mah LJ 1145 (FB), **Approved.**)
6. **1988 Mah LJ 414 (418) (Bom)**
7. **ILR (1988) Kant 631 (638).**
8. **AIR 1988 Andh Pra 250 (254) : (1988) 1 Andh LT 18**
9. **1998 (3) Mad LJ 42 (45)**

20. Plea of part performance.

The plea of part performance can be raised only by a person who is in actual possession of the property and not by person who is not in possession **(1)** Defence of part performance is a mixed question of fact and law and must be pleaded in written statement The defence is not available to the party who is guilty of committing breach of contract and is not ready and willing to perform his part of the contract **(2)** Plea of part performance involving questions of fact cannot be raised for the first time in second appeal **(3)** When plea based on S 53-A is not taken in the written statement, it does not merit consideration **(4)** If, however, the defendant has stated in his written statement, all the facts on which he bases his defence under S 53 A without deducing his legal position properly from the facts his plea cannot be rejected merely because he has not properly appreciated the law bearing on such facts.**(5)**

The fact that there is no specific mention of S 53-A in the written statement will not debar the defendant from raising the defence under that Section **(6)**

Pleadings under S 53-A must be in accordance with S 16(c) of the Specific Relief Act When this statutory requirement has not been complied with in pleadings, the concerned party is not entitled to the benefit of S 53-A Mere mention in the written statement that the lessee has exercised the option of renewal is not sufficient for claiming protection under S 53-A The readiness and willingness should be in terms of the agreement already exectued by the party Where the lease was granted for a specific purpose and the lessee wants to renew it with modifications therein and wants to incorporate some new clauses in the lease deed, and is using the premises for some other pur-

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Section 53-A — Note 20

1. 1995 (34) DRJ 228 (232).
2. 2001 (3) All Mah LR 689 (699) · 2001 (4) Bom CR 250
3. **AIR 1966 Ker 96 (97) (FB) ** AIR 1999 SC 3248 (3251) : 1999 AIR SCW 3221 : 1999 All LJ 2088 : 1999 (7) SCC 303.** (Plea under S 53-A raises a mixed question of law and fact.) ** AIR 1981 (NOC) 113 : 1981 Sim LC 239 (Him Pra) ** AIR 1975 Cal 445 (448) (DB) ** AIR 1974 Punj 130 1973 Pun LJ 668 ** AIR 1973 Orissa 21 (22) 38 Cut LT 369 ** AIR 1965 Punj 117 (118) ** AIR 1964 Pat 288 (289) (DB) ** AIR 1964 All 300 (301) ** (1954) 20 Cut LT 532 (535) ** AIR 1951 Pat 502 (503) (DB) ** (1949) 30 PLT 388 (392) (DB) ** (1976) 1 Mad LJ 230 (235).

   [**See also** AIR 1955 Madh Bha 93 (95) (Defence of part performance involving questions of fact — Defendant must raise plea in written statement — Plea not allowed in revision.)
4. AIR 1998 Orissa 19 (22)
5. AIR 1979 Andh Pra 156 (1978) 2 APLJ (HC) 353 ** AIR 1979 (NOC) 86 (1979) 1 Cal LJ 309 (318) ** (1970) 74 Cal WN 734 ** (1967) 2 Andh WR 2 (5) ** AIR 1966 Mys 86 (89) ILR (1963) Mys 1109 (Contract to sell — Payment of earnest money and vendee put in possession — Contract falling through for non-payment of price — Suit for possession by vendor — Concurrent finding that defendant was always willing to perform his part of contract — Finding being one of fact cannot be challenged in second appeal — Absence of specific plea of part performance in written statement — Section 53-A can be availed of in second appeal.) ** AIR 1957 Manipur 32 (33) (Facts constituting the defence of part performance pleaded — Absence of specific plea of the benefit of the doctrine as embodied in S 53-A, T P Act — Plea entertained.) ** AIR 1955 Madh Bha 49 (52) : ILR (1954) Madh Bha 237 (DB).

   [**See also** AIR 1959 Mys 173 (175) ILR (1957) Mys 108 (Plea under S 53-A not raised in pleading — Plea, however entertained by the trial and lower appellate Courts — Plea cannot be denied in second appeal on the technical ground as to absence of such plea in pleadings.)]
6. **AIR 1973 Cal 1(4) : 76 Cal WN 1048 (FB).** (AIR 1941 Cal 33 **Overruled.**)

poses also which are not covered by the lease deed sought to be renewed, it cannot be said that the readiness and willingness of the lessee is the same. In fact what he wanted was not renewal in terms of the contract but with a modification.(7)

A defence under S. 53-A cannot be raised for the first time in second appeal because it raises questions of fact which should have been put in issue at the time of trial (8)

The rights as would be available to transferee under S. 53-A are required to be pleaded. In instant case the transferee was in possession of the property. But there was no plea by him to the effect that either there was an understanding between the parties that the handing over of possession was only in pursuance to the sale agreement executed between the parties or that in the event of default by transferee in paying balance consideration, the vendor would be entitled to claim only the balance of sale consideration. In effect, the legal right as would accrue with the transferee under S. 53-A was not specifically pleaded by him (9)

In the present case, it was asserted in a written statement filed by '*B*' (the defendant) that '*A*' the owner of the disputed property which '*B*' agreed to purchase from him by paying advance did not produce the title deeds, in spite of the notice issued to him by '*B*'. As '*B*' did not have the remaining money, the property was purchased by '*C*' (the plaintiff) at '*B*'s instance. '*C*' executed a reconveyance document in favour of '*B*' and the relationship between him and '*C*' is that of creditor and debtor, he being debtor. '*B*' further asserted that he came into possession of property by virtue of reconveyance document executed by '*C*'. Though the agreement for reconveyance gave option to get the property conveyed within two years, there was no plea in the written statement filed by '*B*' that '*B*' demanded performance of the contract of reconveyance by offering to pay the stipulated price even though about two years thereafter were about to be over.

Held that on reading the written statement of the defendant and his evidence, it is clear that there is no plea of part performance in the written statement of the defendant and the stand taken by him in the written statement is in effect incompatible with a plea of part performance as enunciated in S. 53-A, T. P. Act.(10)

Where the finding is recorded in second appeal after proper appreciation of evidence that the suit was not barred under S. 53-A, the said finding cannot be reconsidered on merits in review application.(11)

Where a transferee already in possession of property has pressed and proved an oral sale, coupled with delivery of property, then the fact that he did not raise the plea of part performance under S. 53-A specifically or that he had also raised the plea of adverse possession, though did not press it, would not debar him from invoking the plea of part performance in appeal (12)

Plea of adverse possession and retaining possession by operation of S. 53-A are inconsistent with each other. Once it is admitted that a party has come into lawful possession and continued so, the plea of adverse possession would not be available to it unless hostile animus is established (13)

Where the plea of the plaintiff purchasers that they were put in possession of the property is not proved either by documentary evidence or parole evidence, the plea of part performance is to be rejected.(14)

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7. 1998 AIHC 1133 (1140) : 1997 (3) Mad LW 520.
8. 1998 (3) Mad LJ 42 (45)
9. 1998 (3) Mad LJ 42 (44).
10. AIR 1984 Kant 50 (53, 54) : (1983) 2 Kant LJ 185.
11. AIR 2001 Gauhati 92 (93) : 2001 (2) Gauhati LR 102
12. AIR 1983 Raj 109 (126, 127)
13. AIR 2000 SC 1485 (1487) : 2000 AIR SCW 1001 : 2000 (3) SCC 708
14. 2000 AIHC 1543 (1562) : 2000 (1) Bom CR 716.

A suit filed by the vendee for specific performance of an agreement to sell was decided in his favour on condition that sale deed will be executed if he deposits balance consideration within certain time but on his failure, the suit shall stand dismissed. He failed to deposit the amount within time and allowed the suit to be dismissed. In a suit filed subsequently by the vendor for recovery of possession, the vendee could not take the plea of part performance under S. 53-A **(15)**

In a suit for recovery of possession on the strength of title, especially when it is on the ground that the defendant, who is in possession on the basis of a contract for sale, committed breach, the claim for fixity of tenure and the claim under S. 53-A, if available, are grounds which might and ought to be taken.**(16)**

In the facts of the case it was held that in a suit for declaration of title and possession, plea in defence that the defendant had performed partly because the defendant was in continued long possession could not be entertained.**(17)**

CHAPTER III

OF SALES OF IMMOVEABLE PROPERTY

54. "SALE" DEFINED.— "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised

Sale how made.

[A]Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards or in the case of a reversion or other intangible thing, can be made only by a registered instrument.[B]

[A]In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest or charge on such property.

[A] For extension of S. 54 to the entire State of Punjab w.e.f. 1-4-1955 — See Punj. Govt. Gaz. 1-4-1955, Pt. I, p. 372 and to Pepsu area of the said State w.e.f. 15-5-1957 — See Ibid. 1957, Ext., p. 633

Paragraphs 2 and 3 of S. 54 with respect to transfer of property by registered instrument has been extended to every cantonment from the commencement of the Cantonments Act, 1924 — See S. 287 of that Act.

The operation of paragraphs 2 and 3 of S. 54 have been exempted by the Central Government w.r.e.f. 1-1-1950 from all the territories of Himachal Pradesh except (1) an area within the limits of a municipality under S. 241 of the Punjab Municipal Act, 1911, as applied to Himachal Pradesh — See S.R.O. 1873 in Gaz. of India, 1-12-1951, Pt. II, S. 3, p. 2040 read with S.R.O. 395 ibid. 8-3-1952, Pt. II, S. 3, p. 370

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15. 1987 Mah LR 73 (76) (Bom)

16. 1991 Ker LJ 186 (190)

17. 1982 (2) Kant LJ 300 (300)

[B] For exceptions see the various Co-operative Societies Acts e g , Guj Act X of 1967 S 17(3) Maha Act XXIV of 1961, S 17(2), M P Act XVII of 1961, S 16(8), Mys Act XI of 1959, S 14(7), Mad Act LIII of 1961, S 13(2)(g), Or. Act II of 1963, S 14(8), Punj Act XXV of 1961 S 13(7) Raj Act XIII of 1965, S 16(7) T C Act X of 1952, S. 16(1), and U P Act XI of 1966 S 15(7)

STATE AMENDMENTS

Assam :—

In its application to the State of Assam, in Section 54, in Para 2, for the expression, "by a registered instrument" substitute the following expressions namely :—

"by an instrument registered in the State of Assam notwithstanding anything contained in the Indian Registration Act, 1908 (Act XVI of 1908) to the contrary" — See Assam Act 10 of 1976 S 2 (15-7-1976)

Uttar Pradesh :—

In its application to the State of Uttar Pradesh, in S 54

(a) in the second paragraph the words "of the value of one hundred rupees and upwards" shall be omitted;

(b) the third and fourth paragraphs shall be omitted;

(c) after the last paragraph, the following paragraph shall be inserted namely

"Such contract can be made only by a registered instrument"

— See U. P. Act (57 of 1976, S. 30 (1-1-1977).

Synopsis

1. Scope of the section.
2. Government grants.
3. Transfer under decree or order of Court.
3A. Compulsory acquisition of property by Government.
4. Muhammadan law.
5. "Transfer of ownership."
6. Transfer of mortgage interest.
7. Creation of easements.
8. Mutation proceedings.
8A. Sale or agreement to sell.
9. Sale or mortgage.
9A. Sale or reconveyance..
10. Sale or exchange — Also see Notes on S. 118.
10A. Sale or gift.
11. Sale or lease.
11A. Sale or release.
11AA. Reconveyance.
11B. Grant of mineral rights.
12. "In exchange for a price."
13. "Paid or promised."
14. Non-payment of price.
15. Price can be shown to be different from that recited.
16. Inadequacy and inflation of price.
17. Sale of property of value of rupees one hundred or more.
18. Reversion.
19. "Or other intangible thing."
20. "Can be made only by a registered instrument."
20A. Execution of sale deed.
21. Sale of property of less than one hundred rupees in value.
22. Delivery of property.
23. Contract for sale.
24. Several sales of the same property — Priority — See also Notes 8, 9 and 10 on S 48.

1. Scope of the section.

There are several ways recognised by law by which title to property may pass from one person to another, such as sale, gift, exchange, adverse possession(1) and decree of Court(2). This section defines "sale" and specifies the methods in which a sale of immovable property can be effected. It is a general principle that where the law prescribes a mode of transfer, compliance with that mode is necessary before property can pass so as to confer title against third persons(3). Where therefore, this section requires a registered instrument, title cannot pass by mere admission(4) or by mere agreement of parties(5). There can, in other words, be no such thing in law as a title by estoppel(6).

The section prescribes two methods of transfer, namely—

Section 54 — Note 1

1. AIR 1937 Pat 640 (641) (Title can be acquired under proper title deed or by adverse possession.) ** AIR 1919 Nag 70 (72) (Where a real sale has taken place, an unregistered endorsement on the back of the sale deed does not operate to reconvey title to the vendor.)

2. AIR 1926 Nag 95 (96, 98) (Decree for specific performance — Title of vendee relates back to date of agreement — Intermediate conveyance do not render it nugatory.) ** (1881) 5 Bom 554 (560) (DB) (Decree for specific performance by execution of said deed transfers property without waiting for the actual conveyance being executed.) ** (1911) 33 All 728 (731) (DB) (But an order of a Revenue Court in mutation proceedings cannot operate so as to confer title.)

3. AIR 1961 Punj 378 (381) : ILR (1961) 2 Punj 293 (DB) (Provisions of S. 54 as to mode of transfer are exhaustive.) ** (1949) 53 Mys HCR 410 (414, 415) (Sale of casuarina plantation — Trees being young, not intended to be cut on date of sale or immediately thereafter — Sale is not of standing timber but of an interest in immovable property and hence registered sale deed necessary to pass title.) ** AIR 1923 Mad 241 (244) : 45 Mad 537 (DB) (And no principle like equitable construction of statutes should be resorted to.) ** AIR 1920 Nag 265 (266) ** (1911) 33 All 728 (731) (DB).

4. AIR 1961 Punj 378 (381) : ILR (1961) 2 Punj 293 (DB) ** AIR 1975 Rang 68 (69) : 2 Rang 459 (Admission in different proceeding that one had sold land does not act as estoppel so as to do away with the necessity of registering the document.) ** AIR 1924 Pat 185 (186) (Deed of relinquishment does not confer a title.) ** (1906) 33 Cal 967 (983, 984) (DB) ** AIR 1916 Cal 136 (141) : 43 Cal 790 (DB) (1901) 24 Mad 377 (384) : 28 Ind App 46 (PC) (Alleged transfer of impartible zamindari — Held, such transfer could not be effected except by a registered document as required by law.) ** (1912) 16 Ind Cas 440 (440) (DB) (Cal).

[See also (1910) 7 In Cas 264 (266) (DB) (All) (Title to land cannot be transferred by a mere recital in a lease.)]

5. AIR 1939 Mad 220 (223) ** (1901) 14 Mad LJ 337 (338) (DB) ** (1901) 23 All 175 (180) (DB) (A benamidar cannot transfer the title to the real owner by giving him possession.)

6. AIR 1935 Rang 84 (86) : 12 Rang 589 (DB) (Estoppel is a rule of evidence and not a source of title.) ** AIR 1935 Rang 448 (448) (Do.) ** AIR 1918 Nag 102 (103) ** (1909) 36 Cal 920 (922) (DB) (You cannot invoke the principle of estoppel to defeat the plain provisions of a statute and we cannot evade the effect of S. 54 of T.P. Act by holding that the plaintiff is estopped from pleading it.) ** (1913) 36 Mad 564 (569) (DB) (No waiver or transfer of rights can be recognised in case of immovable property without a registered instrument after the passing of the T.P. Act.)

[See also AIR 1958 Pat 133 (140) (DB) (The doctrine of equitable estoppel, even if there is any such doctrine, in ultimate analysis rests either on contract, express or implied or upon some statement of fact constituting an estoppel and secondly that there is no estoppel against statute.)]

(1) transfer by a registered instrument, or

(2) transfer by delivery of property when the value thereof is less than one hundred rupees.

The provisions of S. 55(4)(b) creating a statutory charge in favour of vendor do not apply to a case of an invalid sale or oral sale(7).

The object of registering the document is to publish to the world that such a document has been executed(8). There are transactions evidenced by documents of which registration is necessary under the T. P. Act, but not under the Registration Act, the purpose being to make known the title to the property(9). The object of delivery of the property is also the same(10) and is, in fact, a substitute for the requirement of a registered instrument.

Where patta issued by a Municipality is unregistered and unstamped, it is not sufficient to convey title. However it can be looked into for collateral purpose of showing nature of possession of the occupant of the plot(11).

No valid action can be founded upon an oral sale; the contract for sale that precedes every transaction of sale cannot form the basis for a valid action for specific performance in cases where that contract of sale resulted in an oral sale. The modes of conveyance specified in Sec. 54 are exhaustive, no other mode of conveyance is permissible. In respect of actions based on oral sales the rights and liabilities of buyers and sellers incorporated in S. 55 of the T. P. Act do not come into play. When the oral sale itself is void, since it is repugnant to S. 54, the penultimate stage — the contract of sale is also void. No charge is created in respect of the purchase money paid by the buyer(12).

Transfer of Property Act provides for different modes of transfer of property, it is not exhaustive of the modes of transfer of property. There may be modes other than those as mentioned in the T. P. Act by which property may be lawfully transferred by its owners in favour of another. Section 14 of the Partnership Act embodies one such provision. It is in that sense a special provision and it cannot be said to be in derogation of or in conflict with any provision of T. P. Act, viz., S. 5 or S. 54 thereof.

As per S. 14 of the Partnership Act the contribution by a partner of his separate immovable property by throwing the same into the stock of the partnership firm has the effect of transferring the partner's share therein to that of the firm. No particular mode or form is provided for so bringing in separate property of the partner into the stock of the firm and no deed whatsoever registered or otherwise is required to be executed by the partner for doing so(13).

Though generally time is considered to be the essence of the contract, the legal proposition is that time is not the essence of the contract regarding the sale of immovable properties, unless it is specifically stipulated that the time that is fixed in the sale agreement is a relevant factor and the said time is considered the essence of the contract further putting the other side on notice to the said effect(14). Where the vendors/defendants did not make any assertion in the written statement or in

7. AIR 1985 Andh Pra 200 (205) : 1985 (1) Andh LT 123.

8. (1909) 31 All 523 (526) (DB).

9. AIR 1969 SC 1316 : (1970) 1 SCJ 63.

10. AIR 1928 All 726 (727, 728) : 50 All 986 (FB).

11. (1989) 2 Raj LR 652 (655) ** 1995 Supp (2) SCC 86 (90). In construing a sale deed the words used by the vendor cannot be ignored on any supposition or presumption. Where the property has been specifically identified in a deed any ambiguity or inconsistency arising out of it has to be disregarded.)

12. (1989) 1 Andh LT 389 (398).

13. 1985 Tax LR 1229 (1240, 1241) : (1985) 154 ITR 509 (Delhi).

14. AIR 2002 Mad 241 (247) ; AIR 2002 Mad 352 (364) (Contract to sale of immovable property — Time not of essence of contract.)

the evidence to the effect that time was of the essence of the contract nor was it the case of defendants/vendors that time was made the essence of the contract by giving an intimation to this effect to the vendee then the Courts erred in holding that the time was of the essence of the contract. Moreover in the present case the vendor can go away from his usual place of residence or business or go abroad without leaving his address. If time were to be treated as essence in such a contract the rightful claim of vendee could always be defeated by going away at material time so that the vendee could not enforce his claim(**15**).

This section and the next use the words "buyer" and "seller". In England these words apply to a sale of goods, while the words "vendor" and "purchaser" apply to sales of land(**16**).

In the absence of any concluded contract between the parties for sale of immovable property, no obligation arises out of any contract and therefore the provisions of Ss. 40 and 54 would not apply(**17**).

The legality and validity of the sale deed cannot be challenged usually by a stranger if it is not contested by the vendor himself(**18**).

Although the Act does not apply to Punjab, by a Notification No. 183st, issued by the Punjab Government on 27th April, 1935 under S. 1 of this Act, this section was first made applicable from 6th May, 1935 to all the muncipal areas in that Province. From 1-4-1955 the section has now been extended to the entire State of Punjab, see foot-notes to S. 1 (text). But in those areas to which the section did not apply the definition of 'sale' in this seciton was adopted as embodying a general principle(**19**), but not the special *modes* of transfer specified by it, as these could not be said to be general principles of law enacted in the section. Before 1-4-1955 in those areas of Punjab to which this section was not extended, an oral sale was, therefore valid(**20**) and no delivery of possession was necessary(**21**). But where a sale of property of the value of rupees one hundred or more was intended and there was a *deed* of sale, it had to be registered under S. 17 of the Registration Act and unless registered, it did not affect the immovable property nor was it admissible as evidence of the sale(**22**). As the last clause of the section did not apply in those areas, a contract of sale was held to

15. AIR 1988 SC 1074 (1070, 1079) : 1988 (1) JT 652 (2).

16. AIR 1937 Mad 882 (886) : ILR (1937) Mad 638 (FB). (Per Stone J.)

17. ILR (1996) 3 Ker 651 (658)

18. 1999 AIHC 2147 (2149) : 1999 (2) Gauhati LR 219.

19. AIR 1910 Lah 155 (156) : 1916 Pun Re No. 53 (FB).

[See AIR 1936 Lah 612 (615).]

20. 1971 Sim LJ 411 (414) (Delhi) (Oral sale of land in Part B State of Pepsu prior to its merger in Part A State of Punjab was valid as T.P. Act was not made applicable to that area.) ** AIR 1990 Punj & Har 89 (90) ** AIR 1989 Him Pra 23 (25) ; 1988 (1) Sim LC 340) ** (1986) 2 Land LR 646 (647) (Punj & Har) ** 1969 Pun LJ 560 (564) (DB) (Oral transfer of land in the Punjab subsequent to 1-4-55 i.e. after coming into force of the T.P. Act and Registration Act would not be valid.) ** AIR 1961 Punj 378 (381) ; ILR (1961) 2 Punj 293 (DB) ** AIR 1937 Lah 507 (513) ; ILR (1957) Lah 171 (DB) (No formal sale deed was drawn up as purchaser failed to pay the balance of consideration but mutation proceedings showed that a verbal sale was alleged to have taken place and vendor himself had applied for the mutation to be attested. — **Held,** such a verbal sale was permissible in the Punjab.) ** AIR 1933 Lah 262 (263) ** 1897 Pun Re No. 52, p. 229 (233) (DB) ** (1931) 133 Ind Cas 551 (552) (DB) (Lah)

[**See also** AIR 1923 Lah 310 (310) (Where sale price is one hundred rupees and the sale deed is not registered the transfer is still a sale.)]

21. (1928) 110 Ind Cas 243 (244) (Lah).

22. AIR 1942 PC 67 (68, 69) : 69 Ind App 130.

create an equitable interest in the property in favour of the buyer on the analogy of the English law(**23**).

In the State of Himachal Pradesh any transaction entered into between the parties under Ss 54, 58, 122 and 123 of the T P Act are to be compulsorily registered(**24**)

It has been held by the Rajasthan High Court that, although the technical rules of this section would not apply in areas to which this Act does not apply, yet before a Court would hold that there is an oral sale, it would require to be convinced that there was either the payment of entire consideration by the vendor to the vendee or that possession of the property had been made over to him(**25**).

In the former Gwalior State where the T P Act was not applicable the sale was complete when the vendor transferred the ownership and accepted the price(**26**)

In order that the plea of the defendant that earlier owner's title was under oral sale and thus defective, can succeed, he must prove that S 54 applied to suit land area(**27**).

So far as transfer of agricultural land is concerned, the State Legislature has exclusive jurisdiction in the matter and the provisions of a State Act relatable to that topic override the provisions of this section(**28**).

Where the area of the plot as mentioned in the sale deed as well as in the site plan is the same but the map differs, the term of the grant must prevail The right to property has to be expressed in the title and when so expressed will not be limited by map(**29**)

When there is no evidence to prove that the property is ancestral its sale by the karta of the Hindu joint family will not be illegal on ground that consent of other coparceners was not taken or that there was no legal necessity(**30**).

Where the sale deed was exempted by the karta of Hindu joint family when plaintiffs were minor, plaintiffs would have right to challenge the sale deed in toto No doubt, such sale is not void per se, but becomes voidable as soon as the option is exercised by the minors through their guardian(**31**).

In the instant case(**32**) parties belonged to a Scheduled Tribe in Himachal Pradesh having custom that female would hold property to her lifetime or till she remarried Plaintiff claimed that widow of his brother remarried and that therefore sale deed of her property executed by her was invalid The defendant however, took the plea that she sold the property for legal necessity viz returning debt of her husband and spending money for his ritual on his death It was however shown

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23. AIR 1941 Lah 240 (240) ** AIR 1930 Lah 131 (132) (DB) (Vendor becomes trustee of the property for the vendee and the vendee becomes a trustee for the vendor in respect of the purchase money)

[**See also** AIR 1937 Lah 764 (765) (DB).]

[**See however** AIR 1961 Punj 378 (381) ILR (1961) 2 Punj 293 (DB) (Obiter Even if S 54 is not applicable the equitable principles of English law cannot be invoked for treating the transaction as tantamount to transfer of ownership)]

24. 1998 (1) Shim LC 492 (495) (Him Pra)

25. AIR 1955 Raj 70 (72) : ILR (1954) 4 Raj 705 (DB).

26. AIR 1960 Madh Pra 237 (238).

27. 1998 AIHC 4788 (4794) : 1998 (1) Ren CR 207 (Delhi).

28. AIR 1951 Orissa 11 (12, 13) : ILR (1950) Cut 322 (DB)

29. AIR 1993 Delhi 19 (22) : 1992 (24) DRJ 532

30. AIR 1992 Orissa 170 (176).

31. AIR 2002 Raj 370 (377).

32. AIR 2002 Him Pra 77 (85) : 2002 (1) Sim LC 308

that sale consideration was deposited in bank in joint name in herself and her second husband. It was held that plea of legal necessity was not maintainable and sale was invalid.

Transferee landlord cannot take advantage of the defaults committed by tenant in paying rent long before the transfer(33).

In the case of a transfer as defined in the Explanation to S. 4 of the I.-T. Act by the individual, the property cannot be said to belong to the individual, unless it is within the clutches of S. 4 of the I.-T. Act, notwithstanding the fact that the transfer had not been effected as contemplated under S. 54 of the T. P. Act or under the Registration Act(34).

The transfer contemplated under S. 32(5) of the Bangalore Development Authority Act need not be in terms of T. P. Act, though the Authority exercises its right over the properties leased(35).

The provisions of Transfer of Property Act are fully applicable while effecting a transfer of holding by a bhumidhar and therefore any transfer of any holding regarding an amount of Rs. 100/- or more can be only executed by registered documents(36).

In a suit for specific performance some defendants raised the plea that they were *bona fide* purchasers for value without notice to the suit agreement. However none were examined to prove their case. In the absence of relevant and unempeachable evidence in their favour, their plea was liable to be rejected(37).

Merely because one of the boundaries of the land sold is described as 'neighbour's land', the sale deed could not be challenged as an inchoate document, when a recital in the sale deed mentions that the boundaries are fully described in the plan annexed and when the plan clearly shows the dimensions and boundaries of the land sold and the details of the neighbour's land shown as a boundary in the sale deed(38).

There was an agreement between the landlord and tenant regarding construction of house on the land belonging to the landlord. By the agreement respondent/tenant was allowed only right to construct the house on the land and to occupy it. Of course the tenant was also allowed to buy the land. Reading the agreement as a whole it is clear that right to buy a land was in respect of the area on which the house stands. The agreement did not give right to the tenant to buy the entire area(39).

Where it was the intention of parties to come to a definite and complete agreement on subject of sale of property, subject to the exercise of option by purchaser in accordance with terms stated in option, the mere fact that it was subject to an agreement to be signed did not necessarily mean, that there was no legal binding and enforceable agreement, even when the option had been properly exercised(40).

2. Government grants.

This section has no application to grants made by the Government under the Government Grants Act, 1895(1).

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33. AIR 1989 Pat 13 (18) : 1988 Pat LJR (HC) 950
34. (1997) 226 ITR 654 (669).
35. ILR (1997) Kant 705 (710)
36. 2002 All LJ 680 (685, 686) : 2002 AIHC 1882 : 2002 (1) All CJ 622
37. 2000 (4) Andh LD 136 (158).
38. 2001 (5) Andh LD 102 (111).
39. AIR 1990 Gauhati 87 (90)
40. 1984 (2) Malayan LJ 48 (52).

Section 54 — Note 2

1. See Section 2 of Act XV of 1895 ** AIR 1931 Pat 268 (270) : 10 Pat 203 (DB) (A sale by Government for less than Rs. 100 requires a sale deed.)

3. Transfer under decree or order of Court.

A transfer under a decree or order of Court is outside the operation of this section. The reason is firstly, that such a transfer cannot, as has been seen in Note 3 on S. 5, be considered to be a transfer by act of parties and is, therefore, not a "transfer of property" at all(1), and secondly, S. 2 cl. (d) provides that nothing in this Act shall be deemed to affect any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction. Such a transfer need not, therefore, be made by a registered instrument as is required by this section. Thus, a sale in execution of a decree need not fulfil the conditions of this section and need not be registered(2). The assignment of a security bond by the Court in favour of a party is not a sale(3). A transfer effected by a compromise decree of a Court cannot be treated as a sale pre-emptible under the Agra Pre-emption Act (1922), though such a compromise transfers property from one party to another for a price(4).

Where a decree for declaration of ownership is passed in favour of the plaintiff but the same is not registered and there is also no transfer of the suit property in favour of plaintiff earlier to passing of the decree, the ownership will not pass to the plaintiff on basis of the decree, it being not registered, as required under S. 54 of the T. P. Act read with S. 17 of the Registration Act(5).

There is a difference of opinion on the question whether a sale by the Official Receiver in insolvency with the sanction of the Court is a transfer by operation of law, or by, or in execution of a decree or order of Court. According to a Full Bench decision of the Madras High Court(6) it is not. The same view has been held by the High Courts of Calcutta(7) and Allahabad(8). A contrary

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Section 54 — Note 3

1. **AIR 1928 All 67 (68) : 50 All 454 (DB)**

   [**See however** AIR 1966 Mys 299 (303) (Contract of sale executed by Court in pursuance of decree for specific performance — It is transfer by Court on behalf of judgment debtor **and has got all characteristics of transfer *inter vivos***)]

2. AIR 1960 Pun, 630 (632) : ILR (1959) Pun, 55 (DB) (Sale of minor's property under direction of guardian Court — Sale is governed by S. 2(d) and not but by S. 54 — Fact that Court passed order on application by guardian of minor would not detract from order being order of Court — AIR 1924 Lah 48 **Dissented from**) ** (1889) 2 CPLR 137 (138)

3. **AIR 1931 All 389 (390) : 53 All 786 (FB).**

4. AIR 1931 All 741 (742) : 53 All 100 (DB) ** AIR 1928 All 67 (68) : 50 All 454 (DB)

   [**See however** (1961) 63 Pun LR 345 (346) (Suit to avoid alienation and possession paid within certain period — Compromise decree held not a sale — Right recognised by decree was only a right to avoid unauthorised transfer and not a right of reconveyance.) ** AIR 1951 Nag 129 (131) : ILR (1949) Nag 625 (DB) (Settlement of debt by Debt Conciliation Board — Claim of Rs. 1,000 conciliated for Rs. 600 — Debtor executing sale deed of his fields in favour of creditor for the amount — Transaction held voluntary transfer **giving rise to right to pre-empt.**)]

5. **AIR 1986 Punj & Har 197 (200) : 1985 (2) 88 Pun LR 593**

6. **AIR 1927 Mad 1 (3) : 50 Mad 135 (FB).** (Per Full Bench Krishna J. **Dissenting.**)

   [**See also** AIR 1935 Mad 55 (55) (DB) (Official Receiver executing transfer to auction purchaser — It is not exempt from registration) ** AIR 1939 Mad 220 (223) (A sale by **Official Receiver is a private sale.**)]

7. AIR 1919 Cal 193 (193) : 46 Cal 887 (DB) (A conveyance in writing and registered is necessary to pass title from the Receiver of an insolvent's estate to a purchaser from him.)

8. **AIR 1942 All 39 (41) : ILR (1942) All 120 (DB)**

view has been expressed by the Chief Court of Oudh in *Wazirey v Mathura Prasad*(9), a case decided by a single Judge, on the ground that it is in the nature of a Court sale and that its validity really depended on the order of the Insolvency Court vesting the property in the Official Receiver But a later Division Bench of the same Court(10), has dissented from this view and has followed the view taken by the High Courts of Calcutta and Madras Where no Receiver in insolvency is appointed and the Court by virtue of the powers conferred on it by S 58 of the Provincial Insolvency Act, 1920, sells the property, it has been held by the Rangoon High Court that the same must only be made by a registered instrument(11) According to that Court, S 54 makes a registered deed requisite by whomsoever the sale is undertaken, except when it can clearly be shown that the sale takes place, for example, under the provisions of O 21 of the Code of Civil Procedure

Where the suit for possession against non-agricultural tenant on determination of tenancy right is decreed in favour of landlord on payment of compensation to tenant for structure erected by him, the tenancy right of that structure in respect of sub-tenant of the tenant does not transfer to the landlord merely on paying the compensation The decree is to be executed or the possession is to be obtained by landlord as required by S 70 of West Bengal Non-Agricultural Tenancy Act and the case will not be 'sale' under T. P. Act or otherwise(12).

See also S. 2, Note 6

3-A. Compulsory acquisition of property by Government.

Compulsory acquisition of property by the Government is a unilateral act and can never be said to be a 'sale' There is nothing voluntary about the transaction(1) Transfer of ownership of tangible immovable property of the value of one hundred rupees and upwards can take place only by sale made under a registered document as required u/S 54.

Unless a statute itself provides for vesting and transfer of immovable property from one person to another by acquisition, the transfer of ownership of property cannot be said to have taken place, even if the property had been forcibly taken over or the possession of the same had been given voluntarily(2) Where a person/purchaser claims to be in possession of the land in view of agreement for sale of the land and claimed higher compensation for the land acquired by the Govt and it being settled law that the agreement of sale does not confer title, then the agreement holder even assuming the agreement to be valid, does not acquire any title to the property, and is not entitled to compensation Moreover the agreement being subsequent to notification u/S 4 of Land

9. AIR 1939 Oudh 55 (56) 14 Luck 404 (AIR 1927 Mad 1 (FB) distinguished on the ground that no sanction for the sale had been obtained in this case)

10. AIR 1942 Oudh 424 (425) 18 Luck 433 (DB) (Sale of insolvent's property by Official Receiver — Transfer is not by operation of law or by or in execution of decree or order of Court within S 2(d), T P Act — Purchaser is entitled only to sale deed from Official Receiver and not sale certificate — Even if the insolvency Court ordered the sale and acceptance of the bid which it had no jurisdiction to do, it could not make any difference in the nature of the sale)

11. AIR 1940 Rang 186 (187) : 1940 Rang LR 263 (DB).

12. AIR 1979 Cal 160 (1979) 83 Cal WN 195 (DB) (Decree for possession in favour of landlord on payment of compensation to the tenant for structure erected by him — It is not a case of sale)

Section 54 — Note 3A

1. AIR 1977 Raj 80 1976 Raj LW 372 (DB) ** 1968 BLJR 710 (713) (Acquisition of land under S 50 of the Chotta Nagpur Tenancy Act does not require formalities under S 54) ** AIR 1951 Cal 151 (152) (Pr 18) ILR (1952) 1 Cal 263 (DB) (Compulsory sale is a contradiction in terms.)

2. AIR 1955 SC 1058 (1063, 1064) : 1995 AIR SCW 1068 : 1995 All LJ 759 : 1995 Supp (2) SCC 667.

Acquisition Act, it is not binding on the Government(3)

4. Muhammadan law.

As seen in Note 1 on S 9 the Muhammadan law does not require any writing for the validity of a transfer. This rule of Muhammadan law is preserved by S 129 so far as *gifts* of property are concerned. But the rule has been rendered obsolete by this section so far as *sales* of property are concerned(1). It may be noted that the last clause of S 2 only provides that Chapter II of this Act shall not affect any rule of Muhammadan law.

There is a difference of opinion as to whether a *hiba-bil-ewaz* (gift for consideration) is a sale within the meaning of this section or a gift. The question arises by virtue of the fact that while a gift under the Muhammadan law need not be in writing, a sale for more than one hundred rupees would require a registered instrument for its validity. According to the Chief Court of Oudh a *hiba bil ewaz* is a *hiba* and not a sale and therefore need not be in writing(2). The Calcutta and the Assam High Courts have, on the other hand, held that a *hiba-bil-ewaz* is in reality a sale and must conform to the provisions of this section(3). The High Courts of Madras(4), Nagpur(5) and Allahabad(6) have also taken a similar view. The Patna High Court has held that a gift of immovable property by a Muhammadan in favour of his wife in lieu of dower is not a true *hiba bil ewaz* but a sale and so can only be effected by a registered deed if the value of the property is Rs 100 or upwards(7). The Karnataka High Court(8) also held that a gift given in lieu of mahr if not registered within the meaning of S 17 of the Registration Act such a gift is invalid in the eye of law. The Hyderabad(9) High Court, however, has taken a contrary view.

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3. **AIR 1995 SC 1891 (1891) : 1995 AIR SCW 2940 : (1995) 4 SCC 147.**

Section 54 — Note 4

1. (1912) 16 Ind Cas 679 (680) (DB) (All)
2. AIR 1934 Oudh 163 (165) (DB)
3. ILR (1949) 1 Assam 478 (479) (Held Revenue Courts in Assam were bound by the Calcutta view until the competent Courts in Assam took a different view.) ** AIR 1934 Cal 693 (693) (DB)
4. (1976) 89 Mad LW 378 (380, 381) ** AIR 1952 Mad 671 (674) ILR (1952) Mad 1019 (DB)
5. AIR 1951 Nag 428 (430) · ILR (1949) Nag 426 (DB)
6. **AIR 1951 All 86 (92, 93) : ILR (1952) 1 All 477 (FB)** (A transfer may have all the attributes of a true *hiba bil ewaz* known to Muhammadan law and it may also be treated as such but if it falls within the purview of S 54 T P Act and is not effected in the manner provided therein it will be inoperative and ineffectual in law — The delivery of possession under such a transfer will also be ineffectual as against the real owner of the property — AIR 1936 All 600 and AIR 1957 All 25 **Overruled** ** 1972 Rev CJ 584 (All)

   [See also AIR 1983 All 363 (364) 1983 All WC 513 (Possession of house delivered on basis of sale deed — Sale deed executed in consideration of Nikah — Sale held invalid where the consideration for transfer is not price but a thing of value the transaction is called an exchange as defined under S 118 of Transfer of Property Act.)]
7. **AIR 1978 Pat 197 : 1978 Tax LR 624 (633) : 1977 BLJR 437 (FB)** ** AIR 1949 Pat 237 (240) 26 Pat 561 (DB) (It is a question whether it is implied that a true *hiba-bil ewaz* would be a gift and not a sale.)
8. 1998 (4) Kant LJ 643 (646)
9. AIR 1952 Hyd 5 (5) ILR (1952) Hyd 7 (DB) (Property given in lieu of dower and not in consideration of the wife having relinquished her mehar — There is only a gift and not a sale.)

A Muhamedan executed a Mehernama in favour of his wife, it was clear from recitals in the Mehernama that at the time it was executed the dower had become a debt. It was also clear that the donor had alienated the suit house in lieu of Meher (dower) amount. The ascertained amount of Meher which was debt since it was not paid to the wife by her husband was mentioned in the Mehernama. It was held that the said amount of Meher constituted 'price' within the meaning of S 54. Thus the Mehernama was clearly a deed of sale and since the property was worth more than Rs 100/- the document required registration. In the absence of registration, title in the suit house would not pass to the wife by virtue of the said Mehernama**(10)**.

A transfer of immovable property by a Mohammedan husband in favour of his wife discharging the dower debt does not involve two reciprocal gifts but is only one contract. Such *Hiba-bil-ewaz* as recognised in our country is a sale within the meaning of S 5 and unless made by a written instrument duly registered, it cannot convey title to the person in whose favour it is made**(11)**.

The Kerala High Court**(12)** held that '*Hiba*' or gift under Mohammedan law is a transfer of property made immediately and without any exchange by one person to another and accepted by or on behalf of the latter. By virtue of S 129 T P Act, the chapter does not affect any rule of Mohammedan law and therefore '*Hiba*' of subject-matter of whatever value need not be registered as required by S 123. If however it is reduced into writing and relates to immovable property worth Rs 100/- or more the document is compulsorily registrable u/S 17 of the Registration Act which applies. On the other hand *Hiba-bil-ewaz* in India being a gift for an exchange is in the nature of a sale and if the subject matter is immovable property worth Rs 100/- or more then it can only be by a registered instrument as provided u/S 54 of T P Act. Oral gift in discharge of money owed to the donee being one for consideration amounts to sale. It was not pure and simple '*Hiba*' but a *Hiba-bil-ewaz* and if the property of value of Rs 100/- or more is involved it can only be by a registered document.

There was also a conflict of opinion on the question whether for the purposes of pre-emption under the Muhammadan law it is sufficient if a transaction amounted to a sale under the *Muhammadan law* though it might not be valid as a sale under this section. According to one view, a sale valid under the Muhammadan law, is sufficient to give rise to a right of pre-emption under that law though the transaction may not be valid as a sale under this Act**(13)**. A second view was that Muhammadan rules of law as to sales were superseded by the general law of sales enacted by this Act which therefore must be taken to govern the incidents of sale in applying the Muhammadan law of pre-emption**(14)**. And a third view was that the intention of the parties must be looked at to determine what system of law was to be applied**(15)**. The Privy Council in *Sitaram v. Sved Ismail Hasan Khan*(16) had approved the third view abovestated. The conflict must be taken as now set

10. 1986 Mah LR 183 (188)

11. 1995 (2) Cur CC 22 (26) (All)

12. AIR 1989 Ker 148 (151, 152) : 1988 (1) Ker LT 409

13. **(1894) 16 All 344 (351) (FB).** (Per Banerji J contra.) ** **(1885) 7 All 482 (489, 490) (FB)** ** AIR 1931 Nag 166 (167) : 27 Nag LR 392 ** AIR 1922 Bom 124 (125) : 46 Bom 312 (DB) ** (1900) 22 All 343 (345) (DB)

14. AIR 1957 Pat 546 (547) : ILR 36 Pat 114 (DB) (AIR 1916 Pat 364 **Foll.**) ** AIR 1916 Pat 364 (366) : 1 Pat L Jour 174 (DB) ** AIR 1914 Cal 234 (236) : 41 Cal 943 (DB)

15. (1908) 35 Cal 575 (599) (DB) (It was held in this case that the vendor and the vendee did not regard the sale as complete till the price had been paid and the deed registered.)

[**See also** (1955) Madh BLJ (HCR) 828 (833) (True test to determine date on which right to pre-emption accrued is to look at intention of parties and to ascertain what was the date with reference to which parties intended sale to be effectual — Case under Quanun-ul-Haq Shafa Gwalior.)]

16. **AIR 1923 PC 41 (44) : 48 Ind App 475 : 45 Bom 1056.**

tled by the decisions of the Supreme Court(17) which however have approved the second view and have now laid down that where the Transfer of Property Act applies the provisions of the Act supersede the principles of the Muhammadan law as to sale and it is the statute that one should look to to find out whether and if so when, a sale is complete in order to give effect to a right of pre-emption.

Transfer of interest of Muslim minor in immovable property by his de facto guardian is void(18)

5. "Transfer of ownership".

In order to constitute a sale there must be a *transfer of ownership* from one person to another. A transfer of ownership by a person means a transfer by such person of his rights and interests in the property, in *toto* and *permanently*. A transfer of a part only of such interests or for a particular period reserving the rest for the transferor himself is not a transfer of ownership(1). But it is not necessary that the transferor should be a full proprietor. He may be the owner of a partial interest in the property such as that of a mortgagee or an occupancy tenant(2).

A transaction of sale is neither sham nor nominal if the intention of the vendor is to confer title on the vendee(3).

Upon every transfer of property all the rights and claims including those which are capable of being waived and which are not exercised do not automatically pass to the transferee whether they relate to property or as to property. Even if they are rights conferred upon the landlord, they do not include a successor in interest. So in the absence of any express words in the sale deed the right of the landlord to terminate tenancy does not pass to the purchaser merely on the purchase of the property.(4)

Where property belonging to firm was transferred to another firm which was constituted by old partner with substitution of one new partner. Thus it was merely change in the constitution of the firm. As some partners in both the firms were common they could not sell property to themselves and therefore taking over of assets of firm by reconstituted firm did not amount to sale in eye of law and therefore profits obtained from the property could not be included in the income of firm(5).

Where there is no transfer of ownership the transaction, though in form a sale, cannot be

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17. AIR 1961 SC 1747 (1750) ; (1962) 2 SCR 474. (AIR 1960 SC 1368 Ref. — Sale of intangible immovable property of value of Rs. 100 or upwards — Sale is not complete until registration of instrument. ** AIR 1960 SC 1368 (1371) ; (1961) 1 SCR 248 ; AIR 1953 Nag 182, **Reversed** ** AIR 1939 Nag 35. **Overruled.**)

18. AIR 1967 Mad 369 ; 79 Mad LW 657 (DB).

Section 54 — Note 5

1. 1907 Pun Re No. 136, p. 652 (654) ** [illegible] 2 Mad 4[illegible] (DB) — Land of zamindar granted on condition of rendering services and paying certain [illegible] — Ownership remains in the zamindar.)

2. 1907 Pun Re No. 136, p. 652 (654) (DB).

(See also AIR 1[illegible] Assam 20[illegible] 22[illegible] Pr[illegible] (LR 1 [illegible] 2 Assam 1 (DB) — Neither S. 11 Assam Land and Revenue Regulation nor Rule [illegible] of the Rules framed under that Act prohibits transfer by sale etc. of land held under annual patta from Government. They permit transfers but the transfers are limited in their duration to the period covered by the annual patta.)

3. 1984 TNLJ 442 (448)

4. 1982 Mah LJ 738 (747) : (1983) 1 Ren CR 185

5. 1982 Tax LR 1279 : 1983 MPLJ 300 (DB)

considered to be a sale. Thus, a sham transaction not intended to pass any title is not a sale(6). Where the sale deed was executed by the plaintiff for the purpose of saving the property from the creditors and in the conspiracy the defendant was also a party, the both parties being in pari delicto neither the plaintiff nor the defendant could be permitted to take advantage of such transaction(7). The tenor of the document in the instant case indicated that there was no question of outright sale. In a document of outright sale this type of language would not be used. Normally the document would mention that the property is sold for consideration stated herein. The document would not merely state that the transferee is made owner of the property, but it would state that the transferee had become owner of the property and that he is entitled to deal with it as owner in any manner he likes by sale, gift, mortgage or lease. There is no recital in the document that transferee was entitled to deal with the property as an absolute owner and that he [illegible] to any person by way of sale, gift, mortgage or lease. The document further [illegible] subject to a condition stated previously. This also indicates [illegible] executor never intended to transfer the property absolute(8). A *bona fide* settlement of a disputed claim which is a mere recognition of each other's antecedent title is not a sale(9).

The assessee-trust obtained certain immovable properties under an agreement. The properties were possessed by the trust but the agreement was not executed as required by law and was not registered. The claim of the assessee was that the possessory right under the agreement coupled with the use thereof made it eligible to deduction of depreciation under the Income Tax Act.

Held that the ownership in properties did not vest in the assessee and hence depreciation could not be allowed.

Under S. 34 of the I. T. Act, 1961, depreciation is allowed to an owner of properties who was the asset in question. Both the conditions, ownership [illegible] to be satisfied.

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6. 1981 UPLT (SCR) 65 (Sham and fictitious [illegible] that even if consideration [illegible] ** AIR 1964 Guj 74 (81) (LR) [illegible] ** AIR [illegible] (886) ** AIR 1939 Pesh 27 (28, 29) (DB) ** AIR 1937 Oudh 493 (496) 13 Luck 454 (DB) ** AIR 1932 Bom 247 (247) 56 Bom 556 (DB)

   [**See also** 1964 1 Mad LJ [illegible] Property [illegible] by owner by [illegible] registered instrument followed by transfer of registry — Person [illegible] to be benefit [illegible] that ostensible vendee is mere nominal vendee — Benamidar [illegible] legation.

7. AIR 1990 All 47 (49) : 1989 All WC 1271.

8. (1986) (27) 2 Guj LR 1133 (1136).

9. AIR 1929 All 788 (789) (DB) ** (1911) 9 Ind Cas 267 (268) (DB) (Mad). A deed of release whereby the releasee compounds and takes to [illegible] *bona fide* settlement of a family dispute even though [illegible] word of [illegible] ** (1910) 34 Bom 139 (141) (DB).

   [**See** AIR 1932 Lah 281 (287) : 13 Lah 70 (DB).]

   [**See also** (1961) 63 Pun LR 545 [illegible] Suit [illegible] of possession [illegible] promise decree — Possession to be decreed provided [illegible] was [illegible] tain period — Compromise decree held not a sale — R[illegible] decree [illegible] a right to avoid unauthorised transfer and not a right to [illegible] ** AIR [illegible] 171 (172) (LR) (1980) Nag 61 (N) (Extinguishment of [illegible] by transfer of [illegible] be effected only by a sale, gift or exchange. No [illegible] property transferred is not in dispute [illegible] The property when it is of more than Rs. 100 [illegible] registered instrument in order to [illegible] ** AIR [illegible] (DB) (Family arrangement [illegible] not transfer within the meaning of S. 10.)]

It must be remembered that Tax laws do not stand in relation from the general law of the country. The Transfer of Property Act or the Registration Act, would certainly insist on document in writing and duly registered, for the recognition of a transfer of title of immovable property of the value of over Rs. 100/-. A mere agreement of sale will not do duty for a proper sale deed duly executed. The context of S. 32 of the I.-T. Act would not clothe with ownership a mere possessor of some beneficial interest. Section 53-A of T. P. Act which only furnished on equipment of equity, is not effective enough for the acquisition of title or obtaining of the ownership. When such a vital condition regarding ownership of the asset is not satisfied, the claim for deduction is bound to be rejected. This is the correct view to be taken in relation to the claim for deduction under the head of depreciation(**10**).

Section 224-C (as it stood prior to U. P. Act 45 of 1975) of the U. P. Municipalities Act (1916) empowers the Municipal Board to obtain sale of water works from the licensee only after price is agreed upon. In the absence of sale as contemplated under S. 54, transfer of property in water words could not have taken place even if such water works has been forcibly taken over by the Municipal Board or the possession had been given voluntarily by the licensee. The U. P. Act does not by itself provide for vesting or transfer of immovable property by acquisition(**11**).

The question whether there has been a transfer of ownership in any particular case will depend upon the intention of the parties and this again must be ascertained from the facts and circumstances of the particular case(**12**). It is settled law that if the term in the sale deed is not ambiguous

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10. 1987 Tax LR 1259 (1264, 1265) : (1987) 2 Ker LT 485 (FB).

11. AIR 1995 SC 1058 (1963) : 1995 AIR SCW 1068 : 1995 All LJ 759 : 1995 Supp (2) SCC 667.

12. (1965) 31 Cut LT 233 (235). Document executed and registered and possession given — Absolute character of legal title of transferee postponed till expiry of certain date — Document also providing for avoidance of entire transaction on repayment by transferor — These two features are inconsistent with sale.) ** AIR 1992 Madh Pra 22 (27). (**Held** on interpretation of the document that it was an out and out sale. There was nothing in the document stipulating reconveyance on repayment of consideration along with interest. Repurchase agreement was also not executed contemporaneously but was executed subsequently.) ** AIR 1964 Guj 174 (181) : ILR (1963) Guj 739 ** 1959 Raj LW 283 (284) (DB). (Sale of property — Registered deed — Patta under not obtained from Nazool Department — Non-acquisition of patta held did not detract from title vested in vendee.) ** AIR 1957 Bom 236 (237) : ILR (1957) Bom 769. (Sauda chitti showing intention to pass ownership only upon the execution of a further deed of sale after obtaining the permission of the Deputy Commissioner in view of the existence of the scheme under S. 11, Relief of Indebtedness Act, was held not to be a sale but only a contract for sale.) ** 1956 Andh WR 569 (571) (DB) ** AIR 1957 Manipur 9 (11). (Where the contents of the deed clearly show that it is an out and out sale deed, the mere fact that the word 'Mahajan' has been used in the deed will not be sufficient to prove that the deed was only intended to embody a loan transaction.) ** AIR 1953 Mad 545 (547, 548) ** AIR 1952 All 200 (203, 204) (DB). (Condition of repurchase embodied in deed itself is not necessarily conclusive on the question whether the transaction is mortgage by conditional sale or sale with condition of repurchase — Intention of parties has to be gathered from deed and surrounding circumstances.) ** AIR 1951 Nag 403 (405) : ILR (1950) Nag 25. (Document described as an agreement and stamped as such, and without words of conveyance therein and clearly stating that a sale deed will be executed in future must be regarded as an agreement and not a conveyance.) ** AIR 1951 Pat 454 (457). (Suit for declaration of title and possession — Suit filed within 9 days after execution and registration of sale deed — **Held,** that non-delivery of document and possession to vendee are not important circumstances in determining whether it was the intention of the parties that the ownership should pass on payment of entire consideration money.) ** AIR 1950 All 632 (638) : ILR (1953) 1 All 265 (DB). (Where there is intention to transfer ownership immediately, a condition for reversion of ownership of vendor on the failure of vendee performing his part does not detract from transaction being a completed sale. If such a condition is void under law it would be ignored but will not affect the effect of the

then any external aid to find out the true intention of the parties cannot be availed of and the narration in the document would be the sole determining feature(**13**) Where on a construction of a document transferring title to hold a property it is clear that the intention of the parties was to transfer a parcel of land within well defined boundaries, any erroneous statement of survey number or omission to state it, should be rejected as falsa demonstratis(**14**).

Certified copy of the sale deed which is registered and copied in Book under the Registration Act is admssible as secondary evidence since the Register in the Registration office is a public document (**15**) Where some of the co-owners excuted an acknowledgment deed acknowledging the sale deed executed by other co-owners on previous day, reason stating, therein, that they were absent on that day, their intention is held to convey their interest in the suit properties in favour of the purchaser.(**16**)

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sale deed) ** (1949) All LJ 566 (574, 575, 577) (DB) (Heirs of A entering into agreement with B — B agreeing to finance heirs to recover properties left by A — B to become owner of certain property in lieu of his aid — Agreement called agreement of partnership — On construction of document held parties intended that title to property should be conveyed under document and further document was not contemplated) ** AIR 1936 Oudh 410 (411, 412) 12 Luck 339 (DB) (Vendor wanting to recover possession of property to be transferred — Agreement of transfer executed registered and stamped as sale agreement held to be sale deed) ** AIR 1935 Oudh 27 (29) 10 Luck 289 (Transaction alleged to be shankalapnama by chela to his guru — Usufructuary mortgage on same date of another property by guru to chela to be redeemed at future date — Shankalapnama held in reality to be sale) ** AIR 1935 Rang 149 (149, 150) (Right, title and interest relinquished as other party had agreed not to demand payment of money — **Held**, deed was not one of pure release but was one of conveyance) ** AIR 1938 Oudh 25 (26) 2 Luck 416 (DB) (A transfer of a limited right subject to annual payment of rent is not a sale so as to give rise to a right of pre-emption even if the annual payment of rent is so small that it was clearly the object of the transferor to effect the transfer in such manner as to avoid the possibility of pre-emption and obtain the same results as would be obtained by the execution of a deed of sale) ** AIR 1925 Lah 284 (285) (The Court must look to all the terms of the document and the fate of the document cannot be determined with reference merely to certain incorrect phraseology used by the scribe) ** AIR 1920 Oudh 109 (111) 23 Oudh Cas 50 (A deed described as sankalapnama with power of transfer recited that the grantors had received from the grantees Rs 84 which was described as zar-i-peshgi yani barthki and that in consideration of this payment they had openly put the grantees in possession of certain land and that the grantees were to remain in possession forever subject to an annual payment of Rs 3 on account of malguzari sarkari — It was held that the document was an out and out sale of an under proprietary right and was therefore subject to pre-emption) ** (1928) 109 Ind Cas 268 (270, 271) (DB) (Pat) ** (1926) 98 Ind Cas 729 (730) (DB) (Mad) ** (1912) 37 Bom 53 (56) (DB) (Deed described as contract of sale registered — Deed providing that on certain events happening, property should be regarded as sold — Vendee put into possession — **Held**, there was transfer ** (1910) 7 Ind Cas 568 (569) (DB) (Lah) (Payment of part of consideration does not necessarily imply that there is an out and out sale and not a contract to sell.)

[**See also** AIR 1962 Assam 143 (144, 145) ILR (1962) 14 Assam 478 (DB) (Sale of land in Khasi States — Permission of Deputy Commissioner not obtained — Sale is not void *ab initio* — Order of Assistant Political Officer, Khasi States showing that transaction was not recognised is executive order and not by Court — Such order is not conclusive between parties so as to take away title of purchaser) ** AIR 1920 Bom 369 (370) (DB) (Whether rajinamaha and Kabuliyat form sale deed depends upon circumstances — Intention to transfer ownership is necessary.)]

13. AIR 1986 Orissa 196 (198) : (1986) 61 Cut LT 480

14. AIR 1986 Ker 236 (237)

15. AIR 1989 Orissa 27 (31) : (1988) 65 Cut LT 586

16. AIR 1978 Orissa 82 (83) 44 Cut LT 576 (DB) ** **1987 Supp SCC 689 (690).**

Where however, the purchasers were well aware that the vender has some share in the properties but they never approached the other share holders (co owners) before purchasing the property, it could not be said that they were bona fide purchasers for value (17) The recitals in the document on which a suit for possession and title was based, were not decisive and there was no clear convevance that the executant conveyed the title in favour of the vender from the date of execution of the document, recital as to consideration did not came as an independent clause terms regarding passing of title and consideration were intermingled the document was in the custody of the executant and possession of land was not delivered to the vendee In the circumstances held that the intention of the parties was not that the title would pass under the document immediately on its execution(18).

Where recitals of the sale deed clearly show that vender conveyed title to the vendee on the date of execution of the document and evidence shows that the consideration has passed under the sale deed, there is a transfer of title to the vendee (19)

Where the suit properties were sold and the vendee undertook to discharge the mortgage debts to the mortgagee of the vendor and that undertaking formed part of the consideration and agreement to reconvey was also alleged, the possession of the property was given to vendee a part of the consideration was paid by vendee to vendor at the time of execution of sale records stood mutated in the name of the vendee, from the mere fact that the mortgage debts were not discharged by the vendee, it could not be said that the sale transaction was nominal (20)

The passing of title in the property which is transferred does not always depend on payment of consideration.(21)

Where a sale deed was got executed from an illiterate woman who did not understand what the document was and no consideration was given, the sale would be sham, invalid and no title would pass to the purchaser (22)

It is no doubt true that S 54 defines sale to be a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised but from this it does not follow that even a transferee deceives a transferor and leads him to execute a document on basis of a false statement the document should be held to be valid transfer of property to transferee a wrongdoer (23) Before the transfer could be pre-empted, it must be sale which further means transfer of ownership Therefore sale of Pattedari Dwami rights could not be transfer of ownership as contemplated under section 54 of the Act Right of pre-emption under section 4 of Punjab Pre-emption Act is in respect of sale and sale necessarily implies transfer of ownership (24) It is not necessary that the word "convey" or any formal term should be employed, it is sufficient if the document shows that transfer of ownership for a price was intended (25) The words "bikri,", "farokhi, "kharidar, "bai and khandigi ordinarily will imply a sale (26) But the mere fact that a deed is styled a sale deed and that word used for the purpose of the transfer is "sale", cannot preclude the Court from ascertaining the true nature of a transaction by construing the deed as a whole (27) A transaction is known by the right it confers

17. AIR 1987 Mad 129 (139)
18. AIR 1984 Orissa 111 (115) : (1984) 1 Orissa LR 135
19. (1974) 2 Cut WR 978
20. AIR 1985 Mad 222 (234) : 1984 TLNJ 442
21. (1972) 1 Cut WR 338 (342)
22. (1975) 41 Cut LT 978 (986)
23. (1978) 80 Pun LR 41 : 1978 Reve LR 110 (112)
24. (1982) 84 Pun LR 278 (280) 1982 Rev LR 589 ** 1982 Rev LR 278 280) (P & H)
25. AIR 1936 Mad 918 (919)
26. AIR 1917 Pat 117 (120) (DB).
27. AIR 1927 Oudh 204 (205) : 2 Luck 575 (DB).

by the transfer and not by the *name* by which it is labelled by the party **(28)**

A transfer by sale takes effect from the date of its *execution* its operation is not postponed till the date of registration,**(29)** although the sale is not complete until the registration is completed **(30)** (See Note 17) Nor is it invalidated by the delay in delivering the deed to the vendee,**(31)** unless the non-delivery of the deed was for the reason that certain conditions had to be fulfilled before the title was intended to pass.**(32)**

Where a transfer is made for a price paid or promised and the deed is registered a sale is duly effected and the proprietary interest in the property passes, no matter whether the vendor is or is not in the possession of the property.**(33)**

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28. AIR 1957 Hyd 37 (39) ILR (1956) Hyd 733 (DB) (Document evidencing transfer of ownership as well as possession of property for price partly paid and partly promised — It cannot be held to be a contract to sell merely because it is expressed to be so and also contains a stipulation for execution of a formal sale deed and registration thereof — On the basis of its contents it is a sale deed which requires to be registered) ** AIR 1954 All 195 (196) (It was held that the transaction in question was in reality a transaction of sale and not a hire purchase agreement) ** AIR 1945 Mad 407 (409) (Where a member of a joint Hindu family makes over his share in family properties to another member in consideration of certain sum transaction amounts to sale though it may be named a release) ** AIR 1930 Oudh 300 (303) 5 Luck 721 (Document called lease but on proper construction appearing to be sale — Court is not bound to hold it to be lease) ** AIR 1925 Oudh 714 (714) (Transfer miscalled a lease when in reality it was a sale) ** (1913) 18 Ind Cas 199 (200) (DB) (Mad) The transfer of his share by one coparcener of a joint Hindu family to another coparcener for consideration is a sale whether called a "sale" or a surrender.)

29. AIR 1958 Pat 193 (195) (Section 47, Registration Act does not create new title — It only affirms title created by sale deed) ** AIR 1953 Nag 167 (168) ILR (1952) Nag 644 (647) (DB) ** AIR 1938 Nag 253 (253) ILR (1939) Nag 652 (DB) ** AIR 1937 Nag 1 (3) ILR (1937) Nag 291 (DB).

[**See also** (1955) Madh BLJ (HCR) 828 (834) (Property of value of Rs 100 or more — Sale of — Price paid — Possession made over to buyer — Intention of parties clearly is to effect sale.)]

30. **AIR 1961 SC 1747 (1749) (Pr 8)** ** 1976 Tax LR 366 (368) 102 ITR 19 (Andh Pra) (Such relation back to the date of execution on the registration of document does not affect the rights of third parties.)

31. AIR 1944 Pat 3 (4) 22 Pat 306 (DB) ** 1864 Suth WR 62 (62) (DB)

[**But see** (1866) 5 Suth WR 248 (248) (DB) (Deed not delivered — Sale not complete — Submitted not correct)]

32. AIR 1951 Pat 454 (457) (No evidence to show that passing of title depended on payment of entire consideration — Title must be taken to have passed on the execution of sale deed itself and not postponed by the non-payment of part of the amount) ** 1864 Suth WR 222 (223) (DB) (Condition was that the vendee should withdraw the suits brought by him against the vendor.)

33. AIR 1950 All 632 (634) ILR (1953) 1 All 265 (DB) ** AIR 1947 All 110 (113) ILR (1947) All 321 (DB) (There is nothing in law to prevent the owner of property from transferring his title even if the property is in the actual possession of others) ** AIR 1945 Oudh 130 (132) 20 Luck 19 (DB) ** AIR 1932 All 685 (686) ILR 54 All 905 (Transfer for consideration of ownership of property in possession of third person is sale and is pre emptible) ** AIR 1927 All 361 (363) 49 All 488 (DB) (Per Sulaiman J)

[**See also** 1949 All LJ 566 (574, 575, 577) (DB) (B financing heirs of A to recover properties left by A and to become owner in lieu of his aid — It was held on construction of document that parties intended title to be conveyed without any further document)]

and irrespective of the delivery of possession to the vendee **(34)** Where the sale deed was duly registered, the fact of delivery of possession on date of execution of the sale deed was mentioned therein, and the vendor handed over symbolic possession and sought time to vacate the premises the sale became absolute and the title of the property passed to the vendee **(35)** On execution and registration of sale deed, the ownership and all interests in the property pass to the transferee unless a different intention is either expressed or necessarily implied Such intention has to be gathered by intrinsic evidence, namely, from the averments in the sale deed itself or same other attending circumstances, subject of course to S 92 of the Evidence Act **(36)** Where it is clear from the contents of the sale deed that the vendor had transferred her interest in the property sold and title had passed to the vendee, any subsequent action or omission viz cancellation of the sale deed will have no legal effect on the right title and interest of the purchaser Execution of subsequent sale deed in favour of third party will be of no consequence for the earlier vendee **(37)** Thus by mere cancellation of sale deed by another deed title which had already passed in favour of vendee would not revert to vendor until it was declared invalid by competent Court of civil jurisdiction **(38)** A sale deed can be taken in the names of two persons one of whom is a benamidar for a third person **(39)**

It is well accepted principle that shebaitship devolves like any other specific heritable property The personal proprietory interest which the shebait has got is ancillary to and is inseperable from his duties as an administrant of the deity and a manager of its temporalities The transfer of shebaitship would mean a delegation of duties of the transferor & it would contravene very policy of law.

Neither a temple nor the deities nor the shebait right can be transferred by sale for pecuniary consideration Such transfer by sale is void at its inception The property dedicated to the services of an idol is as a rule alienable But exceptions to this rule have been recognized in the interest of deity itself.**(40)**

6. Transfer of mortgage interest.

Before the year 1900 there was a difference of opinion as to whether the transfer of mortgagee's interest in immovable property was merely a transfer of a debt carrying with it by virtue of S 8 the security therefor or whether it was a sale within the meaning of this section or gift under S 123 **(1)** By the amending Act II of 1900 the Legislature excluded mortgage debts from the category of actionable claims and substituted a new chapter on actionable claims The object was obviously to

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[But see **(1909) 31 All 82 (91) (FB)** The observations of Stanley C J are couched in general terms — It is submitted that they cannot be taken as [illegible]

34. AIR 1957 Punj (38) (241) ** AIR 1956 Hyd [illegible] (116) ILR [illegible] 328 (DB) Non delivery of actual possession when there was standing [illegible] support of the fictitious nature of sale ** AIR 1950 [illegible] (663) (664) ILR [illegible] (DB) ** 1949 All LJ 566 (578), (Per Desai, J) ** (1886) 13 Cal 297 (299) (DB)

35. 1997 (2) Rajasthan LR 598 (604)

36. **AIR 1998 SC 3006 (3009) : 1998 AIR SCW 2860 : 1998 (7) SCC 498.** Mere non delivery of registration receipt by seller to purchaser would not [illegible] passing of title

37. 1997 AIHC 1751 (1756) : 1997 (2) BLJR 924

38. 2002 AIR Jhar HCR 363 (364) · 2002 AIHC 1777

39. 1951 All LJ 449 (449) (DB)

40. 1983 Jab LJ 248 (254, 255)

Section 54 — Note 6

1. (1901) 24 Mad 449 (463) (DB) (It is a transfer of immovable property [illegible] 8 Mad 454 (454, 455) (DB). (It is only a transfer of a debt)

treat mortgage debts as immovable proeperty transferable only in accordance with the provisions of chapters III, VI and VII (2) It has accordingly been held in the undermentioned cases(3) that a transfer of a mortgagee's interest for a price is a sale within the meaning of this section and must conform to its provisions The contrary view taken in the cases noted below(4) can no longer be taken as laying down the correct law.

Equity of redemption can form subject matter of 'sale' as defined and in manner laid down in section 54 and such a right can form subject matter of partition as well Division or partition of such a right need not be made by a registered instrument A joint family property which is subject to mortgage can be allotted in oral partition to a coparcener and it is not necessary that such a right to redeem should be made only by a registered instrument, particularly when such oral partition is not going to interfere with the scheme of mortgage.(5)

7. Creation of easements.

This section contemplates the existence of a *subsisting* right of ownership in immovable property and provides for the transfer of such right It cannot apply to the *creation* of a right The creation of a right of easement by an owner of property in favour of another is, therefore, not a transfer of property and is not governed by this section (1) In *Sital Chandra v. Allen J. Delannes* (2) it was held by the Calcutta High Court that the Act was not intended at all to deal with the creation of easement and that consequently the grant or imposition of an easement whether as a gift or for consideration need not be in writing under S 123 or under this section

It will be noted however that where an easement right is created in writing it must under the provisions of the Registration Act be registered if the value of the right is more than one hundred rupees.(3)

There was a well in western portion of the land of the vendor He sold eastern portion to defendant The sale deed was silent about the use of well by defendant Only routine and general averments made in the sale deed that all easementary rights like pathways, irrigation Such averments could not be taken as conferring right upon the defendant vendee to use the well irrigation of his land.(4)

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2. AIR 1921 Mad 137 (138) . 44 Mad 196 (DB).

3. AIR 1922 Mad 344 (345, 346) 44 Mad 965 (DB) ** AIR 1921 Mad 681 (681) (DB) ** AIR 1921 Mad 277 (277) (DB) (AIR 1921 Mad 137 Applied) ** (1910) 5 Ind Cas 852 (852) (DB) (Mad) (Assignment of hypothecation bond for Rs 176 Assignment requires registration to operate as a transfer to the hypothecation) ** AIR 1918 Cal 411 (413) (DB)

   [See AIR 1939 Mad 165 (165 166) (DB) (Mortgagee becoming insolvent His claim sold by Official Receiver by auction Before registration of deed purchaser suing on mortgage — **Held**, purchaser was not entitled to sue as assignee of mortgage right in absence of registered deed.)

   [See also AIR 1916 Mad 480 (481) (Assumed.)]

4. AIR 1919 Mad 547 (549) (DB) ** AIR 1914 Mad 353 (353, 354).

   Also see S 8, Note 17

5. AIR 1980 Pat 254 (257) : 1981 BLJR 134 (DB)

Section 54 — Note 7

1. AIR 1929 Mad 79 (80) ** AIR 1917 Low Bur 110 (111) 9 Low Bur Rul 24 (31 All 612 followed) ** AIR 1926 Mad 543 (544) ** (1909) 31 All 612 (622) (DB)

   [See also AIR 1944 Pat 261 (266) 23 Pat 115 (DB) Grant of a right to dig mica — Owner not excluding himself from working the mine — **Held** grant was not a transfer of property but in the nature of an easement)]

2. AIR 1917 Cal 681 (686) (DB).

3. AIR 1917 Cal 681 (686) (DB)

4. 2001 (3) Andh LD 367 (371)

As to the transferability of an *existing* right of easement apart from the dominant heritage See Note 9 on section 6

8. Mutation proceedings.

Mutation does not effect a transfer of property (1) Therefore mutation will not in the absence of a registered instrument, effect a transfer of rights in immovable property (2) As observed by the Privy Council in *Nirman Singh v Lal Rudra* (3) mutation proceedings are not judicial proceedings in which the title to and the proprietary rights in immovable property are determined

8-A. Sale or agreement to sell.

There is clear distinction between "sale" and "agreement to sell" both under common law and statute law. A sale can be constituted where there has been an agreement express or implied, relating to goods, to be completed by passing of title therein A contract to sale may be absolute or conditional.(1)

9. Sale or mortgage.

The question whether a transaction is a sale or a mortgage will depend as seen in Note 5 on the question whether full proprietary rights were intended to be transferred thereby or whether only an interest in immovable property was intended to be transferred by way of security The Court can take into consideration the oral evidence adduced to find out whether the [illegible] was never intended to operate as a sale deed but was intended to be a deed of [illegible] as alleged in the plaint S 92 of the Evidence Act is not a bar to admission of such oral evidence (1)

Mortgage

Where the recitals in a document established the relationship of creditor and debtor between the parties and that the amount received in cash was received by way of loan by the debtor the consideration having been received a loan rather than in lieu of a price paid as referred to in S 54 the transaction was held to be a mortgage by conditional sale and not a sale with condition to repurchase.(2)

In the instant case it was found that the sale deed in reality is not an out and out sale but an anomalous mortgage There was an agreement to resale (3)

Sale deed in question was not acted upon no action was taken to mutate property in name of purchaser original owner continuing to pay taxes at market value of property was much more than the consideration mentioned in the sale deed Held that the document was mortgage deed for security of amount borrowed by the executant.(4)

Section 54 — Note 8

1. 1980 Pun LJ 272 1980 Land LR 408 (421) (DB) (Title in property passes as soon as transfer is effected entries in roznamcha or date of sanction of mutation is not therefore relevant for determining date of transfer) ** AIR 1929 All 549 (550) (DB)
2. AIR 1953 Bom 145 (146) ILR (1953) Bom 253 (DB) ** AIR 1916 [illegible] 29 (30) ILR 38 [illegible] 411 (DB) ** AIR 1927 All 338 (339) ** (1908) 11 Oudh Cas 301 (304 305) ** (1912) 13 Ind Cas 436 (438) (DB) (All) (Statement before mutation officer that the transferee's name may be recorded, not sufficient to effect transfer)
3. AIR 1926 PC 100 (103) : 53 Ind App 220.

Section 54 — Note 8-A

1. AIR 1999 Guj 240 (242) : 1999 (1) Guj LH 957.

Section 54 — Note 9

1. AIR 1984 Orissa 62 (63) : (1984) 1 Orissa LR 135
2. AIR 1984 All 219 (222) : 1984 All CJ 185
3. AIR 1997 Andh Pra 53 (68) : 1996 (1) Andh WR 655.
4. AIR 1999 Bom 260 (265) : 1999 (2) Mah LJ 569

Though sale deed of plot was executed by the plaintiff the attending circumstance were that possession of plot remained with vendor, he continued to pay taxes, no attempt was made to mutate it in favour of vendee, the consideration was much less than the market price, the sale-deed was not acted upon Thus the document was a mortgage deed (5)

Where the vendee is a regular money lender, the premises are located in prime locality but consideration is much below the market price, the mutation was not done, amount of rent represented interest and vendor continued to be in possession, the transaction was mortgage and not outright sale.(6)

Where a property is alleged to have been sold to a money lender at a price less than market price, the vendor continued to remain in possession, same property was agreed to be reconveyed the transaction was one of mortgage and not sale.(7)

In the instant case it was found that the sale deed was in reality executed as a supplement to the anomalous mortgage It was ageed that the loan would carry interest Possession of suit property was given to mortgagee, thus it was usufructuary mortgage Period of 5 years was agreed, on payment of balance property would be reconveyed to mortgagor Thus it was not out and out sale but was usufructuary mortgage The mortgagee was therefore entitled to redeem mortgage on fulfilment of its terms.(8)

Out and out sale

Where the recitals in a deed mentioned that the vendor was in need of money to discharge hand loans and therefore he was conveying property by way of absolute sale and stated before Registrar that possession of property is being handed over it is an out and out sale and not mortgage.(9)

For a full discussion see Notes on S. 58

9-A. Sale or reconveyance.

An agreement to sell is a concession which is granted by a purchaser to the seller for repurchase of the property in case he fulfills his part assigned in the agreement within the time granted by the purchaser (1)

Where after the sale deed was executed, the deed of reconveyance was executed, the prior sale deed did not contain stipulation of reconveyance, since it was accordingly so advised by the advocate and the reconveyance deed was supported by letter written by seller to purchaser it was held that the deed of reconveyance was genuine.(2)

10. Sale or exchange.

In instant case first party agreed to transfer 12 acres in favour of second party the second

5. AIR 1999 Bom 260 (265) : 1999 (2) Mah LJ 569.
6. 1998 (6) Andh LD 615 (621)
7. 1999 AIHC 2126 (2131) : 1999 (1) Andh LT 199
8. AIR 1997 Andh Pra 53 (67) 1996 (1) Andh VVR 655 (AIR 1971 Orissa 58 **Dissented from.**)
9. AIR 1996 Kant 51 (54) ** 2002 AIR Jhar HCR 943 (946) 2002 (2) JCA 150 (Finding by trial Court that sale deed was executed by defendant by practising fraud upon plaintiff who wanted to execuse mortgage deed - Reversed by appellant Court and held that sale deed was genuine by giving better reasons than trial Court while repealing its finding — No interference.)

Section 54 — Note 9-A

1. AIR 1984 All 369 (371) : 1984 All CJ 517.
2. AIR 1995 SC 1607 (1611) : 1995 AIR SCW 2528 : (1995) 4 SCC 15.

party agreed to transfer 96 cents in favour of the first party further it was stipulated that the documents can be executed in favour of all persons nominated by the parties Held that it contemplated sale deeds by both parties and not exchange (1)

Also See Notes on S 118.

10A. Sale or gift.

See S. 122. Note 16 and the undermentioned cases.(1)

11. Sale or lease.

The question whether a transaction is a sale or a lease also depends upon the question whether there has been a transfer of full proprietary rights or only a part of the transferor's interests (1) The question must be decided on the terms of the document and the intention of the parties gathered from the surrounding circumstances (2) Where there is a recurring liability to pay *rent* the transaction cannot be regarded as a sale (3) Where *rent* however small is reserved to be paid to the transferor

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Section 54 — Note 10

1. AIR 2000 Ker 408 (414) : ILR (2000) 3 Ker 517

Section 54 — Note 10-A

1. AIR 1959 Punj 117 (118) : ILR (1959) Punj 626 (DB) (Where out of regard for the donees and their father, the donor gets the land mutated in favour of the donees who in return maintain him and look after him, such a transaction cannot be described to be a sale.) ** AIR 1947 Bom 280 (282, 283) : ILR (1958) Bom 667 (DB) (There is an essential difference between a sale and a gift in the case of a sale [illegible] the case of a gift there is no consideration proceeding from the donee to the donor except what one may call natural love and affection as constituting the consideration for the transaction.) ** AIR 1955 Pat 458 (462, 463) : 34 Pat 440 (DB) (Donee in whose favour a transfer is made for "obedience and submission" cannot be called in law a purchaser.) ** AIR 1954 Pat 280 (283) (DB) (Whatever might be the original motive behind a deed which purports to be a deed of transfer and consideration has been paid for it it must be treated as an effective deed of transfer and cannot be regarded as a deed of gift.) ** AIR 1954 Pat 116 (117) (Transfer of property by Christian mission to poor Christians rendering service — Property worth Rs 6000 shown as sold for Rs 100 — No money paid by vendees as price — **Held**, transaction was a gift and not a sale.) ** AIR 1952 Hyd (S) 51 : ILR (1952) Hyd 7 (DB) (House given to bride in lieu of dower and not in consideration of her relinquishment of 'Mehar' — Transaction being unilateral act is only a gift and not a sale.)

Section 54 — Note 11

1. AIR 1965 Orissa 121 (122) ** AIR 1949 Nag 389 (391) : ILR (1949) Nag 599 (DB) (Where a proprietor holding sir rights parts with [illegible] ownership outright and the parties agree that a specified rent shall be paid in respect of those fields then whatever the parties may choose to call the transaction in law the transfer amounts to a lease.) ** AIR 1943 Oudh 125 (127, 128) : 18 Luck 303 (Under proprietor executing perpetual lease — Contention that it was a sale deed — **Held**, an under proprietor can only transfer his under proprietary rights by sale under which he reserves no interest for himself he cannot transfer them and at same time reserve some interest for himself — If an under proprietor has not transferred all his interest in the land he has transferred only an interest by way of lease.) ** AIR 1942 Oudh 151 (154) : 17 Luck 701

See also Note 5

2. AIR 1965 Orissa 121 (122) ** AIR 1952 Nag 45 (47) : ILR (1949) Nag 699 (DB) (Auction sale by co operative bank — Under conditions of sale title of property was not to pass unless sale deed was executed — Auction purchaser taking only lease of property purchased instead of a sale deed — Lease unauthorised — Transaction held not sufficient to give rise to right of pre-emption — There was no valid lease.) ** AIR 1941 Oudh 2 (14)

3. AIR 1965 Orissa 121 (122) (Reservation of right to realise rent right to increase rent.) ** AIR 1927 Oudh 161 (162) (DB)

the transaction can only be a lease even though it is a perpetual one and extensive rights are conferred on the transferee (4) However, a deed purporting to be a perpetual lease, but transferring all the proprietary rights of the transferor in consideration of a substantial sum of money would be a sale even though a small amount *called* rent is nominally reserved to be payable to the so called lessor. The undermentioned cases(5) would fall under this principle The so-called rent will not be really rent in the legal sense of the term in such cases Where a purchaser under an agreement of sale has been given a right to collect and carry away the subject matter of the agreement in consideration of the purchase price, the agreement relates to a sale and not to a lease (6)

See also S 105, Note 42 As to the distinction between a sale of coal land and a mining lease thereof, see the undermentioned case.(7)

Where an agreement between landlord and tenant to sell the tenanted premises to the tenant does not indicate that the tenant was allowed to continue in possession pursuant to the agreement

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4. (1949) 7 J & K LR 224 (227) (Land transferred by deed styled Bianama Mauras — Transferee called occupancy tenant in the deed and granted heritable and transferable rights — Transferor barred from evicting transferee under any circumstances — Transferee made liable for annual rent equivalent to land revenue and two annas in the rupee — It was held that transaction was lease and not sale) ** AIR 1936 Cal 727 (734) (DB) (Where a person grants a lease of his property for a very long term, for example of four hundred and ninety nine years the lessor still retains a right of reversion against the lessee — There is always a distinction between a conveyance in fee simple and a lease in perpetuity) ** AIR 1924 Oudh 203 (205) 27 Oudh Cas 167 (Where the transfer of under-proprietary interest is made by the superior proprietor in the form of a lease, but the rent reserved for payment to the superior proprietor is equal to or slightly more than the revenue such a transfer is held to be a sale giving rise to a right of pre emption) ** AIR 1924 All 60 (61) (DB) (The relation of the premium paid to the value of the property and smallness of the rent would not in themselves be sufficient to prove that the transaction was a sale and not a lease) ** AIR 1923 All 560 (561) ** AIR 1922 Oudh 229 (231) (The test applied to determine the real nature of a transaction is whether any rent was reserved to the grantor over and above the Government revenue which he himself had to pay on the land This applies only to deeds executed by the superior proprietor whereby an under-proprietary right is created in the grantee) ** AIR 1922 Oudh 81 (82) 24 Oudh Cas 310 ** AIR 1914 Oudh 360 (360) 17 Oudh Cas 299 (DB) (A grant of under proprietary rights by means of leases giving heritable and transferable rights in lieu of a premium taken in advance, and an annual rent reserved thereby cannot be treated as a sale) ** 1907 Pun Re No 136 p 652 (655) (DB) ** (1876) 25 Suth WR 43 (45) (DB) ** (1867) 8 Suth WR 106 (107) (DB) ** (1912) 14 Ind Cas 717 (718) (Oudh).

[See AIR 1924 Oudh 426 (428) 27 Oudh Cas 243 (DB) (On facts transaction held to be sale.) ** AIR 1927 Pat 254 (255) : 6 Pat 358 (DB).]

5. **AIR 1940 Pat 633 (641, 642) : 20 Pat 13 (SB) ** AIR 1935 Oudh 217 (226) : 10 Luck 392 (FB)** AIR 1941 Oudh 12 (13) ** AIR 1937 Oudh 492 (493) ** AIR 1933 Oudh 329 (331) ** AIR 1930 Oudh 300 (301) 5 Luck 721 ** AIR 1925 Oudh 714 (714) ** AIR 1925 Oudh 624 (625) 29 Oudh Cas 90 ** AIR 1914 Lah 290 (292) (DB) ** (1911) 33 All 104 (106) (DB).

[See also AIR 1938 Oudh 17 (18) 13 Luck 662 (Sale of property for cash consideration — Stipulation in sale deed for payment of rent to vendor — Such stipulation is illegal — Deed cannot be construed as perpetual lease)]

6. **AIR 1971 All 430 (431, 432) : 1971 All LJ 640 (FB).**

7. **AIR 1940 Pat 633 (641, 642) . 20 Pat 13 (SB).** (One point of distinction is that while in a mining lease lessor has right of reversion, there is no such right in case of sale Another distinction is that while in sale the consideration is price, in mining lease there is the price otherwise called premium and the royalty which at least outwardly bears closer resemblance to rent than price.)

of sale the character of possession by tenant does not change and he continues to be a tenant (8)

In the instant case the parties inter se did agree to exchange the possession of land in consideration of the amount to be paid by the plaintiff to the defendants. The documentary evidence led to no other transaction except the one that the transaction was of the nature of leasehold rights to be created in respect of plots and not that of outright sale (9)

11-A. Sale of release.

Where a member of a joint Hindu family makes over his share in the family properties to another member in consideration of a certain sum, the transaction amounts to a sale though it may be named a release (1) Relinquishment cannot be inferred on basis of oral evidence and in absence of any documentary evidence in view of the provisions of S. 54 of the T.P. Act and S. 17 Proviso of the Registration Act (2) Where a coparcener has relinquished his interest in joint family in favour of another coparcener for a sum mentioned in the deed, the transaction is supported by consideration and thus though styled as release deed it was really a sale deed (3) As to the distinction between a sale and a relinquishment, see the undermentioned cases (4)

11AA. Reconveyance.

The landowner on receipt of money gave possession of land to opposite party. The agreement between them stipulated that the opposite party was to execute reconveyance on payment of the amount by landowner within stipulated period. There was no stipulation for payment of interest. Held that the transaction amounted to sale with condition to repurchase and not mortgage by conditional sale.(1)

It is not general principle of law that every agreement of sale by which the original owner agrees to buy back the property is a privilege or concession granted to such owner. Whether such an agreement is an option to purchase or an "ordinary" agreement would depend on the interpretation of its provision. The mere fact that an agreement for sale described as a reconveyance does not by itself mean that it is an option to repurchase nor does it in any way alter the substance of the

8. (1982) 1 Kant LJ 284 (287)
9. AIR 1996 Him Pra 94 (96) : 1996 (2) Ren CR 534

Section 54 — Note 11-A

1. AIR 1945 Mad 407 (409)
2. (1982) 95 Mad LW 654 (657)
3. AIR 1985 (NOC) 57 : (1984) 97 Mad LW 441
4. AIR 1983 Cal 76 (83) : (1982) 2 Cal HN 445 (DB) (A Hindu minor's property was sold and on attaining majority he executed deed described as release deed in respect of the property. It was held that the deed was not conveyance but was only ratification of earlier transfer. It was therefore ineffective as the original transfer being void it could not be validated by ratification.) ** (1982) 95 Mad LW 654 (656) : ILR (1982) 3 Mad 363 ** AIR 1968 Pat 274 (276) (Para 4) (A registered instrument styled as release deed relinquishing right, title and interest of the executant in any property in favour of the releasee for valuable consideration may operate as a conveyance if the document discloses intention to effect a transfer — AIR 1966 SC 337 (Foll.) ** AIR 1954 Bom 95 (99) : ILR (1953) Bom 281 (DB) (A sale or a transfer presupposes the existence of the property which is sold or transferred. It presupposes the transfer from one person to another of the right in property. On the other hand, relinquishment means the extinction of a right or the destruction of a property, and if the property is destroyed or the right is extinguished there is nothing left to transfer or to sell.)

Section 54 — Note 11-AA

1. AIR 2001 Bom 369 (372) : 2001 (3) Bom LR 436

deed No logical distinction can be drawn between an agreement to repurchase and an ordinary agreement of purchase.(2)

Suit for declaration that sale deed was null and void would not be maintainable when it was definite case of plaintiff that there was an agreement for reconveyance of property on payment of consideration Suit in such a case has to be one for specific performance (3) In the following case (4) the Karnataka High Court indicated the tests which can be employed to distinguish a mortgage by conditional sale with "a bona fide sale with a clause to re-purchase"

11-B. Grant of mineral rights.

A grant of a partial and limited right in immovable property such as right to dig minerals where the grantor does not exclude himself from working the mines has been held not to be a transfer of property.(1)

12. "In exchange for a price."

A transfer of ownership will be a sale if the consideration for such transfer is a "price" paid or promised or part paid and part-promised by the transferee Price is thus an essential ingredient in all sales(1) and in the absence thereof the transfer is not a sale (2) No transaction of sale can be made without payment of price Price means monetary consideration The payment of money consideration is necesary ingredient of sale.(3)

The expression "on terms settled between the parties" in definition of contract for sale contemplates the basic ingredient and element that for transferring the ownership of the property by the vendor the price must be settled Until this is done the terms of the contract for sale cannot be said to be settled between the parties.(4)

An adulterous intercourse with a married woman cannot be a substitute for price paid or promised nor can it be a valid consideration Transaction for sale in consideration for such intercourse is void for want of consideration.(5)

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2. AIR 2001 SC 2446 (2449, 2450) : 2001 AIR SCW 2731 : 2001 (7) SCC 617 (1996 (2) Mad LJ 145, Reversed.)
3. 2002 AIHC 1202 (1204) : ILR (2001) 3 Ker 364
4. 2001 AIR Kant HCR 26, 3 (2617 2618 2001 AIHC 4187 ILR (2001) Kant 4529

Section 54 — Note 11-B

1. AIR 1944 Pat 261 (266) : 23 Pat 115 (DB)

Section 54 — Note 12

1. AIR 1930 Oudh 481 (495) 6 Luck 282 (DB) ** AIR 1927 Cal 889 (893) 55 Cal 285 (DB) ** (1908) 10 Bom LR 617 (621) (DB) ** (1900) 14 CPLR 117 (119) ** (1815) 13 RR 234 (235) 19 Ves 429 1 Ves and B 68 Gourlay v Duke of Somerset ** (1807) 33 ER 574 (577) : 14 Ves 400 : 9 RR 307, Milnes v. Grey.

   [See also AIR 1968 SC 676 (678). (Income-tax Act (1922) S 10(2)(vii) — "Sale" Expression is used in its ordinary meaning - Sale is transfer of property for a price — Adjustment of rights of partners in dissolved firm — Not a transfer, nor is it for a price) ** (1962) 40 MysLJ 675 (676) (A sold property to B Part of price paid Payment for balance promised - Suit by A for recovery of balance held to be suit for recovery of money due on contract — Hence suit fell down under S 3(ii) of Mysore Agriculturists Relief Act (18 of 1928).]
2. AIR 1974 Mad 30 (32) (1972) 2 Mad LJ 406 ** (1908) 4 Low Bur Rul 369 (371)
3. 1997 (1) All WC 175 (177).
4. AIR 1976 Pat 395 (398) ** (1981) 2 Malayan LJ 79 (In the instant case it was held that as there is no monetary consideration it will not amount to sale, but exchange, and therefore, suit for specific performance will not be maintainable)
5. AIR 1978 Andh Pra 1 (2) : 1977 Andh LT 438

The word "price" means money only **(6)** It need not, however, be handed over in current coin at the time of the transfer but will include money which might be already due or which might be payable in future **(7)** In undermentioned case**(8)** it is held that though S 54 defining 'sale' speaks only of price as a consideration the same need not be solely money consideration There can be other consideration by way of reciprocal promises between the parties Thus a transfer of ownership in consideration of a dower debt due to the vendee would be an exchange of property for a price and would be a sale **(9)** Similarly, a transfer in consideration of a decree debt payable by the ven-

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6. **AIR 1968 SC 200 (202).** (Word 'price" in S 54 must be construed in same sense in which it is used in S 4 read with S 2(10) Sale of Goods Act ** **AIR 1922 Mad 311 (313) : 45 Mad 612 (FB)** ** AIR 1963 Andh Pra 177 (183) ILR (1963) Andh Pra 991 (DB) (False recital of cash consideration — Real consideration being past cohabitation — Documents are not sales but gifts) ** AIR 1949 All 204 (206) ILR (1949) All 408 (DB) (A transfer which is not in lieu exclusively of cash price or such price as can be definitely ascertained is not a sale) ** AIR 1945 Mad 407 (408) ** AIR 1[illegible] Mad [illegible] 54 Mad 1[illegible] (DB) ** AIR 1930 Oudh 48 (495) 6 Luck 282 (DB) ** AIR 1928 Al[illegible] 205 (DB) ** AIR 1927 Oudh 204 (205) 2 Luck 575 (DB) ** AIR 1926 Oudh 186 (189) 29 Oudh Cas 108 : 1 Luck 83 (DB) ** AIR 1921 Oudh 248 (249) (DB)

   [**See also** AIR 1933 Bom 209 (211 212) (DB) (Past cohabitation is not valuable consideration at all) ** **AIR 1937 Mad 882 (887) : ILR (1937) Mad 638 (FB)** (Obiter — In order of reference)

   Also see S 105, Note 58 and S 118, Note 2

7. **AIR 1935 PC 73 (78).** (Sale in consideration of release of debt) ** ILR (1959) Bom 35 (37) ** **AIR 1922 Mad 311 (313) : 45 Mad 612 (FB)** ** AIR 1959 Nag [illegible] (Consideration made conditional on the success of the suit — The transaction is a real sale)

   [**See also** AIR 1960 Orissa 16 (18) ILR (1959) Cut 250 (DB) (It is not wide enough to include any kind of valuable consideration such as forbearance to contest a suit AIR 1922 Mad 311 (FB) and AIR 1937 Mad 882 (FB) **Foll.**) ** AIR 1948 Pat 247 (249) (DB) (Advance by one brother to another — Sale in lieu of such loan cannot be presumed to be benami — Benami)]

8. **ILR (1988) Kant 1307 (1321)**

9. **AIR 1951 All 86 (89, 90) : ILR (1952) 1 All 477 (FB)** ** AIR 1960 Orissa 16 (18) ILR (1959) Cut 250 (DB) ** AIR 1939 All 348 (363) (DB) ** AIR 1932 All 596 (597) 54 All 22 (DB) (AIR 1926 Oudh 186 and AIR 1927 Oudh 204 **Dissented from**) ** AIR 1931 All 237 (237) ** AIR 1930 All 434 (435) (DB) (Execution of sale deed in satisfaction of contemplated dower is for consideration) ** AIR 1928 Mad 430 (433) (DB) ** AIR 1925 Oudh 407 (407) 28 Oudh Cas 227 ** AIR 1921 Nag 84 (85) 17 Nag LR [illegible] ** AIR 1918 Cal 113 (114) (DB) ** AIR 1917 Pat 18 (24) (DB) (Transfer to wife in lieu of dower amounts to sale and not to gift) ** AIR 1915 Lah 251 (253) (DB) (Gift by husband of landed property in lieu of dower in favour of his wife is tantamount to sale) ** (1886) 8 All 178 (181) (DB) ** 1882 Pun Re No 87 p 254 (255) (DB) ** 1882 SA 165 (169) (DB) ** (1836) 162 Ind Cas 881 (88) (Nag) ** (1831) 133 Ind Cas 901 (902) (DB) (All) ** (1911) 14 Oudh Cas 214 (216) ** (1911) 12 Ind Cas 457 (457) (DB) (Misc) (Transfer for a term in consideration of dower must be regarded as sale.)

   [**See** AIR 1952 Hyd 3 (5) ILR (1952) Hyd 7 (DB) (Where however property is given in lieu of dower and not in consideration of the bride's relinquishment of the dower debt the transaction being only a unilateral transaction is a gift and not a sale)]

   [**See also** AIR 1949 Pat 237 (240) 26 Pat 561 (DB) (Oral transfer of land by Muhammadan to wife in lieu of transfer — Transfer is sale and not gift — Transfer is therefore invalid under S 54 for want of registered deed) ** (1878) 2 All 854 (856) (DB) (Gift by a person labouring under a fatal disease made in lieu of dower is really of the nature of sale)]

   [**But see** AIR 1927 Oudh 204 (206) 2 Luck 575 (DB) (Where consideration for transfer is

dor(**10**) or in consideration of amounts which had been advanced by the transferee to the transferor by way of *takkavi* loans(**11**) will be a sale Even a *barred debt* would be a good consideration for a sale (**12**) Again, a transfer in consideration of *specified* amounts to be spent by the vendee on the vendor's behalf in litigation would also be a sale It is necessary however, that the amount should in order to constitute "price" be an *ascertained* sum of money or be capable of being ascertained at the time of the transfer,(**13**) though it is not necessary that the contract should in the first instance *determine* the price It may appoint a way of determining it or it may stipulate for a fair price (**14**) In the former case the price must be ascertained only in the way appointed and if it is not so ascertained the Court cannot, in the

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release from dower-debt, transaction is not sale) ** AIR 1926 Oudh 186 (189) 1 Luck 83 29 Oudh Cas 108 (DB) (Transfer by a Muhamedan to his wife in lieu of dower debt is not a sale as such a debt is a thing under S 118, T P Act) ** 1902 Pun Re No 86, p 352 (356) : 1903 Pun LR No. 4 (DB) (Obiter.)]

10. AIR 1937 Mad 714 (715) (DB).

11. AIR 1924 Pat 392 (395, 396) (DB)

12. (1913) 21 Ind Cas 69 (72) (DB) (Oudh).

13. AIR 1951 All 86 (89) ILR (1952) 1 All 477 (DB) (Outstanding debts) ** AIR 1945 Oudh 130 (132) 20 Luck 19 (DB) (Consideration clearly stated in sale deed Part of it paid down and part left with vendee for conducting suit — There is nothing indefinite about consideration) ** AIR 1949 All 204 (207) ILR (1949) All 409 (DB) (A transfer in lieu of future kharch-i pandan allowance is not a sale within the meaning of S 54 ** AIR 1927 All 361 (364) 49 All 488 (DB) (Per Sulaiman, J A sale which is not in lieu of exclusively of cash price or such price as can be definitely ascertained is not capable of pre-emption) ** AIR 1926 Oudh 196 (197) (DB) ** AIR 1926 Oudh 368 (368) ** AIR 1914 Cal 335 (336) 41 Cal 148 (DB) (There was an agreement between B on the one side, and A on the other, that the former should sell and the latter buy the property — It was stipulated that in order to ascertain the price B should give an account of the receipts and expenditure with respect to the property that A was to obtain a share of the profits after the account was settled — It was held that the transaction was not a sale) ** (1901) 14 CPLR 117 (119) (Where price is neither ascertained nor ascertainable the contract is void for incompleteness)

[**See also** AIR 1945 Oudh 161 (164) 19 Luck 595 (DB) (Vendor selling part of his share in villages for Rs 700 Rs 25 paid to vendor Balance kept by vendee for launching partition proceedings for separating vendor's and vendee's shares — Balance to represent costs of partition — Whether actual partition costs were more or less, deposit of Rs 675 was to absolve vendor of further responsibility — Transaction held out and out sale) ** (1882) 5 All 65 (69) (DB) (Amount of dower not ascertained — Property assigned to wife in lieu of dower — Transaction is not sale) ** AIR 1923 Nag 330 (331) 20 Nag LR 126 (Transfer in consideration of dower, amount of which is not ascertained, is not sale) ** AIR 1928 Mad 430 (433) (DB) (Do.)

[**But see** AIR 1955 All 393 (395) (DB) (The mere fact that consideration is unascertainable on the date of the sale will not make the transaction of sale an agreement to sell AIR 1947 All 110 and AIR 1945 Oudh 161, Ref. on) ** AIR 1947 All 110 (112) ILR (1947) All 321 (DB) (Transfer of property in consideration of vendee undertaking to fight out litigation and on success to pay half its value **Held** that transfer was valid as a sale — The law does not require that the consideration should be immediately ascertainable at the time of the transfer It is sufficient that it should be ascertainable at the time when the payment is to be made) ** AIR 1921 Oudh 248 (249) (DB) (Transfer for amounts to be spent in litigation — It was held that if the amount as capable of ascertainment not at the time of the deed, but later on it would be a sale — Submitted wrong.)]

14. AIR 1927 Cal 889 (893) 55 Cal 285 (DB). (Fry on Specific Performance, 6th Editions, Ss 353, 354, Referred to.)

absence of special circumstances, interfere by having the price ascertained in a different mode **(15)** In the latter case, the Court can interfere and determine what is a fair price **(16)** A transfer in consideration of the transferee defraying the costs of a litigation, the amount of such costs not being ascertainable at the date of the transfer, is not a transfer for a 'price' and is therefore, not a sale **(17)** A transfer in lieu of dower, the amount thereof not having been ascertained or fixed, is not a sale **(18)** A transfer in consideration of past and future services is not for any 'price' and is not a sale **(19)** So also is a transfer in consideration of the vendee clearing other land of the vendor or sinking well therein **(20)** It has been held in the undermentioned cases**(21)** that if the past or future services in consideration of which a transfer is made are capable of a monetary valuation, the transfer would be sale within the meaning of the Oudh Laws Act or for purposes of Muhammadan law

A transfer of property for a consideration consisting partly of a sum of money and partly of other things cannot be said to be a transfer "for a price" and is therefore, not a sale but an exchange **(22)** Thus, a transfer in consideration of a sum of money and a forbearance on the part of the vendee to set aside a Court sale is not a sale.**(23)** But the mere fact that stipulations are made in the deed of transfer does not render the transaction other than a sale if such stipulations do not constitute the consideration for the transfer.**(24)** 'There is hardly any instrument of sale ' said their Lordships of the Privy Council in *Jagannatha Rao Guru v. Surya Rao Bahadur* **(25)**

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15. (1901) 14 CPLR 117 (119, 120) ** (1853) 43 ER (10, 14) 3 Deg M & G 24 22 LJ Ch 897 : 1 WR Eng 134 · 22 LT (OS) 285 · 98 RR 16, Morgan v Milman

16. (1901) 14 CPLR 117 (119) ** (1853) 43 ER (10, 14) 3 Deg M & G 24 22 LJ Ch 897 1 WR Eng 134 : 22 LT (OS) 285 : 98 RR 16, Morgan v. Milman.

17. AIR 1956 All 632 (637, 638) ILR (1953) 1 All 265 (DB) (Sale in consideration of vendee filing suit at his own expense and recovering possession of property — Suit compromised by payment of cash to defendant — Transaction is not a sale and at any rate not a pre emptible sale because consideration for sale is expenses not ascertained and labour the value of which is incapable of ascertainment) ** AIR 1926 Oudh 196 197 (DB) ** AIR 1926 Oudh 368 (368)

[But see AIR 1955 All 393 (395) (DB) (Mere fact that the consideration is unascertainable on the date of sale will not make the transaction of sale which on face of it is completed sale, an agreement to sell)]

18. AIR 1923 Nag 330 (331) 20 Nag LR 126 ** (1882) 5 All 65 69) (DB)

19. (1910) 34 Bom 287 (290) (DB).

20. AIR 1923 Lah 70 (70) (AIR 1921 Lah 82 Foll) ** AIR 1921 Lah 82 (83) 2 Lah 199 (DB).

21. AIR 1926 Oudh 474 (475) (Where a gift is made by a Muhammadan in lieu of something which has a monetary value the transaction may be considered by way of sale and in such a case services of a professional character rendered by the donee to the donor may be considered as a consideration of monetary value) ** 1903 Pun Re No 2, p 3 8)

22. See Notes on Section 118.

23. AIR 1931 Mad 140 (143) · 54 Mad 163 (DB) (Nor is it an exchange)

24. AIR 1936 PC 204 (206) , 63 Ind App 304 ** AIR 1942 All 71 (73) 11 R (1942) All 169 (FB). (Sale in lieu of cash price plus expenses of suit to be brought by vendee to recover possession of property sold — The latter expenses were not for the benefit of the vendor and did not constitute consideration) ** 1981 All LJ 1239 (1243) (Where the parties had decided to transfer their rights in the respective plots situate in two villages for the sake of convenience it would constitute transfer by exchange Mere mentioning the sale consideration in the sale deed would not necessarily mean that the transaction was not one of exchange but was of sale) ** AIR 1945 Oudh 130 (133) 20 Luck 19 (DB) (Document consisting of sale-deed for Rs 1500 followed by distinct but connected covenants — Nature of sale-deed not altered. AIR 1937 Mad 714, Foll) ** AIR 1937 Mad 714 (715) (DB (AIR 1936 PC 204 Foll) ** (1909) 4 Ind Cas 466 (466) DB) Cal) (Transfer of immovable

"which does not contain some stipulations by the parties, and if the addition of a covenant by the transferees would change its real character, it would be difficult to find a transaction which could be held to be a sale. For example, a covenant by a purchaser giving the vendor a right of pre-emption does not convert the sale into some other transfer."

A who was appointed by the Court as the guardian of a minor drew out monies belonging to the minor, after executing a security bond in favour of the Court. The guardian failed to account for the monies so drawn and the Court assigned the bond to the minor on his attaining majority for the purpose of its being enforced against A. It was held that the Court was not under any liability to pay to the minor the amount drawn out by his guardian, that the assignment was therefore not in lieu of any such liability and that the transaction was consequently not a sale.(26)

Earnest money — Earnest money paid in a contract for sale becomes part of the purchase-money when the transaction goes forward.(27)

Earnest money is the proof of bona fides of the vendee and on failure of the transaction due to vendee's fault it is to be forfeited. Where the sale does not materialise it does not become a part of the price.(28)

Where it is settled between the parties that on failure of execution of sale deed by seller the buyer is entitled to claim back the earnest money paid at the time of agreement of sale and the promissory note is executed to that effect, it cannot be said that no consideration was paid for promissory note and agreement is not invalid for want of consideration (29)

Authority to "sell" — Scope — As sale is the transfer of ownership in exchange for a price, an authority by A to B to *sell* A's property includes an authority to receive the price (30)

Transfer of ownership for consideration other than 'price' — Validity. — A transfer of ownership for consideration need not necessarily be a transfer for a 'price'. The consideration may take any form and need not be necessarily *money* paid or promised. In other words, a transfer of ownership for a consideration other than money is quite valid (31) Where there is a contract to transfer the property, the mere fact, that the purchaser company agrees to pay purchase money partly in shape of cash and partly in shape of allotment of its shares, does not render a contract of sale into a contract of exchange. It is open to the parties to a contract of sale to agree to receive the sale price otherwise than merely in cash (32)

See also the undermentioned cases.(33)

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property by a Muhammadan to his wife purporting to be made in consideration of a dower-debt of Rs. 49 and "on account of right of inheritance" was held to be a sale. The words "on account of right of inheritance" are only a reason for the transfer and not a consideration for it.)

[**See also** (1867) 2 Agra 160)162) (DB) (Government may like any other seller, impose any condition it pleases in reference to the property which it offers for sale prior to sale but is not at liberty subsequently to the sale to disaffirm or annul it on the ground not only novel but directly at variance with the terms on which it offered by the property for sale)]

25. AIR 1936 PC 204 (206) : 63 Ind App 304.

26. AIR 1931 All 389 (390) : 53 All 786 (FB).

27. See Notes on Section 55

28. AIR 1967 Delhi 91 (94) (DB).

29. 1981 UPLT (NOC) 205 : 1982 All CJ 9.

30. AIR 1942 Mad 634 (639) ILR (1942) Mad 775 (DB) (Dissenting from 7 IC 189)

31. AIR 1947 All 110 (112) ILR (1947) All 321 (DB) (There would be nothing invalid in a transfer, say, in consideration of services rendered.)

32. (1966) 1 ITJ 105 : (1966) 59 ITR 221 (Bom)

13. "Paid or promised."

The fact that the price is promised to be paid on the delivery of possession and is not to be paid at all if possession is not delivered, does not prevent the transaction from being a sale (1) Where a sale deed recited that the vendor had that day received rupees one thousand which he deposited with the vendee for the expenses of certain litigation, but it was found that there was absolutely no such payment, it was held that there was neither a payment nor a promise of payment of the price and that consequently there was no sale (2) In the undermentioned case(3) it was, however, held that in such cases the question of validity really depended on the intention of parties and if from the tenor of the document the intention to pay the consideration was evident the transaction was valid and if otherwise, not valid To constitute a sale ownership has to be exchanged for the price paid or promised to be paid or partly paid and partly promised Therefore future payment of price does not arrest the passing of title made by a registered instrument If the parties so contract it may be postponed till the payment of full consideration In the absence of contract the title gets conveyed as soon as the document with the stipulation of consideration is registered where the witnesses examined by the vendee have clearly stated that the vendors signed the sale deed after receiving Rs 5000/- and thereafter they refused to come before the registering authority obviously because the black moneys of Rs 4000/- was not paid and the vendors have failed to establish that Rs 9000/- was the agreed consideration and the sale deed was registered by the registering authority it could be said that there was no proof of intention contrary to what was stated in the deed and the execution of the deed having been admitted, it conveys title to the vendee Vendee would be entitled to possession of the suit house and to mesne profits from the date of execution of sale deed till the date of the delivery of possession Non-delivery of possession does not affect the conveyance of title What is transferred for consideration is the right of ownership Right of possession is incidental to the right of ownership One who is a owner can bring an action for recovery of possession once the right title and interest are sold on payment of sale consideration the person in possession is either a permissive holder like tenant or a person holding adversely to the interest of true owner In either event person in possession has no title Since delivery of physical possession is not an essential ingredient of sale that circumstances by itself can have no relevance to decide the intention

Clause (c) of S 58 of Registration Act requires the authority to endorse about facts that have happened in his presence If the consideration is paid in his presence he has to record it if it is not paid and the parties accept the receipt of consideration he has to record the "acceptance" and nothing more In the instant case vendee's witnesses have stated that the amount of Rs 5000/- was paid in the house before the vendors executed the deed in such a situation the absence of any endorsement on the deed by the Sub-Registrar does not lead to the inference that consideration has not been paid (4) **See also the undermentioned case (5)**

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33. (1958 2 Andh WR 30 (30) ** 1998 (47) DRJ 706 (708) (In instant case the agreement of sell bore a date anterior to the date on which the stamp paper was purchased None of the witnesses could state the exact date of its execution Power of Attorney was also not executed in terms of S 85 of the Evidence Act Thus there was no bona fide sale for consideration) ** AIR 1955 Pat 458 (462) 34 Pat 440 (DB) (In law a consideration for a contract of sale as in all other contracts under the Contract Act must be a good and valuable consideration Therefore a meritorious or a gratuitous consideration such as natural love and affection or obedience and submission by way of respect or love may at best be a meritorious or a gratuitous consideration and in no case be a good or valuable consideration)

Section 54 — Note 13

1. AIR 1915 All 347 (347) 37 All 63 (DB) (Agreement of payment of consideration contingent on certain event is not opposed to public policy)
2. AIR 1924 Nag 146 (147).
3. AIR 1953 Bom 56 (57) (DB)

Non-payment of a portion of the sale price does not affect validity of sale, the part payment of consideration by vendee itself proves the intention to pay the remaining amount **(6)**

Normally the passing of consideration cannot be challenged except by the parties but where the payment of price is disputed the party contending that the price has been paid has to establish the payment.**(7)**

Where a vendor accepts receipt of consideration having endorsement of the Sub-Registrar a stranger is not entitled to challenge it.**(8)**

But a stranger to a sale deed intended to be real and operative cannot dispute the payment of consideration or its adequacy.**(9)**

A stranger can challenge the payment of consideration on ground that the sale deed is fictitious and was never designed to operate as real deed or to effect a transfer of the title **(10)**

14. Non-payment of price.

It follows from the definition of "sale" that, in order to constitute a transaction a "sale"—

(a) the parties must *intend* to transfer the ownership of a property,

(b) the parties must *intend* that the price should be paid whether in present or in future

Where the parties *do not intend* that ownership of property should pass from one to the other, the transaction, though in the form of a conveyance, will be merely a sham and colourable transaction. Where the parties, though they may intend to transfer ownership, do not intend *that the price should be paid at all*, the transaction would be without consideration and would be void as a conveyance.**(1)**

Where the title is intended to pass, and the price is intended to be paid, the mere fact that the price is *not actually paid* at the time of the conveyance will not prevent title from passing to the buyer **(2)** In other words pre-payment of price is not a *sine qua non* or a condition precedent to the transfer of ownership **(3)** If the recitals in the deed show a clear intention that the title is to pass immediately after execution and registration and is not dependent on payment of full consideration

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4. AIR 1990 Kant 128 (131, 135) : (1989) 2 Kant LJ 523.

5. AIR 1953 Trav-Co 161 (163) (DB) (Sale for Rs 5650 — Part paid in cash, another part made payable at the time of completion of sale-deed and third part to be secured on a mortgage right possessed by transferee — **Held**, that transaction was a sale and nonetheless so although the part of consideration secured on mortgage right was deferred for payment on a future occasion.)

6. 1973 All LJ 412 (414) : 1973 All WR (HC) 606 (DB)

7. (1978) 80 Bom LR 302 : 1979 Mah LJ 494 (502) (DB).

8. (1974) 2 Cut WR 937 (941).

9. AIR 1977 Orissa 194 : 44 Cut LT 606

10. AIR 1973 Pat 352 (356, 357) :1973 BLJR 255.

Section 54 — Note 14

1. AIR 1952 Bom 56 (57) (DB) ** AIR 1996 Orissa 86 (88) ** AIR 1932 Bom 247 (247) 56 Bom 556 (DB) ** (1898) 22 Bom 176 (180, 183) (DB).

[**See also** AIR 1954 Punj 116 (117) (Property worth Rs 8 000 sold for Rs 190 — Price not paid before Registrar No evidence that price was paid by vendee but that he had paid only some subscription to the vendor which was a Christian mission — Transaction held was not a sale but a gift)]

2. AIR 1922 Pat 619 (641) (SB) ** AIR 1916 Lah 155 (156) : 1916 Pun Re No 53 (FB). (Title passes on execution regardless of whether and when the price is actually paid) ** (1975) 41 Cut LT 383 (1975) 1 Cut WR 186 (189) (If a sale deed recited the title to pass on registration and balance price payable at a future date title passes at registration) **

AIR 1971 All 151 (154) (Where a sale was registered between two sisters pursuant to a compromise and there was no proof of duress or coercion, the sale could not be said to be void even if cash consideration was not paid.) ** AIR 1970 Orissa 2, 8 (319) ** AIR 1965 Pat 29 (30) ** AIR 1964 Gujr 174 (181) ILR 1963 Cut 739 (Idea that there can be no sale unless the consideration is fully paid is contrary to the provisions of S. 54.) ** AIR 1964 Orissa 239 (240) ILR (1964) Cut 561 (Clause to the effect that title would pass independently of passing of consideration.) ** ILR (1964) Cut 381 (385) ** AIR 1961 Madh Pra 176 (178) ILR (1960) Madh Pra 624 (DB) (Intention that sale deed should operate as transfer — It does not matter if whole or part of consideration remains unpaid.) ** AIR 1960 Orissa 29 (2) (Recital regarding consideration coming out of independently or [illegible] regarding [illegible] the passes independent of [illegible] consideration.) ** (1959) 1 Orissa JD 1 (4) ** AIR 1957 Punj 238 (241) ** AIR 1953 Orissa 315 (323) ILR (1955) Cut 333 (DB) ** AIR 1952 Bom 56 (57) (Statement about [illegible] — Document, if it shows intention to pay consideration is valid — Otherwise invalid.) ** AIR 1951 Pat 454 (456) ** AIR 1950 All 632 (634) ILR (1953) 1 All 265 (DB) (Sale may be complete though full price has not been paid.) ** AIR 1938 Pat 255 (256) ** AIR 1937 Pat 83 (83) ILR 10 Pat 63 (3B) ** AIR 1935 Lah 57 (344) (Receipt for earnest money mentioning an out and out sale as having been effected — Fact that receipt is not followed by registration of formal sale deed is not sufficient to show that intention of parties was that title should not pass until consideration money had been paid.) ** AIR 1949 Orissa 14 (5) (There is no presumption that title passes [illegible] consideration is paid to the vendor in full.) ** AIR 1944 Bom 50 (56) (57) (26) ** AIR 1933 Pat 236 (239) : 10 Pat 264 (DB) ** AIR 1929 All 85 (86) ** AIR 1924 Mad 544 (545) (Conditions to be complied with by vendee as to discharge of prior debts unless there is express or implied contrary intention of parties — Non-suspend vesting of title in vendee.) ** AIR 1924 Nag 938 (939) ** AIR 1920 Mad 154 (164) 43 Mad 712 (DB) (Vendee in possession on purchase money is entitled to obtain decree for possession without [illegible] being attached for payment of unpaid purchase money.) ** AIR 1919 Law Bur 21 (26) [illegible] Law Bur Rule 133 ** AIR 1919 Law Bur 140 (141) ** AIR 1919 Pat 469 (470) ** AIR 1919 Cal 844 (844) (DB) ** AIR 1919 Cal 855 (856) (DB) ** AIR 1918 All 337 (338) (DB) (Non-payment of consideration by vendee may often be very strong evidence that the deed was not intended to operate.) ** AIR 1917 Mad 492 (494) (DB) ** AIR 1917 Cal 556 (558) (DB) ** AIR 1916 Cal 120 (122) (DB) ** AIR 1916 Low Bur 9 (19) ** AIR 1915 Mad 387 (391) (DB) ** AIR 1914 Cal 385 (386) (DB) ** AIR 1914 Cal 239 (240) (DB) ** (1909) 32 Mad 325 (326) (DB) ** (1909) 2 Ind Cas 424 (424) (DB) (Bom) ** (1908) 30 All 125 (127) (DB) (Purchaser notwithstanding such non-payment of consideration sue for possession — Court is entitled to pass a decree in favour of the claimant for possession subject to the equities which exist in favour of the defendant.) ** (1906) 4 Cal LJ 334 (336) (DB) ** (1906) 16 Mad LJ 524 (525) (DB) ** (1902) 6 Cal WN 150 (157) (DB) ** (1899) 23 Bom 525 (527) (DB) ** 1899 Pun Re No. 77 p. 327 (329) (DB) ** (1891) 13 All 409 (418) (DB) (Deed purporting to be a sale deed [illegible] Consideration received but [illegible] back to the vendor — Possession [illegible] **Held,** on the face of the document [illegible] sale and [illegible] was passed [illegible] ** (1891) Bom PJ 147 (147) (DB) ** (1891) 4 CPLR 92 (93) (1890) Bom PJ 65 (65) (DB) ** (1888) 11 All 244 (251) (DB) ** 1882 Pun Re No. 192 p. 559 (560) (DB) ** (1881) 4 All 168 (170) (DB) ** (1880) 2 All 712 (712) (DB) ** 1879 Pun Re No. 132 p. 387 (389) (DB) ** (1878) 2 Bom 547 (548) (549) (DB) ** 1875 Pun Re No. 2 p. 75 (78) (DB) ** (1869) 1 Agra 30 (31) (DB) ** (1867) 7 Suth WR 317 (318) (DB) ** (1823) 7 Ind Cas 45 (49) (Peshr) ** (1911) 9 Ind Cas 562 (562) (DB) (Cut) ** 1912 Pun Re No. 105 ** 1911 Pun Re No. 55 (DB) ** (1910) 8 Ind Cas 674 (674) (DB) (Lah) ** (1910) 6 Nag LR 98 (102) (Although the legal ownership of immovable property may have passed to a buyer by virtue of a properly executed deed of conveyance, if the purchase money or any part thereof remains unpaid, such buyer will not be entitled to a decree for possession of the property sold, **except on condition of first paying the purchase money in full.**)

[See also AIR 1954 Bom 518 (525) (DB). (Sale of goods.)]

[But see (1881) 3 All 77(81) (DB). (Submitted wrong.)]

it is not necessary that price must be paid in whole or in part at the execution or registration **(4)** When the recital in registered sale deed is that the vendor intended to transfer the title on the very date of execution of sale deed it cannot be said that for non-payment of consideration there was no passing of title **(5)** Where the document is on its face a deed of sale, duly executed and registered, and it is not the plea of the vendor that title in suit property was not intended to be passed on to the vendee and was postponed to be passed until the consideration was paid, even if the possession was not given and the price was not paid, on the contents of the document the title would pass to the vendee It the vendee was deprived of possession he was well justified in asking for the same The remedy of the vendor lay in asking for payment of price **(6)** In such case the title must be deemed to have passed without passing of consideration **(7)** Whether title passes on execution of sale deed even if consideration is not paid or partly paid depends on intention of parties It has to be gathered from recitals in the sale deed as also circumstances surrounding thereto.**(8)** Even if it is mentioned in sale deed that consideration is received, it is not decisive The Court can take into consideration of various factors existing at the time of execution of sale deed **(9)** Want or failure of consideration, the condition precedent to the transfer, irrespective of recitals of the document, can be proved by independent evidence Whether the consideration is executed or is still executory i e whether the consideration is actually paid and accepted or not is a question which a Court can determine on such evidence that the parties may lead and the contents of the document of disposition shall not be conclusive for the said purpose **(10)** The seller cannot, on the ground merely of non-payment of the price, claim to retain possession as against the buyer of the property sold **(11)** Nor can he set aside the sale on that ground **(12)** His remedy is to sue the buyer for the recovery of his purchase money **(13)** or to enforce the seller's charge for the purchase money against the properties sold in the hands of

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3. 1959 MPLJ 1078 (1080) ** **AIR 1999 SC 1441 (1450) : 1999 AIR SCW 1129 : 1999 (3) SCC 573.** (The real test is intention of parties It is to be gathered from recital in sale deed conduct of parties and evidence on record) ** 1999 (3) Mad LW 162 (166) (Vendor will however have lien over the property sold for sale consideration or its balance) ** 1998 (3) Mad LJ 372 (374) In instant case there was no contract or statement that document will come into effect only on payment of consideration) ** AIR 1957 Punj 238 (241) ** AIR 1952 Bom 56 (57) (DB) ** AIR 1934 Lah 917 (919) (DB) (Unless there is anything in the agreement of sale definitely laying down that sale shall not be taken to have been completed until entire purchase-money is paid) ** AIR 1916 All 366 (367) 38 All 154 (DB) ** (1866) 1 Agra 85 (86, 87) (DB).

   [**See also** AIR 1955 Cal 101 (103) (The ordinary rule governing vendors and purchasers is that the payment of the consideration is to be simultaneous with and at the time when the conveyance is executed by the vendor In any particular case, however the parties may agree to deviate from the ordinary rule).]

4. 1966 BLJR 291 (DB).
5. AIR 1993 Orissa 59 (62)
6. AIR 1993 MP 162 (164) : 1993 MPLJ 448
7. AIR 1971 Orissa 147 (149) : 36 Cut LT 1274
8. AIR 1990 Pat 26 (31) (1989) 2 BLJ 587 ** AIR 1989 Pat 50 (54) 1988 Pat LJR (HC) 950) ** 1989 BBCJ (HC) 650 (652).
9. AIR 1989 Pat 50 (54) : 1988 Pat LJR (HC) 950.
10. AIR 1985 Pat 94 (96) : 1985 BLJR 736.
11. AIR 1965 Pat 29 (30) (Buyer is entitled to recover possession and also mesne profits for period seller remains in possession) ** AIR 1944 Mad 124 (125) (In a suit for possession by vendee, vendor cannot enforce his lien for unpaid purchase-money.) ** AIR 1920 Mad 164 (164) 43 Mad 712 (DB) ** AIR 1919 Low Bur 20 (20) 10 Low Bur Rul 133 ** AIR 1919 Low Bur 140 (141) (The only remedy of the vendor is a suit for the recovery of the purchase-money) ** (1911) 34 Mad 543 (544) (Vendor is entitled to statutory charge on the property for unpaid purchase-money) ** (1910) 6 Ind Cas 117 (117) (DB) (All)

the buyer **(14)** He can file suit under S 31 Specific Relief Act or for decree for consideration amount which remained outstanding.**(15)**

The non-payment of consideration may however, often be very strong *evidence* to show that the parties did not intend the document to be operative**(16)** or that the transaction was the result of undue influence **(17)** But it is not conclusive to show such an intention **(18)**

The question as to whether title from the vendor to the vendee has passed on the execution and registration of the sale deed or not on account of non payment of consideration money depends upon the intention of parties which has to be looked into to decide whether the sale deed operated as a transfer of interest from the vendor to vendee on the date of its execution If the intention was to transfer the title, then it is wholly immaterial whether the whole amount of consideration or part of it remained unpaid Where the recitals in the sale deed are indicisive or ambiguous then only the Court should consider the conduct of the parties and the surrounding circumstances to determine the intention of the parties at the time of execution of the sale deed.**(19)**

Where the parties to the sale deed had agreed that the title in the property sought to be sold should pass to the vendee only after payment of the full consideration of money and it is found that the consideration was never paid the sale deed will not convey any title to the vendee.**(20)**

The sale deed shall not be treated as invalid merely because the sale deed recites payment of sale price but in fact, it was not paid If the vendee intended to pay the sale price but in fact he did not pay, though a recital of such payment was made in the sale deed such sale deed would not be invalid and title will pass to vendee unless intention of vendor was that title

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[**But see** (1968) 16 Sutb WR 194 (194) (DB) (A party selling land may refuse to give delivery until the consideration is paid but having given delivery he has no right to retake possession and pay himself the purchase money out of the usufruct.)]

12. AIR 1944 Bom 50 (56, 57) (DB) ** AIR 1934 Lah 917 (919) (DB) ** AIR 1929 Bom 147 (150) 53 Bom 321 (DB) ** (1909) 2 Ind Cas 429 (429) (DB) (Bom) ** (1901) 14 CPLR 57 (58) ** (1913) 36 Mad 8 (10) (DB)

13. AIR 1919 Low Bur 140 (141) ** AIR 1919 Low Bur 20 (20) 10 Low Bur Rul 133 ** (1901) 14 CPLR 57 (58) ** (1899) 23 Bom 525 (527) (DB) ** (1910) 6 Ind Cas 117 (117) (DB) (All).

[**See also** AIR 1957 Mad 630 (631) (Possession delivered under sale but consideration not paid — Vendor entitled to the consideration and interest thereon till date of payment)]

14. **See** S 55 sub-section (4) clause (b) ** (1963) 1 Mys LJ 592 (595) (Consideration for sale agreed to be Rs 2 000 Sale supported by consideration only to the extent of Rs 1 000 Seller has charge over property for the balance) ** (1909) 2 Ind Cas 429 (429) (DB) (Bom) ** (1901) 14 CPLR 57 (58) ** (1911) 34 Mad 543 (544) (DB)

15. 1989 BBCJ (HC) 650 (652)

16. AIR 1957 Mad 630 (631) ** AIR 1918 All 337 (338) (DB) ** AIR 1917 Mad 493 (494) (DB)

17. AIR 1934 Cal 762 (763) (DB)

[**See** AIR 1926 Pat 539 (542) (DB).]

18. AIR 1957 Mad 630 (631) ** AIR 1928 All 391 (392) (DB) (Mere fact that portion of sale consideration has not been paid is no ground for coming to conclusion that parties did not intend document to be operative.)

19. 1997 (6) Andh LT 283 (287).

20. 1985 BLJR 785 (787) (DB).

should not pass. But if the intention of the vendee was not to pay, it will only be a colourable transaction and will have no effect. The Court has to examine the intention of the parties **(21)**.

Where a registered sale deed is executed but the vendor did not part with the possession and it was intention of parties that the title would pass only on receipt of full consideration by the vendor, there was no transfer of title either factually or legally. Adjoining land holder could not therefore claim right of pre emption, as there was no transfer of land **(22)**.

The agreement was executed by the transferor alone and it contained a peculiar clause that if the sale consideration is not paid on or before the stipulated date, the document shall be deemed to be cancelled. Therefore, this is not a case where the consideration is agreed to be paid on a future date. Hence it will not qualify within the definition of S. 54. Further since the deed was executed by transferor alone, there was no reciprocal promise to pay by the transferee **(23)**.

If there is no proof of payment of price it will not operate as a sale deed, but if the requisites of Ss. 122 and 123 of the T.P. Act are established, it will take effect as a gift deed. The transferee is entitled to establish the non-payment of consideration and to prove that what are in terms sale deeds are in effect only deeds of gift.**(24)**.

Where a conveyance is duly executed and registered the presumption will, in the absence of circumstances to the contrary, be that the parties intended the title to pass forthwith, and the consideration to be paid **(25)**. In such a case the burden lies heavily on vendor to prove that consideration is not paid **(26)**. The presumption can be rebutted by evidence showing that it was the intention of the parties that title should not pass until certain conditions are fulfilled. In such cases title will not pass until those conditions are fulfilled **(27)**. Thus, the parties may agree that title should not pass until the price is paid. In such cases title will not pass until the price is paid **(28)**. Heavy burden lies

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21. 1998 AIHC 921 (923) : 1997 All LJ 2111 : 1997 (3) All WC 1690

22. 1998 (3) Pat LJR (HC) 192 (196)

23. 1995 HRR 317 (2) (318) (SC).

24. 1976 Ker LT 840 (842).

25. AIR 1961 Madh Pra 176 (178) ILR (1960) Madh Pra 614 (DB) (Registered deed of sale purporting to operate as conveyance on face of it — Burden of proving that it was not so intended is on party who asserts this fact.) ** 1989 BBCJ (HC) 650 (652) ** AIR 1953 Orissa 315 (323) ILR (1953) Cut 343 (DB) ** AIR 1951 Pat 454 (457) ** AIR 1944 Pat 3 (4) 22 Pat 306 (DB) ** AIR 1916 Lah 336 (336) (DB) ** (1909) 4 Ind Cas 541 (541) (DB) (Cal) ** (1909) 32 Mad 72 (75) (DB) ** (1897) 21 Mad 56 (57, 58) (DB) ** (1894) 17 Mad 146 (147) (DB)

[**See also** AIR 1967 Assam 9 (13) ILR (1964) 16 Assam 237 (DB) (Sale-deed relating to land — Vendee not taking deed from Registration office — This does not show that vendee had no knowledge of sale or that he did not pay consideration for sale.) ** AIR 1962 Andh Pra 94 (97) ILR (1961) Andh Pra 579 (DB) (Once execution is proved, recitals of payment of consideration are *prima facie* proof of it against executant or persons claiming under him.) ** (1909) 32 Mad 325 (329) (DB) (Sale-deed registered — Want of consideration — Vendor intending deed to be operative only if vendee outlived her — Deed acted upon — Title passes without consideration.) ** AIR 1953 Pat 330 (333) (**Held**, that it was manifest from the recitals in the deed and from the facts that the intention of the parties was that title should pass on the payment of the consideration money which was to be paid at the time of the passing of the registration receipt. As no consideration had been paid either to the vendor or to her creditors no title had passed.)]

26. AIR 1991 Pat 99 (106)

27. (1975) 1 Cut WR 171 (177) 41 Cut LT 447 ** (1913) 19 Ind Cas 562 (562) (DB) (Cal) ** (1912) 37 Bom 53 (56) (DB) ** AIR 1944 Pat 3 (4) 22 Pat 306 (DB) ** (1904) 28 Mad 124 (126) (DB) (Consideration — Promise to give a girl in marriage.)

28. ILR (1978) 1 Cut 98 (103) ** AIR 1978 Pat 97 1978 Pat LJR 255 (DB) (Though the sale-

on vendor that consideration is not received by him at all and, therefore, title did not pass to the vendee, in spite of execution of registered sale deed (**29**) Where in a contract of sale a part of the consideration money is paid by cheque and the transferor executes the document relying on the representation given by the transferee that the cheque would be encashed on presentation to the bank, it would be proper to assume that the intention of the parties was that the title should not pass till the consideration represented to be paid is paid (**30**)

Even if a registered sale deed in respect of agricultural land is executed, if it is clear that the intention of the parties was that the transfer of title shall take effect only on payment of full consideration, there is no transfer of land Thus the owner of the adjacent land could not claim

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deed may recite that the consideration has been paid there is nothing to prevent the parties from adducing evidence to show that the recital is untrue and that, in fact the consideration was not paid this will not be barred by S 92 of the Evidence Act [illegible] ILR [illegible] 56 Pat 943 (948) (DB) ** AIR 1965 Pat 29 (30) ** AIR 1964 Orissa 239 (240) ILR (1964) Cut 551 ** ILR (1964) Cut 381 (384) ** AIR 1961 Orissa [illegible] ** 1959 MPLJ [illegible] ** AIR 1957 Orissa 243 (245) ILR (1957) Cut 380 Sale deed a bargain on point of passing of title — Retention of sale deed by vendor and subsequent cancellation of the deed on the ground of non payment of consideration and execution of sale deed to a third party indicate that the intention of parties to the first sale deed was that it would not pass to vendee until he paid the consideration ** AIR 1953 Orissa [illegible] ILR [illegible] Cut 343 (DB) ** AIR 1950 Pat 288 (289) ** AIR [illegible] Pat [illegible] (DB) [illegible] Pat LR No 112 (Option to lessee to purchase property [illegible] and [illegible] on payment of purchase money subject to sanction [illegible] Commissioner [illegible] till purchase money was paid — Commissioner's sanction amounted only to sanction to purchase) ** AIR 1935 Pat 45 (46) AIR [illegible] ** AIR [illegible] (DB) ** AIR 1931 Pat 236 (239) 10 Pat 264 (DB) ** AIR 1929 Pat 550 (552) (DB) ** AIR 1928 Oudh 439 (441, 442) 4 Luck 13 (DB) ** AIR 1920 Oudh 29 (30) (It is open to the parties to contract that ownership shall not pass till the full price [illegible] ** AIR 1917 Pat 514 (515) (DB) ** AIR 1912 Lah 242 (243) ** AIR [illegible] (DB) ** (1913) 20 Ind Cas 325 (325, 326) (Cal) ** (1913) 19 Ind Cas 562 [illegible] (DB) ** (1912) 14 Ind Cas 120 (121) (DB) (Mad) ** (1911) 12 Ind Cas 534 (534) (Lah) ** (1911) Pun Re No 56 (DB) (Conduct of parties after transfer of sale is material in order to ascertain whether parties intended ownership to pass in [illegible] consideration) ** (1910) 6 Ind Cas 477 (478) (Cal) ** (1909) 3 Ind Cas 177 (178) (Cal) (Mere registration of a sale deed does not necessarily pass title to the vendee [illegible] the clear intention of the parties that no title should pass till the consideration money was paid ** (1906) 4 Cal LJ 338 (339) (DB) ** (1900) [illegible] Cal 7 (10) (DB) ** (1898) 2 Cal WN 207 (208) (DB) ** 1882 Pun Re No 192 p 559 (560) (DB) ** (1879) Pun Re No 132 p 387 (389) (DB) ** 1873 Pun Re No 45 p 69 (70) ** (1871) 15 Suth WR 44 (45) (DB) [illegible] is bound to see whether it was or was not the intention of the parties that the respective sale should take place although the purchase money was not paid)

[**See also** AIR 1951 Pat 454 (457) (Suit for declaration of title and possession — Instruction of within 9 days of registration and execution of sale deed — Question whether it was intention of parties that ownership was not to pass till payment of entire consideration money — **Held** absence of delivery of sale deed or possession was [illegible] in deciding the question in the particular case) ** AIR 1948 Pat 185 (189) (**Held**, that in view of the operative portion of the sale deed and the surrounding circumstances looked at in the light of the recitals in the document it was established that there was a prior oral agreement imposing a condition precedent that the passing of the title was not to take place until the vendee paid the dues under the mortgage) ** AIR 1938 Rang 17 (18) 5 Rang 636 (DB) (Non-fulfilment of condition precedent — Effect cannot be given to intention to transfer and no property passes)]

29. AIR 1991 Pat 99 (105)

30. 1978 Rev LR 110 (113) : (1978) 80 Pun LR 41

pre-emption.(31)

It follows that the mere *registration* of a conveyance does not *necessarily* convey title, without regard to the intentions of the parties (32) The Court has to see what the intention of the parties was in each particular case(33) though as seen already, the parties would be presumed to have intended to pass title forthwith in the absence of circumstances to the contrary

Where a recital in the registered sale deed provided that the title would pass only on receipt of full consideration and it is established that consideration is not paid, the sale deed did not convey any

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31. 1998 (3) Pat LJR (HC) 192 (196)*

32. AIR 1973 Pat 386 (387, 388) 1974 BLJR 81 (DB) (When the sale-deed stipulates payment of balance price during exchange of equivalents (balance amount and registration receipt) and mentions only putting buyer in possession (but possession was not delivered) even if it does not expressly postpone passing of the title till discharge of the consideration due and bulk of the consideration (more than 3/4ths of the total) also has been paid the title will not pass with the registration of the deed It will only during the exchange of the equivalents) ** 1968 BLJR 74 (79) (DB) ** ILR (1964) Cut 381 (386) (Sale deed executed and registered — Vendor agreeing to receive consideration money from vendee's father by making endorsement on registration ticket — No clear term that title would pass to vendee immediately after execution of document and before passing of consideration — Possession not delivered to vendee and custody of document remaining with vendor Consideration amount also not paid — Vendee held did not acquire any title to suit property under sale deed) ** AIR 1961 Orissa 19 (21) ** 1959 MPLJ 1078 (1081) ** AIR 1953 Orissa 315 (325) ILR (1953) Cut 343 (DB) (If the recital about the receipt of consideration is proved to be incorrect a latent ambiguity arises and if the circumstances show that the consideration was not in fact paid it would follow that the intention of the parties was not to effect a transfer of ownership by the mere execution or registration of the document) ** AIR 1953 Pat 330 (333) ** AIR 1950 Pat 288 (289) ** AIR 1922 Lah 356 (367) 3 Lah 389 (DB) ** AIR 1920 Pat 774 (774) ** AIR 1917 Cal 589 (590) (DB) (Especially if it be not accompanied by delivery thereof) ** (1909) 4 Ind Cas 541 (541) (DB) (Cal) ** (1904) 28 Mad 124 (126) (DB) ** (1900) 27 Cal 7 (10) (DB) ** (1913) 20 Ind Cas 325 (325) (DB) **(Cal) ** (1913) 19 Ind Cas 562 (562) (DB) (Cal)**

[**See also** AIR 1950 Pat 85 (86) (Registered sale-deed Deed not delivered by vendor to vendee because latter was not in position to pay consideration Parties agreeing that sale-**deed remained ineffective as between them**)]

33. AIR 1972 Orissa 99 (100, 101) (1971) 2 Cut WR 145 (Intention has to be gathered primarily from the recitals in the sale deed and if they are ambiguous, from the surrounding circumstances and the conduct of the parties) ** 1968 BLJR 74 (78) (DB) (Patent ambiguity in recital Aid may be taken from evidence of surrounding circumstances and conduct of parties) ** AIR 1964 Orissa 239 (240) ILR (1964) Cut 551 (Terms so intermingled that it is very difficult to make out from them a definite position Court has to take into consideration surrounding circumstances in deciding whether parties intended that title would pass independent of consideration) ** ILR (1964) Cut 381 (Where the terms in the sale deed are so intermingled that no definite position can be made out from them the extraneous circumstances such as the custody of the document the conduct of the parties etc have to be taken into consideration) ** AIR 1961 Orissa 19 (21) ** 1959 MPLJ 1078 (1081) ** (1959) 1 Orissa JD 1 (4) (Intention should primarily be gathered from recitals in document - Where recitals are indicisive or ambiguous surrounding circumstances and conduct of parties may be looked into — **Held,** on construction of sale deed that title passed on date of execution and that payment of full consideration was not condition precedent to passing of title) ** AIR 1947 Pat 1 (3) (DB) (Intention of the parties must be gathered from the sale deed itself But where the terms of the deed are not decisive and clear the surrounding circmstances may be looked into) ** AIR 1922 Lah 356 (357) 3 Lah 389 (DB) (For this purpose the Court may look to previous as well as subsequent conduct of the parties.) **(1909) 4 Ind Cas 541 (541) (DB) (Cal).**

title to purchaser.(34)

The arrangement between the parties as to when the title should pass is a contract between the parties and if reduced to writing cannot be varied or contradicted by oral evidence. Such an arrangement is not a recital of a fact such as the passing of consideration.(35)

The factum of passing of consideration may be disputed and extraneous evidence may be admissible for determining that issue but the terms of the contract as to the time of passing of title will be proved from the document alone if the terms are clear and unambiguous. If the terms are indecision and ambiguous then only the Courts will take into consideration other extraneous circumstances. Even if the recital in the sale deed is that full consideration is paid but if it is proved that only part of it is paid, it will not effect the passing of title in favour of purchaser in view of the clear recital in the sale deed to that effect.(36)

The fact that the price is not payable into the hands of the vendor but in some other way does not alter the nature of the transaction.(37)

Where the vendor executed a sale deed, signed it and presented for registration without any reservation as to balance consideration, it resulted in passing of the complete title in the vendee. He should not have presented the sale deed for registration if he was of the view that the payment of balance consideration was a condition precedent.(38)

15. Price can be shown to be different from that recited.

There is nothing to prevent a party to sale from showing that the consideration was something different from that recited in the deed.(1) Even the party who has acknowledged the receipt of

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[See also AIR 1957 Orissa 243 (246) : 11 R (1957) Cut 380 (Factum of passing of consideration may be proved by extraneous evidence but to ascertain the intention of the parties as to when the title should pass to the vendees should be ascertained from the deed when the terms are clear and unambiguous. Only when there is ambiguity can extraneous circumstances be considered.) ** AIR 1953 Orissa 315 (323) : 11 R (1953) Cut 343 (DB) (The only evidence that the Court will look into is that afforded by what the parties have said in the terms of the contract itself and evidence aliunde is not admissible to prove their intention if the language employed is unambiguous. AIR 1947 Pat 1 : Relied on. But if the recital is clear that the receipt of consideration and the transfer of title should be simultaneous or that the sale is made in exchange for the price and the vendee is made the owner and put in possession after realization of the entire consideration the only inference should be that one is dependant on the other. ** AIR 1952 Pat 260 (264) (DB). Sale deed — Question whether title passes on execution and registration of deed or on payment of consideration depends upon intention of parties to be gathered from deed itself.)]

34. 1985 BLJR 785 (787).

35. AIR 1938 Pat 505 (506) : 17 Pat 318 (DB)

[See also AIR 1949 Orissa 14 (15) (Title when passes — Terms of document should alone be looked to — Extraneous evidence is admissible only when they are ambiguous.)]

36. AIR 1992 Orissa 170 (173)

37. AIR 1937 Rang 287 (292) : 4 Rang 766 (DB) (Price to be set off against damages — compromise against vendor.)

[See also AIR 1949 Orissa 14 (17) (Portion of consideration left in hands of vendee for payment to vendor's creditors — Failure to carry out trust — Title legally vested in vendee is not divested.)]

38. 1996 (2) Civ LJ 557 (559) (Raj)

Section 54 — Note 15

1. AIR 1928 Rang 47 (48) : 5 Rang 636 (DB) ** AIR 1914 All 298 (302) : 36 All 537 (DB) ** (1909) 2 Ind Cas 953 (953, 954) (DB) (Cal) ** (1901) 5 Cal WN 158 (159) (DB) ** (1882) 5 Mad 6 (8) (DB) ** (1876) 3 Bom 159 (160) (DB)

consideration in the sale deed can show that he did not receive it.(2) The *onus* ordinarily, and especially where the sale deed and the property have been delivered to the buyer, would be on the seller to show that there was no consideration for the deed.(3) The onus may, however, be discharged by proving other circumstances and then the onus will shift to the vendee to prove payment.(4)

But a *third* party cannot question the passing of consideration between the vendor and the vendee.(5)

16. Inadequacy and inflation of price.

A sale is not invalid merely by reason of the *inadequacy* of the consideration (1) Nor does the *inflation* of the price in a sale deed by the parties for purposes of their own vitiate the sale, if

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2. **(1900) 22 All 370 (375, 376) : 27 Ind App 93 (PC). (Affirming** 18 All 168) ** **(1898) 20 All 447 (455) : 25 Ind App 137 (PC)** ** AIR 1950 Pat 85 (85) ** AIR 1920 Lab Bur 112 (113) 10 Low Bur Rul 264 ** AIR 1929 Bom 147 (150) 53 Bom 321 (DB) (Provided there is no case of estoppel) ** (1902) 25 Mad 55 (59) (DB) ** (1867) 7 Suth WR 428 (428) (DB) ** (1866) 6 Suth WR 267 (268) (DB) (But party cannot prove that only part of consideration stated to be received in full was paid at time of sale and that rest was to be paid only in case of a successful termination of a suit) ** (1866) 1 Agra 160 (161) (DB) ** **(1910) 6 Ind Cas 477 (478) (Cal)**

[**See also** (1868) 10 Suth WR 208 (208) (DB) (A Judge acts correctly in considering evidence on the question whether consideration recited in sale deed had passed or not)]

[**But see** (1867) 7 Suth WR 334 (334) (DB) (In a suit by a husband against his wife to recover property alleged to have been nominally sold by him to her oral evidence was not allowed to be admitted to prove that no consideration passed after he had solemnly in a written document, admitted that it had passed.)]

3. **(1891) 13 All 409 (417) (SB)** ** AIR 1920 Lab Bur 112 (113) 10 Low Bur Rul 264 ** AIR 1919 Pat 414 (415 416) 4 Pat LJ 517 (DB) (Mere denial of receipt of consideration is not sufficient to relieve the vendor to shift the burden on to the vendee)

4. AIR 1920 Lab Bur 112 (113) 10 Low Bur Rul 264 (Vendee not getting possession under deed for long time — Burden of proving that consideration passed is shifted to him) ** **(1886) 8 All 641 (643) (DB)**

5. AIR 1957 Trav-Co 189 (192) ILR (1956) Trav Co 998 (DB) ** AIR 1928 Pat 44 (45) 7 Pat 95 (DB) ** (1913) 20 Ind Cas 952 (954) (DB) (Mad) ** (1912) 15 Ind Cas 192 (192) (DB) (Lah) (Sale by one co owner of his share Other co-sharers incompetent to contest validity of sale on the ground of want or failure of consideration.)

Section 54 — Note 16

1. 1975 All WC 380 ** AIR 1975 Cal 445 (449) (DB) (Sale at a reduced price is not sufficient to show that it is not bona fide - On the contrary, the mala fide purchaser generally inflates the price) ** AIR 1957 Mad 630 (631) (Merely because a purchaser gets the property for one fourth of its value it should not be held that the inadquacy of consideration by itself proves fraud Court should scrutinise the circumstances before it holds there is fraud It is better in such cases to apply the doctrine of lucky purchasers adumbrated in some cases) ** AIR 1954 Pat 280 (283) (DB) (Want of adequate consideration would not of itself affect the title of the vendee) ** AIR 1918 Oudh 5 (6) 21 OC 97 ** AIR 1924 Nag 124 (125) (No presumption of fraud between debtor and creditor from mere inadequacy of consideration.) ** AIR 1915 Mad 1055 (1055) (DB).

[**See also** AIR 1927 Mad 664 (665) (Sale of large piece of land for a large price several years ago — Inadequacy of price must be strictly proved — Oral evidence is not of much value — Price should be determined with relation to price paid for adjoining lands of the same quality sold at the same time.)]

otherwise valid (2) Though consideration need not be adequate it must be real where the vendee undertakes to discharge the mortgage debt of the vendor, it forms part of the consideration for sale The mere fact that the vendee did not discharge the mortgage debt would not make the sale transaction nominal (3) Challenge to the sale deed that consideration was very low could not stand in absence of reliable evidence to show market value at relevant period when agreement was executed (4) See also the undermentioned case (5) *A* sold to *B* property for Rs 1 200 Rs 550 being undertaken to be paid by *B* to the prior mortgagee and the balance to be paid to *A* before the registration officer It was found that the latter amount was so paid but was taken back by *B* It was held that the sale was nevertheless valid as the consideration to the extent of Rs 550 had passed (6) In the undermentioned cases(7) the disparity between the real value of the property and the price specified in the document was held to indicate that it was not an absolute sale but only by way of security for a pre-existing debt.

17. Sale of property of value of rupees one hundred or more.

A sale of property of the value of rupees one hundred or more can be effected only by a registered instrument (1) Section 54 comprehends the value of property as distinguished from the purported consideration of alienation and therefore even if the property worth more than Rs 100/- is transferred for consideration of less than Rs 100/- it cannot be so done without a registered

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2. AIR 1924 All 938 (939) (Consideration money overstated to safeguard purchaser from pre emption)

3. 1984 TNLJ 442 (448) (DB)

4. AIR 2001 All 231 (233) : 2001 All LJ 1718 : 2001 (2) All WC 1118

5. AIR 2002 All 13 (20) 2002 All LJ 43 2002 AIHC 48 2001 Rev Dec 892 (Case under Specific Relief Act — Contract of sale [illegible] — Permission of competent authority as required under contract — Process of property should be executed in meanwhile — No evidence on record however regarding [illegible] of property — Plaintiff allowed refund of earnest money with damages amounting to Rs 20 000) [illegible]

6. AIR 1923 All 530 (531) : 45 All 559 (DB)

7. 1956 Andh WR 569 (572) DB ** 999 AIHC 3696 (3700) Madh Pra [illegible] Execution of sale deed — Consideration unconscionable low and inadequate — Transaction held to be by way of security for repayment of loan)

Section 54 — Note 17

1. **AIR 1961 SC 1747 (1750) , (1962) 2 SCR 474** Sale is not complete until registration of instrument is completed) ** **AIR 1960 SC 1368 (1371) (1961) 1 SCR 248** (AIR 1953 Nag 182 **Reversed**) ** **AIR 1956 SC 17 (19) ILR (1956) Cut 425** Sale of right to catch fish in a lake) ** **AIR 1922 PC 56 (58) , 48 Ind App 365** ** **AIR 1966 Ker 96 (97) (FB)** ** 2002 AIHC 3261 (3263) 2002 (3) MPHT 239 ** 1990 (2) Mah LR 833 836 (Bom) ** 198, TLNJ 248 (250) Oral sale of property worth more than Rs 100 — Subsequent sale even though made under a registered document purchaser in first sale cannot convey valid title to the vendee in subsequent sale) ** [illegible] ** Pun LR 438 No title passes under a sale of property valued at Rs 100 or more [illegible] deed is executed and registered) ** (1970) 72 Pun LR 294 ILR (197[illegible]) 2 Pun 127 130 DB (Ownership of allotted land — Allottee paying 25% of the price of land on allotment — No registered instrument of sale — Allottee does not become owner of the land) ** 1968 Raj LW 222 (224) ** ILR (1965) 1 Punj 619 (622 623) (But the word transfer in S 40 Administration of Evacuee Property Act 1950) has however been used in comprehensive sense precluding narrowness and technicality — Where conveyance deed has been executed there is transfer within the meaning of S 40 even if conveyance deed has not been registered) ** AIR 1964 All 300 (301) (Oral sale of immovable property of value of more than Rs 100 — Sale is ineffective.) ** **AIR 1962 Punj 475 (475)** (Transaction of oral sale requiring compulsory registration under S 54 is not saved by doctrine of part performance) ** AIR 1960 Andh Pra 397 (399) (Oral sale cannot be recognised as valid and cannot be allowed to be proved. **Reversed** on another point in AIR 1963 SC 1633) ** AIR 1959 Mys 194

document **(2)** An unregistered document in such a case conveys no title whatever **(3)** It is not admissible under S 49 of the Registration Act as evidence of any transaction affecting the immov

(197) ILR (1958) Mys 746 (DB) ** 1959 RLW 283 (284) (DB) (Sale of property — Registered deed — Patta under not obtained from Nazool Department Non-acquisition of patta held did not detract from title vested in vendee) ** AIR 1953 Bom 145 (146) ILR (1953) Bom 253 (DB) (Oral sale of property in value above Rs 100 by delivery of possession accompanied by giving vardi to village officer who effected mutation in favour of vendee Sale is invalid) ** AIR 1951 Nag 171(173) ILR (1950) Nag 618 (Transfer of part of mortgaged property in satisfaction of debt — If value of property is more than Rs 100 transfer to pass title must be by a registered instrument Mere delivery of possession is not sufficient to transfer title.) ** AIR 1921 Pat 150 (152) : 5 Pat LJ 715 (DB) ** AIR 1915 Lah Bur 121 (121) (Property worth more than Rs 100 — Oral transfer could not effect sale) ** AIR 1939 Mad 220 (223) (A private sale by Receiver in insolvency also requires registered document) ** AIR 1928 Mad 459 (462) ** AIR 1927 Sind 206 (207) (DB) ** AIR 1925 Rang 68 (69) 2 Rang 459 (An admission of the agreement to sell does not act as an estoppel) ** AIR 1923 Cal 35 (38 39) 50 Cal 180 (DB) ** AIR 1917 Mad 661 (662) (DB) (Transfer of life-interest by Hindu widow) ** AIR 1916 Mad 214 (217) (DB) (Per Seshagiri Iyer, J) — Conduct and acting cannot be relied upon to supplement an inchoate title) ** AIR 1916 Low Bur 104 (104) ** AIR 1916 Low Bur 73 (73) ** AIR 1915 Low Bur 95 (96) ** (1909) 5 Low Bur Rul 6 (6) ** (1909) 36 Cal 920 (921) (DB) (Where a registered instrument is not executed there is no sale) ** (1905) 7 Bom LR 845 (849) ** (1901) 23 All 175 (180) (DB) ** (1911) 10 Ind Cas 64 (65) (Oudh)

[**See also** 1933 Pat 428 (430) (DB) (In order to create title in immovable property of the value of more than Rs 100 it is necessary that a registered deed should be executed)]

2. AIR 2002 Raj 66 (67).

3. **AIR 1966 SC 1438 (1440) : (1966) 3 SCR 214 ** AIR 1966 SC 115 (118) : (1965) 3 SCR 567 ** AIR 1960 SC 1368 (1371) : (1961) 1 SCR 248.** (AIR 1953 Nag 182 **Reversed.**) **** AIR 1966 Kerala 96 (97) (FB)** ** AIR 1987 Delhi 36 (34) (1986) 30 Delhi LT 487 ** AIR 1959 Mys 194 (197) ILR (1958) Mys 746 (DB) ** AIR 1958 Mad 576 (578) ILR (1959) Mad 69 (DB) (Unregistered document — Doctrine of part performance does not operate to effect transfer of title) ** AIR 1951 Nag 171 (173) ILR (1950) Nag 618 (Property of more than hundred rupees value - Delivery of possession not sufficient to pass title) ** AIR 1947 Pat 424 425) 25 Pat 764 (DB) ** AIR 1937 Mad 22 (24) ** AIR 1934 Rang 303 (304) (If movable property also is transferred by the same unregistered document the title to the movable property also does not pass) ** AIR 1934 Rang 127(128) ** AIR 1929 Rang 280 (281) 7 Rang 271 (DB) A person's admission that he is a party to the transaction which is proved by a report to the revenue authorities but not by a registered document to have been an outright transfer in satisfaction of a mortgage debt debars him from alleging that he is not bound by the transaction and though the transaction does not convey a good title to the mortgagee the transfer not being effected by registered deed as required by S 54 still it is a good defence to the suit to redeem the property) ** AIR 1929 Cal 231 (232) ** AIR 1929 Nag 65 (65) ** AIR 1928 Rang 124 (124) 6 Rang 125 ** AIR 1928 Rang 237 (238) 6 Rang 315 ** AIR 1927 Oudh 482 (483) 3 Luck 107 (DB) ** AIR 1927 Nag 289 (289) ** AIR 1924 All 396 (396) ** AIR 1923 Rang 230 (231) ** AIR 1918 Pat 637 (638) (Admission of execution before a Registrar not followed by actual registration of the document could pass no title) ** AIR 1916 Low Bur 67 (67) ** AIR 1916 Low Bur 38 (39) ** AIR 1914 Low Bur 53 (53 54) 7 Low Bur Rul 262 (But the purchaser is entitled to a charge on the property for the amount paid by him in advance as purchase-money and for interest on that amount) ** (1911) 9 Ind Cas 55 (55) (DB) (Mad) (A subsequent purchaser by registered deed is entitled to priority, even if he had notice of the abortive purchase by unregistered deed.)

[**See also** AIR 1948 Nag 67 (69) ILR (1947) Nag 449 (Mistake in sale deed — Wrong field number given Delivery of possession of correct property — Vendee does not get title thereby to such property in absence of registered instrument) ** (1911) 9 Ind Cas 770

able property,**(4)** though it is admissible for *collateral* purposes, for example, to show the nature of the possession of the vendee,**(5)** or to show that money was paid,**(6)** or to prove an acknowledgment of a debt recited therein,**(7)** under oral sale of property of value of more than Rs. 100/- no title would pass.**(8)** See also S. 53A, Notes 16 and 17.

The value of the property sold must be taken to be the amount for which it is sold and not the market-value of the property **(9)**. In the undermentioned case,**(10)** however, a contrary view was taken, namely, that the above rule is only a convenient test and that if the value of the property is actually found to be more than the consideration recited, that is the value of the property for purposes of registration. It is submitted that the latter view is not correct.

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(771) (Low Bur) (Sale with condition of re purchase — Sale deed unregistered — Purchaser getting possession on payment of price — **Held**, sale was invalid on account of non registration but that purchaser should require vendor to complete his title by formal registered conveyance.) ** AIR 1933 Rang 4 (4, 5) (10 Rang 529) (Sale of property worth more than Rs. 100 — No registered document — Purchaser cannot sue for declaration on basis of possession unless same has ripened into title by adverse possession for twelve years.)]

4. See S. 49 cl. (c) of the Indian Registration Act ** **AIR 1960 SC 1368 (1371) : (1961) 1 SCR 248.** (AIR 1953 Nag 182 **Reversed.**) ** (1985 All Rent Cas 382 (385)) ** 1955 Raj LW 472 (474) ** AIR 1953 Pat 365 (366) ** AIR 1938 Rang 124 (124) (Rang 25) ** **(1909) 5 Nag LR 70 (72)**

[**See also** AIR 1937 Pesh 28 (29) (DB) ** AIR 1930 Pat 530 (532) (DB) ** **1867 Agra 148 (152) (FB).** (Section 3 of Act XVI of 1864 prohibits Courts from receiving in evidence in any civil proceeding a deed of a sale of the value of one hundred rupees or upwards. Consequently a suit for possession brought merely on the basis of such a deed and of the title alleged to be thereby conveyed must necessarily fail for want of proof of any right or title to obtain possession.) ** (1878) 1 Cal LR 542 (543) (DB) (Secondary evidence of **unregistered document cannot be received.)]**

[**See however** AIR 1961 Raj 18 (20) : 11 R (1960) 1 (6 Raj 753) (Shop owned by three persons jointly — Shares leased to tenants — Suit to recover arrears of rent by two lessors — Tenant raising plea of sale of one third share of premises to him by third lessor and relying upon unregistered sale deed — Plaintiffs admitting fact of sale in deposition in suit — Plaintiffs cannot challenge factum of sale notwithstanding circumstance that sale **deed being unregistered is inadmissible in evidence.)]**

5. 1955 RLW 472 (474) ** AIR 1953 Pat 365 (366) ** AIR 1953 Sau 56 (58) (DB) ** AIR 1949 Nag 410 (412) : 11 R (1949) Nag 534 ** (1948) 7 J and K LR 158 (161) ** AIR 1930 Pat 530 (532) (DB) ** AIR 1929 Mad 16 (18) (DB) ** AIR 1929 Cal 710 (711) : 57 Cal 715 (DB) ** AIR 1927 Oudh 581 (582) ** AIR 1927 Nag 342 (343) ** AIR 1924 All 837 (837) ** AIR 1923 Lah 495 (496) : 4 Lah 249 (DB) ** AIR 1921 Mad 82 (84) : 44 Mad 253 (DB) ** (AIR 1915 Mad 573 **held overruled** by AIR 1919 PC 44 : L P A No. 207 of 1915 and 1919 PC 44 Followed ** AIR 1914 Mad 489 **held overruled** by 1 P A No. 207 of 1915.) ** AIR 1920 Cal 822 (823) (DB) ** (1926) 98 Ind Cas 940 (941) (Lah)

[**See also** AIR 1923 Rang 125 (126) : 11 Low Bur Rul 462 (Report of sale to Revenue **Officer is admissible evidence as to what was reported.)]**

Also see Note 21

6. AIR 1956 Manipur 16 (17) ** (1911) 35 Bom 438 (441) (DB)

7. AIR 1930 Lah 985 (989) : 12 Lah 239 (DB) ** (1909) 5 Nag LR 70 (74)

8. 1987 TLNJ 335 (339).

9. AIR 1937 Pesh 39 (40) (AIR 1936 Lah 307 **Dissented from.**) ** (1877) 15 Suth WR 558 (559) (DB).

10. AIR 1936 Lah 307 (316) : 16 Lah 177 (DB).

A vendor who has executed a sale deed which is compulsorily registrable has no locus *poenitentiae* to resile from the transaction by reason of the fact that the title is not complete for want of registration. Registration does not depend upon the assent of the executant but upon the act of the officer appointed for the purpose The incompleteness due to want of registration is not a thing of which the executant himself can take notice, though as regards third parties the point of time at which the transfer is deemed to have been effected is when the deed of transfer can be paid to be a registered deed.**(11)** Title passes to the transferee as soon as the document is registered with the retrospective effect from the date of the *execution***(12)** Where the sale deed requires registration, title does not pass till the sale deed is registered even though the transfer of possession as well as payment of consideration take place before registration of the document Title of the vendor passes to the vendee only on registration of the sale deed irrespective of the fact that the sale deed was actually executed on an anterior day Thus where the sale deed in favour of testator was not registered on the date of executing the Will, the testator could not bequeath his right in the property sought to be sold to him **(13)** A sale, which is required to be registered is however not complete until the registration of the deed is completed **(14)** A compulsorily registrable sale deed executed earlier in point of time will when registered prevail over a subsequent sale deed even though the latter sale deed was registered at an earlier point of time **(15)** Thus where two sale deeds were executed in respect of same property and the sale deed in favour of plaintiff was registered first than sale deed in favour of defendant but the sale deed in favour of defendant was executed first and then sale deed in favour of plaintiff, the sale deed which was executed first in favour of defendant would have priority and would prevail over the the sale deed of the plaintiff **(16)**

Where a land is purchased by a tenant he becomes the owner on the date he deposits the purchase money and is not liable for arrears of rent or damages after such deposit even though the formal sale deed is executed much later.**(17)**

A transfer made by a raiyat or intermediary prior to the date of vesting is not subject to vesting, event though the registration of the transfer is effected subsequent to the date of vesting In such a case, S 47 of the Registration Act will take effect in the absence of any contrary provision in the Acquisition Act**(18)**.

A transfer of immovable property by a sale deed executed on 15-11-72 but registered after 15-11-72 is affected by Section 269(C) of the Income-tax Act which came into force on 15-11-1972 **(19)** Where a sale constitutes an act of insolvency of the vendor the period of three months for presenting an insolvency petition by a creditor commences, however from the date of the regis-

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11. **AIR 1914 PC 27 (29) : 42 Ind App 1 (PC)** ** AIR 1958 Pat 193 (195) ** AIR 1938 All 431 (432) ** **AIR 1936 Cal 17 (18) : 62 Cal 979 (DB).**

12. See Section 47 of the Indian Registration Act ** **AIR 1961 SC 1747 (1749) : (1962) 2 SCR 474** ** AIR 1977 Pat 283 (289) 1978 Pat LJR 130 (DB) ** AIR 1960 Mad 55 (56) ** AIR 1958 Pat 312 (313) (DB) ** AIR 1958 Pat 193 (195) ** AIR 1921 Pat 150 (152) 5 Pat LJ 715 (DB) ** **AIR 1936 Cal 279 (281) : 63 Cal 1117.**

13. **AIR 2001 Ker 184 (192) : 2001 (1) Ker LJ 247.**

14. **AIR 1961 SC 1747 (1749) (Pr. 8) : (1962) 2 SCR 474.** (AIR 1926 All 549 **Overruled:** AIR 1957 Pat 545, Affirmed) ** 1978 All LJ 1255 (1257) (1978) 4 All LR 895 (A sale is complete after completion of the procedure under Sections 59 to 61 of Registration Act (1908) and not when the document has been executed or presented for registration)

15. **AIR 1973 Mys 276 : (1972) 2 Mys LJ 408.**

16. **AIR 2001 Gauhati 29 (31) : 2001 (3) Civ LJ 191**

17. (1966) 1 Andh WR 364 (367)

18. **AIR 1978 Cal 347 (352) : 82 Cal WN 673 (FB).**

19. 1975 Andh LT (Notes) 120.

tration of the document and not from the date of its execution(**20**).

Bona fide registration in a wrong book by the Registrar does not invalidate a compulsorily registrable transfer(**21**).

Where a document transferring a plot of land of value exceeding Rs 100/ was executed on a stamp paper of Rs 10/- and was notarised, it is a sale deed in terms of S 54 and could be impounded for deficient stamp fees(**22**).

Sale of property by virtue of an unregistered document is not invalid in a case where alienation of property is by occupancy tenant because S 46(3), C P Tenancy Act prohibits such alienation and S 46(3), C P Tenancy Act prevents registration of such document(**23**)

Standing trees are immovable property and transfer of trees of the value of Rs 100/ or upwards requires registration(**24**).

Title by adverse possession of the property valued at Rs 100/- or more can be relinquished or transferred only by registered instrument(**25**).

An exchange of property valued at Rs 100/- and more is not effective by mere delivery of possession unless registered deed is executed(**26**)

18. Reversion.

A reversion is the undisposed of interest in land which reverts to the grantor after the exhaustion of any particular estate, such as an estate for years, or for life or in tail which he may have created (**1**) Where, therefore, property in the possession of tenants is transferred by the owner what is transferred is really a "reversion" within the meaning of this section(**2**) and consequently such a transfer must be made only by registered instrument(**3**) In the undermentioned case,(**4**) however it was held by the Court of the Judicial Commissioner of Oudh that property in the possession of a tenant must be considered "tangible property" and is not included in the expression "reversion" or "intangible thing." A similar view has also been taken by the Nagpur High Court in the undermentioned case (**5**) It is submitted that this view is opposed to the general consensus of opinion and is not correct.

Two agricultural fields were given to a Hindu woman by her husband in lieu of maintenance On death of husband she became limited owner of the said property She sold the fields to defendant

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20. AIR 1934 Mad 637 (638) 58 Mad 166 (DB) ** AIR 1933 Lah 821 (822)

Also see Note 13.

21. AIR 1936 Cal 212 (214)

22. 1999 (90) Rev Dec 107 (108) (All)

23. (1983) 1 East LR 144 (Orissa).

24. AIR 1975 Cal 92 : 78 Cal WN 735 (DB)

25. AIR 1971 Pat 253 : 1971 BLJR 272 (DB)

26. (1969) 1 Andh LT 150

Section 54 — Note 18

1. Stroud, Judicial Dictionary

2. AIR 1938 Lah 304 (305) ** AIR 1938 Mad 100 (101 102) (DB) ** AIR 1916 Bom 223 (223) : 40 Bom 313 (DB).

[See also Halsbury Laws of England, Vol. 18, page 335.

3. AIR 1938 Lah 304 (305) ** AIR 1916 Bom 223 (223) 40 Bom 313 (DB) (Registration is necessary though value be less than Rs. 100.)

4. (1899) 2 Oudh Cas 74 (77).

5. AIR 1954 Nag 109 (113) : ILR (1952) Nag 37.

prior to coming into force of the Hindu Succession Act, 1956, though she was not competent to do so. On the date of coming into force of the Hindu Succession Act she was not in possession of the property and therefore could not become its absolute ower. Thus, the sale being invalid the reversioner was entitled to its possession on death of the widow(6).

19. "Or other intangible thing."

The words "intangible thing" must be read *ejusdem generis* with the word "reversion" which is ordinarily used to denote rights in *immovable* property, thus the words, "intangible thing" have reference only to immovable property and not to moveable property (1) In the undermentioned cases(2) it was held that the words "other intangible thing" are intended to embrace those imponderables which are related to immovable property such as, for example, a reversionary right.

The following are accordingly not "intangible things" within the meaning of this section, as not being rights in immovable property though in ordinary parlance they may be considered "intangible things". :

(1) a right of re-purchase under a contract for the re-purchaser of immovable property(3).

(2) a license to sell electricity(4);

(2a) permission to plant trees on land and have access to gather their fruits(5).

(3) a copyright in books(6);

(4) a turn of worship(7);

(5) a debt already become due(8);

(6) a simple decree for money or for possession of immovable property(9);

(7) a final decree for sale under O. 34, R 5 of the Code of Civil Procedure(10);

(8) The right of a mortgagee in movable property(11).

The following are rights in immovable property and are "intangible things" within the meaning of this section :

(1) a right of easements(12);

(2) a right of the rents and profits that may accrue in immovable property(13).

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6. 1999 AIHC 268 (271) : 1999 (1) Hindu LR 206 (Guj).

Section 54 — Note 19

1. AIR 1939 All 305 (307) ILR (1939) All 275 (DB) ** AIR 1935 Pat 492 (493).
2. AIR 1940 All 458 (460) ILR (1940) All 568 (DB) ** AIR 1934 Nag 13 (15) (An undivided share is tangible immovable property though actual delivery of possession is impossible.)
3. AIR 1930 All 101 (103) (DB).
4. AIR 1940 All 458 (460) : ILR (1940) All 568 (DB).
5. AIR 1952 Nag 321 (322) ILR (1954) Nag 172 (Transaction is mere licence — No registration is required — AIR 1938 Nag 377 (DB), Distinguished.)
6. AIR 1939 All 305 (307) : ILR (1939) All 275 (DB).
7. AIR 1927 Pat 7 (8) : 6 Pat 245 (DB).
8. (1905) 27 All 564 (567) (DB). (Arrears of profits accrued due.)
9. AIR 1935 Pat 492 (493).
10. AIR 1925 Oudh 399 (399, 400). 28 Oudh Cas 382.
11. (1887) 10 All 20 (23)
12. AIR 1935 Pat 492 (493).
13. AIR 1977 SC 2149 (2153) ** AIR 1935 Pat 492 (493). (The transaction of sale of the right

(3) the interest under a deed of settlement by which a person is granted an income in future rents and profits of certain immovable property and also a share in the proceeds of the sale of the property in future(**14**);

(4) the right to patta of a land(**15**).

There is a conflict of opinion as to whether an equity of redemption vested in the mortgator is or is not an "intangible thing". One view is that the equity of redemption vested in the mortgator is "tangible immovable property" whatever may be the nature of the mortgage, whether simple or usufructuary(**16**). Another view is that in all cases the equity of redemption is an intangible thing(**17**). And a third view is that where the property is subject to a *simple* mortgage the equity of redemption is tangible immovable property, but that where the mortgage is a usufructuary one the equity of redemption is an "intangible thing" within the meaning of this section(**18**). The decisions noted below(**19**) are in accordance with this view. This view is based on the ground that "tangible property" means property capable of present possession while "intangible property" would con

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to catch and carry away the fish if not effected by means of a registered instrument would pass no title or interest because it is a profit arising out of land and is regarded as immovable property. Even if the right is presumed to be intangible, its sale is required to be effected by a registered instrument whatever its value.)

14. **AIR 1936 PC 230 (233, 234) : 63 Ind App 340 : 14 Rang 400.** (Exact definition of "intangible thing" absent. The purpose of the statute and the context of the phrase to be construed must furnish the guide.)

15. AIR 1957 Hyd 23 (24) : ILR (1956) Hyd 766 (DB). (Rights alienable but only under a registered deed.) ** AIR 1950 Hyd 58 (59) : ILR (1951) Hyd 283 (DB).

16. **AIR 1959 Pat 153 (155) : ILR 37 Pat 1577 (FB).** (Majority view. AIR [illegible] (FB) and AIR 1937 Pat 178. Relied on. 11 Mad LJ 32 and AIR 1919 Cal [illegible] AIR [illegible] Assam 107. **Dissented from.**) ** 1983 Pun LJ 21 (22) : 1983 [illegible] and LR 606 ** AIR [illegible] Orissa 136 (139) : 37 Cut LT 1114. (Sale of mortgaged property to usufructuary mortgagee — Is sale of tangible immovable property and not intangible immoveable property. AIR 1919 Cal 325 (2). **Dissented from.**) ** AIR 1964 Andh Pra 21 (22, 24) : ILR [illegible] Andh Pra 199 (DB) ** AIR 1959 Raj 218 (220) : ILR (1958) 8 Raj 572 (DB). AIR [illegible] Cal 544 and AIR 1921 Oudh 124 (2) and AIR 1919 Cal 107 and AIR 1950 Assam 107. **Diss from.**) ** **AIR 1928 All 726 (728, 729) : 50 All 986 (FB).** (Per Sulaiman Ag. C. J. contra.) ** AIR 1939 Bom 31 (33) : ILR (1939) Bom 7 (DB) ** AIR 1937 Pat 178 (179) : [illegible] Pat [illegible] (DB).

[**See also** AIR 1954 Nag 109 (113) : ILR (1952) Nag 37 (48). (Owner still remains the owner after execution of mortgage or lease of the property. Transfer of his interests is a transfer of property and not a mere transfer of abstract rights which he possessed in the property before he executed the mortgage or lease.)]

17. AIR 1917 Bom 287 (288) (DB). (The transfer of an equity of redemption could be effected only by a registered instrument.) ** (1913) 11 ALJ 407 (409, 410) ** AIR 1915 Oudh 149 (150) : 18 Oudh Cas 109 (DB). (Simple mortgage.)

[**See also** AIR 1955 Ajmer 28 (29). (Transfer of equity of redemption can be effected only by a registered sale deed and not by oral declaration or by an unregistered document embodying any such declaration.)]

18. (1901) 24 Mad 449 (463) (DB).

19. AIR 1950 Assam 107 (113) (DB). (Per Ram Labhaya J. Thadani C. J. contra.) ** AIR 1936 Bom 175 (175) : 60 Bom 220 (DB). (Simple mortgage. Equity of redemption is tangible property.) ** AIR 1921 Oudh 124 (124) : 24 Oudh Cas 155. (Usufructuary mortgage. Equity of redemption is intangible property.) ** (1913) 19 Ind Cas 8 (8, 9) (DB) (All). (Do.) ** AIR 1919 Cal 107 (107) (DB). (Do.) ** AIR 1919 Cal 325 (326) (DB). (Do.) ** (1906) 3 Nag LR 72 (74). (Usufructuary mortgage — Equity of redemption is intangible property — Following 24 Mad 449.)

note right apart from a right to immediate possession(20).

It is submitted that the last-mentioned view is to be preferred. As pointed out by Sulaiman Ag. C.J., in *Sohan Lal v. Mohan Lal*(21) :

> "According to its literal meaning 'tangible' property would be one which is capable of being touched and therefore capable of being possessed. It must accordingly be property which is capable of delivery of possession from one person to another. A mortgaged property itself is undoubtedly 'tangible' but the interest of the mortgagor in the property, when the mortgage is usufructuary, is not indentical with the property itself, as some interest has already passed to the mortgagee including the right to remain in possession and appropriate the profits. The interest which the mortgagor possesses is not itself capable of being touched, nor is it such that an actual delivery of its possession can be effected by the mortgagor to the mortgagee. It seems difficult to conceive of a thing as being tangible when it is not capable of actual delivery of possession. Although, therefore, the mortgagor is the legal owner of the unsufructuarily mortgaged property, whatever rights he possesses, so long as the mortgage subsists, cannot be treated as 'tangible'. The subject-matter of ownership is tangible, but the interest which the mortgagor can transfer is 'intangible'."

In *Moolla Sons v. Official Assignee, Rangoon*,(22) their Lordships of the Privy Council observed :

> " . . . for the reason that, in the absence of registered instrument, delivery is to be required as a formality necessary to the completion of the transaction. S. 54 divides its provisions as to immovable property according as the immovable property is 'tangible or intangible'."

The above passage appears to support the view that the "tangible" property must be one that is capable of delivery and therefore capable of possession.

The right of a *mortgagee* where the mortgage is a *simple* one is "intangible property" (23) In view of the discussion above, it would seem to follow that the right of a *usufructuary* mortgagee would be "tangible immovable" property. The contrary view has, however, been expressed by the High Court of Allahabad in *Sohan Lal's case*, referred to above, namely that it is "intangible property".

An *undivided share* in property connoting rights of possession and enjoyment is tangible property(24).

It has been held that the interest of the partner in the partnership is, no doubt, an intangible thing but its sale would not come within the second clause of the section because it is 'movable' and

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[See also AIR 1957 Pat 502 (507) : ILR 36 Pat 753 (DB) (Where both the mortgagor and mortgagee agree by a consensual act that the possession hitherto held as mortgagee should now henceforth be held as vendee, although such a transaction would be invalid because of not being registered as required by law and as such it did not amount to a valid transfer of the property yet as consensual act of the parties the possession for more than 12 years had the effect of wiping out the equity of redemption.)

20. AIR 1934 Nag 13 (15).

21. AIR 1928 All 726 (733) : 50 All 986 (FB).

22. AIR 1936 PC 230 (232) : 63 Ind App 340.

23. AIR 1936 PC 230 (232) : 63 Ind App 340 ** AIR 1935 PC 108 (111) : 62 Ind App 115. (Agreement as to transfer of security is of no effect by reason of non-registration.) ** AIR 1941 Nag 5 (6) : ILR (1941) Nag 615 (DB) ** AIR 1934 Nag 13 (15) ** AIR 1929 All 161 (164) : 51 All 494 (DB) ** AIR 1924 Rang 267 (268) ** (1911) 14 Oudh Cas 161 (163) ** (1912) 15 Ind Cas 853 (854) (All) ** (1901) 24 Mad 449 (463) (DB). (18 Mad 454, Dissented from.)

[See also (1912) 16 Ind Cas 125 (125) (Lah) (Sale of mortgagee's rights by endorsement on mortgage-deed — Registration necessary.)]

24. AIR 1946 All 125 (126) (Fractional share in a mahal is not capable of being touched and cannot be described as tangible.)

not 'immovable' property(25)

[illegible] the property [illegible] an 'immovable thing' within the meaning of this section the [illegible] can only be made by a registered instrument whatever may be the value of such [illegible] (26) [illegible] where the Transfer of Property Act does not apply [illegible] where the mortgage is a usufructuary [illegible] registered [illegible] less than one hundred rupees (27)

See also S 3 Note 2

20. "Can be made only by a registered instrument."

[illegible] a sale of immovable property [illegible] Under this section it is clear that a sale of [illegible] immovable property [illegible] a reversion or [illegible] instrument. In the absence of a registered [illegible] **evidence can prove** [illegible] a contract of sale (1) As to the [illegible] See also Note 1

[illegible] required to be registered under the Registration Act or the Transfer of Property Act [illegible] after enactment (2)

[illegible] and only right [illegible] as stated the **document required registration(3)**

[illegible] sale does not pass until the sale deed has been registered [illegible] and payment of consideration In the absence of a registered sale deed, [illegible] of immovable property by purchaser on the basis of the agreement to sell and the power of attorney executed by the vendor in favour of the **purchaser.(4)**

See also the undermentioned case(5)

[illegible] as owner by purchaser on the basis of agreement to sell and the power of attorney executed by the [illegible] in favour of the prospective **purchaser-cum-attorney** in the absence of a registered sale deed Where no registered sale deed was executed in favour of the transferee by the [illegible] vendor the transferee could not be said to be the owner of the suit properties under the agreement to sell or power of attorney executed in his favour by such [illegible] vendor (6) [illegible] is a mere [illegible] and transfer of an immovable property valued at Rs [illegible] can be recognised only by a registered instrument [illegible] Where the plaintiff's claim that he is the owner of the suit properties is based on unregistered sale deed he was never in possession of the suit properties and it is not a claim of statutory transfer S 54 [illegible] attracted [illegible] can be said to have been [illegible]

25. AIR 1950 Nag 89 (90) : ILR (1950) Nag 355

26. [illegible] na plantation — Trees being young [illegible] — Sale not an interest in immovable property and requires registration.)

27. [illegible] Lah

Section 54 — Note 20

1. 1998 (2) Sim LC 367 (370) (Him Pra)
2. AIR 1973 Cal 1 : 76 Cal WN 1048 (FB).
3. AIR 1985 (NOC) 42 : (1984) 2 Cal HN 90
4. 1990 Jab LJ 770 (772) (Madh Pra)
5. (1967) 65 ITR 67 (76) : (1967) 2 ITJ 899 (Bom)
6. AIR 1987 Delhi 36 (39, 40) : (1986) 30 Delhi LT 487

the said sale deed (7) Where it is stated in the document that full consideration for the land was duly paid to the vendor and possession of it was also delivered to the vendee, the passing of consideration and the passing of title, i.e. the two essential incidents to constitute sale deed are present in the document Thus the document is nothing but the sale deed and not an agreement for sale However, in absence of registration the sale must fail The suit for specific performance would not be maintainable since the document is not an agreement to sale If it is found that possession was deliverd to the vendee simultaneously with execution of the document and he continued to be in possession, he would be entitled to a decree for permanent injunction to project his title **(8)** Where the title passed on to the vendee on the basis of the sale deed which had been executed between parties for which consideration was partly paid and partly promised to be paid the sale deed required registration But the subsequent receipt of payment of the consideration promised to be paid in future would not require registration.**(9)**

Where there was transfer of shebait's right to worship (pala) and not merely benefit arising out of it, such transfer requires registration when the document disclosed that not only right to collect usufruct was transferred but there was also transfer of duties and functions as shebait, is amounted to transfer and required registration**(10)**.

The mortgagor executed a usufructuary mortgage and put the mortgagee in possession of the property Subsequently the morgagor borrowed a fresh loan from the mortgagee and executed a document under which in case of mortgagor's failure to re-pay the loan within the stipulated period the morgagor would sell the mortgaged property to the mortgagee for the loan amount If the mortgagor failed to execute the sale deed The mortgagee would be entitled to get a sale deed registered on the basis of the document The document was not registered The mortgagor failed to repay the loan and filed a suit for redemption Held, the document in question by itself could not be regarded as the agreement of sale but was one that matured into an agreement or contract for sale only on mortgagor's failure to re-pay the loan within the stpulated period, the same being unregistered could not create, any interest in the property or extinguish any one's interest in the property in view of S. 17(1)(6) of the Registration Act Since under the document the mortgagee could be said to have acquired a right to have a document creating title in himself executed, the document was compulsorily registrable u/S 17(1)(b) and as it was unregistered the mortgagor's right to redeem the property could not be said to have been extinguished by it Therefore, even after the mortgagor's failure to repay the loan within the time stipulated, the mortgagee's possession of the property continued to be that of a mortgagee and as such S 53A of T P Act had no application Accordingly the suit by the mortgagor for redemption was maintainable **(11)** where the petitioner claimed right in a tank, for agricultural purpose, on the basis of agreement, which on bare reading indicates that the document is a lease for period of ten years regarding a profit pendre in the immovable property, which requires registration, but the document being unregistered one, does not confer right, title or interest on the petitioner He has no right, title or interest in the said tank**(12)**

When once the registration of sale deed is completed, the transaction is completed, if any one of the parties wants to set aside the transaction on the ground of fraud, they have to file a suit for said relief because evidence to required to prove plea of fraud It is not open to any one of the parties to cancel the sale deed unilaterally on their volition**(13)**

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7. (1987) 5 Reports 135 (137) (Madh Pra) ** (1990) 2 Mah LR 833 (836) (Bom)
8. AIR 1988 Madh Pra 152 (153)
9. AIR 1983 All 84 (87) : 1982 All WC 706
10. AIR 1985 (NOC) 42 : (1984) 2 Cal HN 90
11. AIR 1986 Kant 221 (222, 223) : (1985) 2 Kant LJ 364
12. 1990 All LJ 1015 (1017) : 1990 All CJ 659
13. 2000 (3) Mad LJ 646 (653).

A sale deed was sought to be set aside on ground that imposter was put before the Registrar However, the attesting witness who was present before the Registrar, did not state that imposter was put. No collateral evidence was put to support the plea Thus the finding that the said deed was duly executed needed no interference(14).

Where it is alleged that the sale deed is obtained by coercion, onus lies on vendor to establish coercion When sale deed is registered presumption as to its validity arises Vendor cannot unilaterally cancel the sale deed without joining the vendee In absence of proof of coercion, sale deed could not be set aside(15).

However, where by operation of statute the property is deemed to have been vested in the transferee viz S 29 of State Financial Corporation Act which provides that any transfer made in exercise of power under S 29, the property would vest on transferee as if it had been made by owner of property, the execution of registration would be a formality consequent upon the acceptance of highest offer (16) Similarly, where the sale deed of suit property was already executed in favour of third party, before the attachment of property before judgment the sale deed cannot be ignored while considering claim petition of third party merely because sale deed was registered subsequent to attachment(17).

20A. Execution of sale-deed.

The seller can execute the sale deed through his agent Thus a person having a general power-of-attorney in his favour authorizing him to execute documents on behalf of the person executing the power of attorney can sign the sale-deed on behalf of the latter (1) In the case of an illiterate person, where such person touches the pen and hands it over to another and asks him to sign the sale deed on his behalf, it is a sufficient execution of the deed(2)

Where the vendor is illiterate the vendee must show that the vendor understood the contents of the deed executed by her (3) Where a sale deed is attested by an illeterate person by putting his thumb impression, unless it is established that the recitals in the documents were read out and explained to him, he cannot be deemed to have assented to them (4) Under S 67 of the Evidence Act the execution of document has to be proved, which denotes a conscious act of subscribing to a document, in order to prove the execution of a document it must be shown that the person executing it consciously subscribed to it in the sense that he put his mark or signaure on it after having known and understood its contents Mere proof that the person's signature appears on the document cannot, by itself amount to execution of the document (5)

Vendor an illeterate person put his thumb impression on sale deed after fully knowing its contents A collusion between vendee and sub-registrar was not proved nor less than agreed consideration was paid Thus the sale deed was properly executed and convenyed the title (6)

In case of illiterate executant of the sale-deed, where there is a payment of proper consideration and the executant understood the nature and the consequence of his act there in the absence of

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14. AIR 2001 Madh Pra 203 (205)
15. 2001 AIHC 1890 (1897) (Andh Pra)
16. AIR 2002 Orissa 156 (167).
17. AIR 2002 Ker 276 (279) : 2002 (2) Ker LT 107

Section 54 — Note 20-A

1. AIR 1919 Oudh 201 (202) (DB)
2. AIR 1919 Oudh 201 (202) (DB)
3. (1967) 33 Cut LT 862.
4. (1996) 7 SCC 101 (103).
5. AIR 1992 Madh Pra 22
6. 1996 All LJ 1551 (1553) : 1996 All CJ 811

other facts to invalidate that execution the sale is valid and it confers on the purchaser good right title and interest(7).

When a blind person is in sound state of disposing mind, he can very well execute sale deed especially when he has understood contents and nature of document Endorsement on sale deed that it has been executed by a blind person is not necessary (8)

Where the seller of minor's property was not his natural guardian nor was she a guardian appointed by Court did not put her signature or thumb impression on the sale deed instead some other person wrote her name and as the guardian of the minor owning tghe property, it cannot said to be proved that the seller actually executed the said sale deed In view of this defect in the alleged sale deed, the minor's share did not stand transferred by it(9).

Similarly where the suit property was owned by mother and her minor children and the agreement to sell the property as executed by mother, did not have reference to share of minors nor any permission was taken by the mother, to sell the share of minors, the agreement to sell cannot be held to be binding the minors in view of S 8 of Hindu Minority and Guardianship Act(10)

It has been held in the undermentioned case(11) that a sale-deed purported to be executed by several persons but actually signed by only one of them is not ineffective on that ground The fact that the several executants are as different places and do not sign the document at the same time and place but at different times and different places will not make the document one not executed by them jointly, provided that the transaction is one and the same The question is one of intention of the parties. If a document is drawn up in the name of several persons and it is the intention of the parties that all should execute it, it will be incomplete and inoperative till all have done so(12)

Where the area of a plot as mentioned in the sale deed as well as in the site plan is the same but the map differs, the term of the grant must prevail The right to property has to be expressed in the title and when so expressed will not be limited by the map(13)

Where the sale deed was executed by some of the Marfatdars, the non-executing Marfatdars had consented to execution of sale deed and they did not assail the validity thereof, it was held that the sale deed was validly executed(14)

But as seen in Notes 5 and 17, a sale, which is required to be registered, is however not complete until the registration of the deed is completed, although the instrument by which it is effected after its registration, commences to operate from the date of its execution

It will be noted the *attestation* is not legally indispensable for the validity of a sale-deed as it is in the case of a mortgage-deed (15) Mere attestation of a sale-deed executed by a person does

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7. (1977) 2 Cut WR 730 (734 & 736).
8. AIR 1998 Ker 171 (175).
9. AIR 1985 Cal 66 (69) : (1985) 89 Cal WN 257.
10. AIR 2002 Punj & Har 54 (57) : 2001 (4) ICC 775
11. (1908) 31 Mad 114 (116) (DB).
12. 1959 MPLJ 1078 (1080) (Sale-deed executed only by the father, though it purported to be executed by him and his son also Latter not signing it because he thought that when his father had signed it he need not sign it — Held that sale-deed was not defective) ** AIR 1952 Mad 687 (689)

    [See also AIR 1934 Lah 262 (267) (DB) (Sale deed purporting to be by all heirs of deceased Absence of signature of one of them Document held incomplete and had not become instrument of sale.)]
13. AIR 1993 Delhi 19 (22) : 1992 (24) DRJ 532
14. AIR 1990 Orissa 190 (195) : (1989) 2 DLR 350
15. 1960 Jab LJ 827 (830) ** AIR 1929 Lah 1 (4) 10 Lah 447 (DB) (There is no law which

not in law amount to a representation by the attestor that the vendor has a good title to the property **(16)** It is not the requirement of S. 54 that the sale-deed should be attested by the attesting witnesses However, where the sale is sought to be proved by producing certified copy of the sale deed and the witnesses who attested it are alive, and available it was necessary to examine them when secondary evidence by way of certified copy is sought to be proved. It could not in such case be said that since it was not necessary to have attesting witnesses, they need not be examined In the peculiar facts of the case, the certified copy of the sale-deed could not be read as proof of execution of original sale-deed**(17)**.

Where the statute relating to Ceiling of Property provides for prior permission of competent authority for transfer of property, the seller is under obligation to seek such permission before execution of the sale deed. The fact that agreement between parties did not contain such stipulation is immaterial.**(18)**

Where an agreement between the parties conferred a right on one of the parties to obtain another deed of sale. The said document could not be termed as sale deed on ground that possession has been delivered to purchaser and consideration is received by vendor**(19)**

Where sale-deed is executed by the vendor in favour of nominee of the purchaser and the purchaser was only confirming party, income-tax clearance certificate of purchaser-confirming party is not necessary**(20)**.

Where the stamp paper bearing certain date was said to have been issued from place "M", however, the evidence disclosed that agreement was executed on said stamp paper at place "B" on same date which was improbable, but the trial Court found that, on account of scarcity stamp papers issued at place "M" were also sold at place "B" the plea of improbability in execution of agreement of sale would not be tenable.**(21)**

As to execution of sale deed by a pardanashin lady, see S. 58, Note 22.

21. Sale of property of less than one hundred rupees in value.

A sale of property of the value of less than one hundred rupees can be made only in one of the two following ways :

(1) by a registered document, or

(2) by delivery of the property**(1)**.

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requires the attestation of a sale deed so far as Punjab is concerned Section 68 Evidence Act, therefore has no application to sale-deeds in that province) ** AIR 1942 Pesh 83 (84). (Case of N W F P where T P Act does not apply — Attestation not necessary for conveyance — Execution of sale deed can be proved under S 67, Evidence Act by proof of admission — Admission of execution can be proved by Sub Registrar s endorsement)

16. 1910 Mad WN 333 (333)

17. (1983) 2 Land LR 85 (88) (Punj & Har).

18. AIR 1998 All 195 (202) : 1998 All LJ 1218 1998 (1) All CJ 21.

19. AIR 1994 Bom 160 (163) : 1994 Mah LJ 497.

20. AIR 1989 Cal 65 (70) : (1988) 92 Cal WN 746

21. AIR 2001 Kant 442 (448) 2001 AIR Kant HCR 2740 2001 (3) Civil Court Cas 369

Section 54 — Note 21

1. **(1892) 19 Cal 623 (626) (FB). (Overruling** 16 Cal 622) **** AIR 1959 Pat 153 (158) : ILR 37 Pat 1577 (FB).** (Oral sale accompanied by delivery of possession of tangible immovable property.) ** (1981) 7 All LR 577 (578) ** AIR 1964 Andh Pra 21 (23) ILR (1964) AP 199 (DB) ** AIR 1954 Orissa 31 (32) (DB) ** (1953) 19 Cut L Tim 278 (280 281) ** (1910) 8 Ind Cas 443 (Oral sale of land followed by possession — Subsequent purchaser of same land by registered deed could not recover land) ** AIR 1929 Pat 620

Oral sale of a tangible immovable property of the value of more than Rs 100/- in invalid in law(2).

A mere unregistered document without any delivery of property cannot therefore convey any title (3) Suppose now that a sale is evidenced by an unregistered document, and there has been delivery of property in pursuance of such sale The question arises whether the existence of the unregistered instrument prevents the passing of title by delivery of the property Before the year 1929 there was a conflict of opinion on the question among the High Courts On the one hand it has held that though an unregistered instrument could not, under this section, convey any title, such instrument was not a *compulsorily registrable* instrument within S 17 of the Registration Act, that it was not therefore prevented by S 49 of that Act from being given in evidence for the purpose of proving an oral contract for sale and that such oral contract followed by the delivery of the property conveyed a good title to the buyer notwithstanding the existence of the unregistered instrument(4) On the other hand it was also held that where there was an instrument no title would pass unless such document was registered, even if there had been a delivery of the property (5) The reason for this view according to Srinivasa Iyengar, J , of the Madras High Court, was that the moment the

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(621) (DB) ** AIR 1917 Mad 951 (951) (DB) ** AIR 1916 Cal 551 (553) (DB) ** 1885 All WN 201 (202) (DB)

2. 1987 TNLJ 335 (339)

3. AIR 1917 Mad 951 (951) (DB) ** AIR 1993 Madh Pra 5 (8) 1993 MPLJ 333 (Even if the unregistered document is 30 years old it cannot be admitted in evidence for collateral purpose There would be no presumption that contents of the document are true) ** (1909) 4 Ind Cas 1135 (1135) (DB) (Mad)

   [See AIR 1926 Cal 705 (705) (DB)]

   [See also AIR 1951 Orissa 11 (13) ILR (1950) Cut 322 (DB) (Occupancy tenancy in property worth less than Rs 100 — Transfer of — Registered deed necessary under Orissa Tenanacy Act — No title passes in the absence of registration) ** 1950 Bur LR (HC) 119 (122, 123) (Suit for possession based on unregistered sale-deed — No allegation or evidence that sale was effected by delivery — Plaintiff must be held to have failed to prove her title)]

4. **AIR 1928 All 726 (732) : 50 All 986 (DB)** ** AIR 1930 Rang 188 (190) ** AIR 1929 Pat 620 (621) (DB) ** AIR 1925 All 206 (206) ** AIR 1924 Rang 267 (268) ** AIR 1922 Nag 58 (59) 18 Nag LR 8 ** AIR 1918 Cal 828 (828) (DB) (Title passes by delivery — Unregistered document merely serves as a piece of evidence) ** AIR 1917 Bom 203 (205) 41 Bom 550 (DB) (Per Macleod J — Beaman, J , contra) ** AIR 1917 Mad 951 (951) (DB) (Unregistered instrument unaccompanied by delivery - No valid transfer) ** AIR 1916 Mad 1126 (1127) (DB) ** AIR 1916 Nag 93 (96) 12 Nag LR 139 ** 1885 All WN 201 (201) (DB)

   In the following cases also it was held that an unregistered document does not prevent a party from relying upon a title by delivery But they do not make any reference to the provisions of the Registration Act ** AIR 1919 Oudh 207 (208) 22 Oudh Cas 58 ** AIR 1917 Oudh 345 (346) 20 Oudh Cas 33 ** AIR 1917 Oudh 292 (293) ** AIR 1917 Pat 80 (81, 82) (Unregistered sale deed not compulsorily registrable accompanied by delivery of possession is not invalidated by subsequent registered sale-deed) ** AIR 1915 Mad 1059 (1063) (DB) (But the title will be defeated by subsequent registered sale-deed without notice of possession of unregistered sale-deed) ** (1909) 2 Ind Cas 413 (414) (DB) (Cal) ** (1898) 8 CPLR 1 (2) ** (1895) 22 Cal 179 (184) (DB) ** (1910) 5 Ind Cas 57 (58) (DB) (Mad) (A sale by unregistered deed of immovable property less than Rs 100 in value, passes a good title to the vendee when it is followed by delivery of possession and has priority over a registered sale of later date.)

5. AIR 1929 Rang 259 (260) ** AIR 1928 Mad 546 (548) (DB) ** AIR 1915 Mad 573 (574) , 38 Mad 1158 (DB)

parties reduced the terms of their contract for sale to writing, it was the writing that thereafter should be regarded as containing and setting out the terms of the contract and that the transaction cannot be properly called a sale by delivery of the property(6). According to Mr Justice Beaman of the Bombay High Court, the consequence of reading the provisions of this Act as supplemental to the Registration Act by virtue of S 4 of this Act was to render inadmissible under S 49 of the Indian Registration Act, *all* instruments of transfer of immovable property whatever may be the value of such property(7).

By the Transfer of Property (Amendment) Supplementary Act (21 of 1929), S 49 of the Registration Act has been amended and the amended section runs as follows

"49 No document required by S 17 or by any provision of the Transfer of Property Act 1882 to be registered shall—

(a) affect any immoveable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power unless it has been registered :

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 to be registered may be received as evidence of a contract in a suit for specific performance under Chap II of the Specific Relief Act 1877 or as evidence of part performance of a contract for the purposes of S 53A of the Transfer of Property Act 1882 or as evidence of any collateral transaction not required to be effected by registered instrument"

The insertion of the words ' or by any provision of the Transfer of Property Act 1882' gives effect to Mr Justice Beaman's view referred to above The insertion of those words has made it clear that the documents in the supplemental list i e, the documents of which registration is necessary under the T P Act but not under the Registration Act fall within the scope of S 49 of the Registration Act and if not registered are not admissible as evidence of any transaction affecting any immovable property comprised therein and do not affect any such immoveable property(8) The proviso has been added in order to give effect to the decision of the Privy Council in *Varada Pillai v Jeevarathnammal*(9) that an unregistered document although not admissible for the purpose of proving the transaction purported to have been effected, is admissible in evidence for *collateral purposes*, such as for ascertaining the nature of the possession of property(10) However where a person is already in possession from before the date of the unregistered document, the same cannot be looked into It will destroy the nature of previous possession To admit unregistered document in such a case would really amount to getting round the statutory bar imposed by S 49 of the Registration Act(11).

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6. AIR 1928 Mad 546 (548) (DB)

7. AIR 1917 Bom 203 (204) 41 Bom 550 (DB)

8. **AIR 1969 SC 1316 (1320)**. (AIR 1928 All 726 AIR 1921 Mad 337 AIR 1917 Bom 203 and cases taking similar view would be no longer good law in view of 1929 Amendment)

   [**See also** (1985) 2 Mad LJ 417 419) (Sale of property of the value of less than Rs 100) — Unregistered document — Inadmissible in evidence to prove sale]

9. **AIR 1919 PC 44 (46) : 43 Mad 244 : 46 Ind App 285.**

   Also see Note 17.

10. **See** Report of the Special Committee on Act 21 of 1929 ** 1960 MPLJ 673 (674) ** AIR 1951 Hyd 42 (42) (DB) (Document though not registered can be looked into for ascertaining whether there was a contract for sale and whether party was in possession in pursuance to that contract.) ** AIR 1949 Nag 410 (412) : ILR (1949) Nag 534

    [**See also** (1948) 7 J & K LR 158 (161) (For purpose of ascertaining whether possession was permissive or adverse.)]

11. **AIR 1958 SC 119 (203) : 1958 SCJ 438** ** AIR 1983 Raj 109 (125)

The question, however, still arises whether where an unregistered sale deed which does not pass title under this Act is sought to be given in evidence for proving a contract for sale it can be said that it is so sought to be used for a "collateral purpose" within the meaning of the proviso to S 49 of the Registration Act. In the undermentioned case(**12**) it was held that the words "collateral purpose" mean a purpose which excludes all reference to the contract relating to immoveable property If this view is correct a valid sale by delivery of property cannot be established after the amended section came into force, where it is evidenced by a document which is unregistered It has, however, been held in the undermentioned cases(**13**) decided after the amendment of S. 49 of the Registration Act, that where in pursuance of an unregistered sale deed possession has been delivered, the buyer can fall back upon the title by delivery although the unregistered document by itself does not convey any title In *Chinnaswami Chetty v Manickammal*(**14**), decided in 1936, it was held that the non-registration of a document was not fatal to the validity of the transfer if the transferee was able to establish a prior oral sale and delivery of possession in pursuance thereof, i e , an oral sale *sufficiently dissociated from the unregistered sale deed* so that the one can be regarded as independent of the other If a sale deed purporting to transfer property less than Rs 100/- in value is not registered sale would be ineffective unless it is accompanied by delivery of possession(**15**) But where there is no evidence of any separate and antecedent oral contract and the deed is found to constitute the transfer and alone to contain its terms it has been held that the transfer is not a transfer by delivery but a transfer by deed and the non-registration of the document is fatal to the validity of the transfer(**16**)

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12. AIR 1932 Lah 655 (656)

13. (1961) 1 Mad LJ 390 (392) ** ILR (1961) Mys 942 (947) ** 1960 MPLJ 673 (676) (Delivery of possession in pursuance of oral contract need not be simultaneous with execution of unregistered sale deed but may be after its execution AIR 1949 Nag 410 Rel on) ** AIR 1957 Mad 209 (210) ** AIR 1954 Nag 109 (113) ILR (1952) Nag 37 (48) ** AIR 1954 Orissa 31 (32) (DB) (Existence of unregistered document is not a bar under S 91 Evidence Act, from proving the transaction of sale by actual delivery — The document itself is admissible for the purpose of proving the terms of the contract between the parties AIR 1928 Mad 546. **Dissented from**: AIR 1929 Pat 620 AIR 1943 Bom 431 ILR (1943) Bom 653 AIR 1925 All 206 (1) and AIR 1936 Mad 301 59 Mad 779 Rel on) ** AIR 1951 Hyd 42 (42) ** AIR 1949 Nag 410 (413) ILR (1949) Nag 534 ** ILR (1944) All 235 (236) ** AIR 1943 Bom 431 (433) ILR (1943) Bom 653 ** 1941 Nag LJ 643 (645) (Property worth less than Rs 100 - Two methods of transferring title (1) registered instrument (2) delivery of property — Defect in one mode cannot impair validity of other mode if property carried out) ** 1944 All LJ 253 (253) ** AIR 1939 Pat 218 (218 219) (Delivery need not be contemporaneous with execution of sale deed) ** AIR 1936 Cal 130 (131) (Unregistered deed admissible in evidence for collateral purpose of showing nature of possession.)

[**See also** 1950 Bom LR (HC) 119 (123) (Where suit for possession is based on unregistered sale-deed and there is no plea or proof of a sale by delivery no question whether the vendee can show that she had purchased the property by delivery can arise for consideration.)]

14. AIR 1937 Mad 265 (265) (DB).

[**See also** AIR 1949 Nag 410 (413) ILR (1949) Nag 534 (Property worth not more than Rs 100 — Vendee acquires complete title by mere delivery to him of the property — Fact that there is in addition an unregistered sale deed cannot affect the good title acquired by him) ** (1947) 52 Mys HCR 443 (445) (DB) ** AIR 1957 Mad 209 (210) (In such a case the deed would be evidence of the contract of sale and of negotiations concerning the transaction. AIR 1916 Mad 1126 (2) Foll)

15. 1969 BLJR 397 (401) (DB).

16. (1945) 49 Cal WN 649 (655).

It is not absolutely necessary that a sale of immoveable property of the value of less than Rs 100/- in such cases, where the vendee was already in possession of the property sought to be sold in a different capacity, could only be made by a registered instrument. In those cases, transfer of property by sale could be effected by delivery of possession and where the vendee was already in actual physical possession of the property sought to be sold, it is not possble to transfer actual physical possession to him and it is not desirable that a mere formality should be undergone that the vendee should hand over possession back to the vendor for one moment who may again put the vendee into possession in pursuance of the sale, the very next moment, still delivery of the property in such cases may be effected by bringing about a change in the nature or character of possession of the vendee by declaration and such other acts on the part of the vendor, as may be necessary to complete the recognition of the right of ownership of the vendee for making his title absolute. Therefore, there can be an oral sale of immovable property of the value of less than Rs. 100/- coupled with delivery of the property and if the property is already in possession of the purchaser, then by making such declarations and overt acts which may be necessary for vesting the rights of ownership of the sold property in the vendee. Such overt acts may be either in the form of getting mutation entry made in favour of the vendee in the revenue records or the vendor may make a declaration before the settlement authorities or other competent authorities that he has relinquished his rights in the property and that thereafter the vendee would be an absolute owner of the said property. The conversion of the nature and character of possession may also be effected by the handing over of the earlier documents of title by the vendor to the vendee. Further, so far as the question of delivery of possession is concerned which is the essence of the transaction of sale within the meaning of Sec. 54, no distinction could be made between an unauthorised occupant or a person in permissive possession. When the provisions of S. 54 provides two modes, by which a sale could be effected in the case of tangible immoveable property of the value of less than Rs. 100/- then the vendor could not be deprived of one of the modes merely because vendee is already in possession**(17)**.

Even if the sale deed of the immoveable property of value of less than Rs. 100/- was executed 30 years before and came from proper custody, the recital in the sale deed that possession of the property was handed over to the purchaser could not be said to be proved by invoking S. 90 of the Evidence Act when there was proof of delivery of the property by way of construction of wall or fencing by the purchaser or his son, who had filed a suit for declaration of title of the property**(18)**.

There was oral sale of agricultural land for Rs. 50/-. Direct evidence of delivery of possession was not available however the entry in the Record of Rights showed that the land was mutated in name of the purchaser. Thus oral sale with delivery of possession was proved**(19)**.

Property transferred for Rs. 25/- only and possession also given, sale did is not invalid on ground that it is not registered**(20)**.

Where an unregistered sale deed for Rs. 99/- was executed in respect of a poultry shed and kotha and the vendee was already in possession for last several years, the sale was valid. It was not necessary that the vendee, who was already in possession, should first vacate the premises and then his vendor would deliver possession in order to complete the sale. Such a circuitous method is not contemplated by law**(21)**.

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17. AIR 1983 Raj 109 (122) ((1907) ILR 34 Cal 207, AIR 1928 All 726 (FB) and AIR 1952 Bom 437 (FB), **Dissented from.**)
18. AIR 1993 Madh Pra 5 (8) : 1993 MPLJ 333.
19. AIR 1997 Madh Pra 238 (244).
20. 2000 AIR-Kant HCR 469 (472).
21. 1998 (1) RCR (Civ) 718 (720) (Punj & Har)

Sale of land valued at less than Rs 100/- by unregistered sale deed, possession being delivered to the vendee would prevail over subsequent sale by registered document(22).

Where the value of the property under usufructuray mortgage is less than Rs 100/- it can be sold orally and registered document is not necessary(23)

Where vacant land was taken in possession by the vendee as pointed out by the vendor and there was no boundary dispute delivery of possession by measurements and demarcation is not necessary(24).

As seen in Note 1, so far as the transfer of agricultural land is concerned, the State Legislature has exclusive jurisdiction in the matter and the provisions of a State Act can make transfer by sale of such land compulsorily registrable irrespective of its value thus overriding the provisions of this section(25)

When the Custodian sells evacuee property worth less than Rs 100/ it may be made either by Regd. document or by delivery of possession(26).

Even if the value of the immovable property is less than Rs 100/ its sale required registration under the Travancore Registration Regulation (2 of 1087)(27)

21A. Tangible immovable property.

The right of mortgagor in the property usufructurily mortgaged by him is intangible immovable property within the ambit of Part 3 of Section 54, T P Act(1)

22. Delivery of property.

The fourth paragraph of the section enacts that delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs in possession of the property In *Mathura Prasad v Chandra Naraian*(1), it was held by their Lordships of the Privy Council that for the purposes of this section there must be a *real* and not a constructive delivery of property In that case the question was whether the delivery to vendee of an unregistered instrument of transfer was a delivery of the property for the purposes of this section Their Lordships observed as follows.

"Their Lordships cannot accept the suggestion made on behalf of the appellants that for the purposes of S 54 some sort of constructive possession resulting from the delivery of the alleged instrument of transfer might be sufficient For this purpose there must be a real delivery of property"

The same view has been expressed in the undermentioned cases(2) It is not sufficient if the

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22. AIR 1977 Orissa 167 (170) : 44 Cut LT 186.
23. ILR (1977) 2 Mad 447 (456).
24. (1975) 41 Cut LT 740 (743) (DB)
25. AIR 1951 Orissa 11 (13) : ILR (1950) Cut 322 (DB).
26. AIR 1969 All 554 (556) : 1968 All LJ 555 (DB).
27. AIR 1976 Ker 105 (107) : ILR (1978) 2 Ker 422.

Section 54 — Note 21A

1. (1976) 2 Mad LJ 72 (77) : 89 Mad LW 436

Section 54 — Note 22

1. **AIR 1921 PC 8 (9, 10) : 48 Ind App 127.**
2. AIR 1956 Hyd 170 (171) ILR (1956) Hyd 321 (Constructive or symbolical possession would not do AIR 1921 PC 8 48 Cal 509 48 Ind App 127, **Foll.**) ** **AIR 1953 Bom 437 (438) : ILR (1953) Bom 1071 (FB)** ** 1950 Bur LR (HC) 119 (122) (Delivery must be actual delivery — Mere constructive delivery of possession is not sufficient for the purposes of this section) ** **AIR 1928 All 726 (728) : 50 All 986 (FB)** ** AIR 1933 Cal 544 (545) (Mere delivery of title deed is not enough to constitute delivery of possession) ** AIR 1926 Nag 93 (94)

vendor is in possession and says, "henceforth I am your tenant"(3). Nor is the recital in the document that possession has been given equivalent to a delivery of possession for the purposes of this section(4).

Where the vendee is a usufructuary mortgagee of the property sold and is in possession as such, the sale can only be of the equity of redemption which, in such cases, as is seen in Note 19, is intangible property. No question, therefore, of a sale by delivery of such property can arise whatever may be the value of property. Similarly, where the vendee is a lessee to the vendor, what is sold would only be a reversion which is also an intangible thing, and no question of a sale by delivery can arise in such cases.

There is, however, a conflict of opinion among the High Courts on the question whether a sale in such cases should be only by a registered instrument or whether it might be by delivery of the property. All the cases proceed on the view that what is transferred by the vendor is tangible immovable property. But according to one set of cases(5) the transfer must be made only by a registered instrument because actual possession cannot be granted to the vendee, and what is contemplated by this section actual delivery of possession. According to the contrary view which also proceeds on the assumption that what is transferred is tangible immovable property, the delivery of possession contemplated is such delivery as the nature of the property admits of(6) and that where the vendor by appropriate acts or declarations converts the vendee's possession into that of an owner it is sufficient delivery of property within the meaning of this section(7). It is submitted that the actual decision in

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[**See also** AIR 1934 Cal 1047 (1049) ; 5 Cal 972 (DB) (Mere delivery of a document of **title does not constitute a transfer of the right to the property.**)]

3. **(1912) 15 Ind Cas 228 (229) (DB) (Cal)**

4. **(1947) 52 Mys HCR 443 (445) (DB) ** 1934 Nag 13 (15, 16).**

5. **AIR 1928 All 726 (728) ; 50 All 986 (FB) **** AIR 1956 Hyd 1 (10) (17) ; ILR (1956) Hyd 321 (Mortgagee in possession — Sale of equity of redemption — Sale must be by registered sale deed unless some overt act of possession is established.) **** AIR 1953 Bom 437 (439) : ILR (1953) Bom 1071 (FB).** Even assuming that the equity of redemption constitutes a tangible immovable property, the sub-mortgagee who is already in possession can acquire title to the property only if he obtains a registered instrument.) ** (1953) 19 Cut LT 278 (281) (Where the vendee is already in possession of the property sold, a registered document is compulsory to pass the title to the vendee, especially when there is an absence of a declaration of renouncement by the vendor or any evidence to the effect that the vendor did any overt act by which he got name of the vendee recorded in any of the public papers.) ** AIR 1933 Cal 544 (545) ** AIR 1917 Cal 25 (26) (DB) (Possession as a usufructuary mortgagee.) ** (1910) 6 Ind Cas 763 (764) (DB) (Cal) (34 Cal 207 **Followed.**) ** (1907) 34 Cal 207 (210) (DB) (Essence of a transfer by delivery of property is change of possession.) ** (1906) 16 Mad LJ 28 (30) (DB) (Usufructuary mortgage — Transfer by usufructuary morgagor to mortgagee of equity of redemption.)

[**See also** AIR 1914 Cal 754 (754) (DB). **(Possession as lessee.)**]

6. AIR 1960 Madh Pra 237 (239) (It is not necessary that vendee should go and physically occupy every nook and corner sold to him.) ** AIR 1925 Mad 566 (567) (DB) (34 Cal 207. **Dissented from.**)

7. **AIR 1959 Pat 153 (158) : ILR 37 Pat 1577 (FB)** ** AIR 1934 Pat 301 ** AIR 1937 Pat 178 and AIR 1949 Pat 504 **Relied on.**; ILR 34 Cal 207 **Dissented from**; AIR 1956 Pat 81 226 Ind Cas 39 **Overruled.**) ** ILR (1977) 2 Mad 447 (456) ** AIR 1964 Andh Pra 21 (23, 24) ILR (1964) Andh Pra 199 (DB) ** AIR 1961 Madh Pra 176 (179) ILR (1961) Madh Pra 614 (DB) (Where both the parties (vendor and vendee) were residing jointly the only way in which the transfer could be made is by change in the village records and by payment of rent being made in the name of the vendee.) ** (1959) 25 Cut LT 28 ** AIR 1959 Raj 218 (220) ILR (1958) 8 Raj 572 (DB) ** AIR 1957 Mad 209 (210) (Sale to usufructuary mortgagee — Direction to vendee to keep property as absolute owner in

the first mentioned set of cases is correct though the assumption whether what is transferred in such cases is tangible immovable property, is open to question.

It is important to note that a mere delivery of property does not by itself amount to a sale In order to constitute a sale, the delivery must be made *in pursuance of a contract to sell*(**8**). If possession had been delivered in pursuance of the sale-deed it is immaterial to the validity of the sale whether the delivery was made contemporaneously with the execution of the document or only later on(**9**).

Proof of formal delivery of possession is not necessary. If there is proof that the possession passed to the buyer and that it did so with the assent of the seller and in connection with and to give effect to the contract of sale it is sufficient(**10**).

Long possession.

Long possession under an agreement of sale may also result in transfer of title and ownership. Thus where for more than 40 years a Company is in possession of the property under an agreement of sale having paid full amount of consideration and acts as owner thereof exercising peacefully and without interruption the ordinary rights of ownership to the knowledge of the vendor who was the wife of the Director of the Company and who did not claim recovery of possession during this long period, her right is extinguished and the vendee becomes the absolute owner(**11**).

Where the promoter of a Company purchased property from the funds of the company and on incorporation the Company assumed possession and built structures upon it the company's title of the property cannot be set aside on the ground that there is no conveyance by the promoter, in favour of the company under a registered document(**12**).

Where a person entered into possession of immovable property by virtue of a sale deed

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discharge of mortgage amounts to delivery of possession) ** AIR 1954 Nag 109 (112) ILR (1952) Nag 37 ** AIR 1949 Pat 504 (505) , 27 Pat 202 (DB) (Oral sale by the mortgagor to the usufructuary mortgagee in possession of the property mortgaged for Rs 96 passes title to the usufructuary mortgagee) ** AIR 1939 Bom 31 (33) ILR (1939) Bom 71 (DB) ** AIR 1937 Pat 178 (180) 15 Pat 772 (DB) (Mutation of vendee's name is sufficient delivery) ** AIR 1936 Lah 756 (757) (Vendee already in possession — Formal delivery of possession is enough) ** AIR 1936 Rang 497 (498) ** AIR 1935 Lah 164 (165) ** AIR 1934 Pat 301 (302) ** AIR 1933 Cal 411 (412) 60 Cal 384 (Essence of delivery is change of possession, but it is enough if character of possession is changed) ** AIR 1926 All 300 (300) ** AIR 1925 Mad 566 (567) (DB) ** AIR 1919 Cal 325 (327) (DB) ** AIR 1917 Oudh 345 (346) 20 Oudh Cas 33 ** AIR 1916 Cal 934 (935) (DB) (Everyting done that could be done to deliver possession Delivery held to be sufficient.) ** AIR 1916 Nag 93 (96) 12 Nag LR 139 ** AIR 1915 Mad 573 (574) 38 Mad 1158 (DB) ** AIR 1915 Nag 114 (115, 116) · 12 Nag LR 3 ** (1948) 27 Pat 202 (203) (DB) (Oral sale by a mortgagor of his property to his usufructuary mortgagee for a price less than Rs 100, is valid and conveys a good title to the vendee — AIR 1928 All 726, **Dissented from; AIR 1937 Pat 178, Foll.)**

[See also 1950 Bur LR (HC) 119 (121) (It is not intended by enacting S 54 that when actual physical delivery is impossible because vendee is already in possession the sale should necessarily be by a registered instrument.)]

8. AIR 1917 Nag 214 (214) ** AIR 1916 Nag 93 (96) 12 Nag LR 139

[See also AIR 1941 Lah 407 (410) : ILR (1942) Lah 79 (FB).]

9. AIR 1949 Nag 410 (412) : ILR (1949) Nag 534.

10. AIR 1915 Mad 1059 (1060) (DB) ** (1909) 4 Ind Cas 1135 (DB) (Mad) (If, on the date of sale, the vendee gets into possession, with the assent, express or implied of the vendor, delivery of property may be inferred.)

11. (1978) 82 Cal WN 92 (98) : ILR (1977) 2 Cal 385 (DB).

12. AIR 1969 Mad 462 : (1969) 2 Mad LJ 509 (DB).

and also raised constructions upon it, even though the sale deed was not been registered in accordance with the requirement of section 54 of the Act he could still protect his title against another person by virtue of such a sale deed(13)

23. Contract for sale.

Every sale must necessarily be preceded by a contract for sale In other words every sale implies a contract for sale(1) If under an agreement title to goods does not pass then it is merely an agreement to sell and not a completed transaction(2). If a contract of sale can be spelled out from correspondence it is not necessary to draw it up formally(3) A person having Sirdari rights in a land can enter into an agreement of sale agreeing to transfer the property after obtaining Bhumidhari sanad(4) Every sale necessarily implies a previous agreement to sell but such previous agreement may take place only a moment or two before and it can be proved from circumstantial evidence and for this, the recitals in sale deed can be relied upon(5) Under Sec 54 it is not necessary that an agreement for sale should be in writing There is no prohibition against oral contracts for sale When valuable properties are involved normally the parties do not conclude the bargain by oral arrangement, but when a party comes to the Court pleading that he is entitled to a specific performance based on an alleged oral contract for sale the burden heavily lies upon him to establish it by acceptable and cogent evidence what he pleaded This rigorous test is warranted to prevent miscarriage of justice(6) The sale itself is very often referred to as a contract of sale which must therefore be distinguished from a contract *for sale* As pointed out by Mahmood J in *Shib Lal v Bhawan Das*(7), a contract of sale is an *executed* contract and a contract *for* sale is an *executory* one The former creates a *jus in rem*, as it passes ownership immediately when it has been executed the latter is a *jus ad rem* as it creates on an obligation attached to the ownership of property

There is no prohibition under S 54 against oral contract of sale However burden lies heavily on the plaintiff to prove it by cogent and reliable evidence(8)

The recitals in the document in instant case showed that there was passing of full consideration and passing of title, two essential ingredients to constitute a sale deed possession was delivered to purchaser and no date was fixed for anything else to be done the document was nothing but a sale deed(9).

In England a contract for sale of property, makes the promisee the owner in equity of the estate(10) In this country the law does not recognise the distinction between legal and equitable

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13. 1983 All LJ 405 (408) : (1983) 1 Civ LJ 504

Section 54 — Note 23

1. AIR 1927 Nag 177 (178 179) ** (1991) 1 Cal HN 53 (55) (DB)
2. AIR 1981 Him Pra 8 (12) : 1980 Sim LC 341 (DB).
3. 1979 Kash LJ 334 (443) : 1979 J & K LR 96 (DB)
4. 1980 UPLT (NOC) 108 1980 All WC 231 (232)
5. 1979 Tax LR 538 (540) : 1979 UPTC 880 (DB)
6. (1989) 2 Andh LT 653 (659)
7. (1889) 11 All 244 (250) (DB).

   [See also AIR 1950 All 632 (635) : ILR (1953) 1 All 265.]
8. 1990 (2) Cur Civ C (AP) 324 (328) : (1989) 2 Andh LT 653
9. AIR 1988 Madh Pra 152 (153).
10. AIR 1916 PC 139 (140) : 44 Ind App 15 ** AIR 1967 SC 744 (748) : (1967) 1 SCR 293 ** AIR 1967 Mad 375 (377) ILR (1966) 1 Mad 590 (DB) ** AIR 1920 Bom 210 (211) (DB) ** (1900) 13 C PL R 163 (164) (DB) ** (1901) 24 Mad 449 (462) (DB) ** (1876) 24 WR (Eng) 778 (779) 2 Ch D 499 (506) 45 LJ Ch 554 34 LT 787 Lysaght v Edwards **

estates(**11**) though prior to the passing of the Act a contract for sale was held to crete an equitable interest in the estate in favour of the buyer on the analogy of English Law(**12**) The concept of duality of ownership legal and equitable on execution of an agreement to convey immovable property as understood in English Law is alien to Indian Law, which recognizes one owner viz , the legal owner(**13**) The last clause in S 54 provides that a contract for sale of immovable property does not of itself create any interest in or charge on such property It totally abolished the English doctrine that a contract for sale transfers an equitable estate to the purchaser The law of India does not recognise the equitable estate(**14**) The section makes it clear that such a contract in this country after the passing of this Act does not create any interest or charge upon the property(**15**) But this

(1820) 37 ER 456 (458) 1 Jack & W 494 21 RR 219 Wall v Bright ** (1808) 33 ER 707 (707) : 15 Ves 138 : 10 RR 44, Crockford v. Alexander.

11. **AIR 1946 Lah 322 (328) : ILR (1947) Lah 213 (FB) ** (1904) 31 Cal 57 (72) : 30 Ind App 238 (PC) ** AIR 1916 PC 139 (141) : 44 Ind App 15 ** AIR 1958 Pat 133 (140) (DB) ** AIR 1957 Andh Pra 960 (961) (Suit for mesne profits from date of contract for sale to date on which buyer obtained possession does not lie) ** AIR 1954 Trav Co 10 (24) (DB) ** AIR 1949 Sind 28 (32) ILR (1947) Kar 240 (DB) (Mere agreement to purchase immovable property or payment of price or delivery of possession would not pass title to person paying price, without execution of registered conveyance Person receiving price does not become benamidar — Indian law does not make distinction between equitable ownership and legal ownership)

Also see S. 5, Note 6, S. 48, Note 10 and S 58, Note 39

12. **AIR 1967 SC 744 (748) : (1967) 1 SCR 293** ** AIR 1929 Cal 263 (264) 56 Cal 487 (DB)

[See AIR 1931 Bom 578 (579).]

[See however AIR 1961 Punj 378 (381) ILR (1961) 2 Punj 293 (DB) (Obiter — Even if S 54 is not applicable the equitable principles of English Law cannot be invoked for treating the transaction as tantamount to transfer of ownership.)]

13 **AIR 1980 SC 1334 (1338) : 1980 UJ (SC) 655** ** (1985) 1 Cal HN 95 (102)

14. **AIR 1989 Cal 65 (68) : (1988) 92 Cal WN 746**

15. **AIR 1977 SC 1226 (1228) : 1977 UJ (SC) 201.** (Order of consolidation allowing new plots for earlier plots in respect of which agreement for sale had been executed — Agreement not creating any interest in earlier plots and therefore would be void) ** **AIR 1967 SC 978 (981) : (1967) 1 SCR 873 ** AIR 1967 SC 744 (749) : (1967) 1 SCR 293 ** AIR 1960 SC 1368 (1371) : (1961) 1 SCR 248.** (AIR 1953 Nag 182, **Reversed.**) ** **AIR 1954 SC 44 (49) : 1954 SCR 310.** (The obligations of the parties to a contract for sale of land are the same as in other ordinary contracts and consequently the doctrine of frustration is applicable) ** **AIR 1934 PC 68 (71) : 61 Ind App 115 ** AIR 1934 PC 235 (237) . 61 Ind App 388 ** AIR 1916 PC 139 (141) : 44 Ind App 15 ** AIR 1930 All 1 (2) : 52 All 338 (FB) ** 51 All 338 (FB) ** AIR 1918 Mad 681 (690) : 40 Mad 365 (FB)** AIR 2002 Andh Pra 8 (11) 2002 AIHC 61 2001 (5) Andh LT 473 (Prohibition under S. 4 of the A P Vacant Lands in Urban Areas (Prohibition of Alienation) Act (12 of 1972) does not apply to agreement for sale of immovable property AIR 1981 AP 38, **Overruled.**) ** AIR 2002 Kant HCR 2181 (2182) 2002 AIHC 3668 (In absence of sale deed, agreement holders cannot claim possession — Moreso, when agreement was executed 20 years ago and could be said to have been lapsed after three years) ** 1999 (3) Cal LT 177 (184) ** AIR 1999 Delhi 383 (393) 1999 (81) Delhi LT 228 ** 1999 (1) Guj LR 373 (376) ** 1999 (1) Rajasthan LR 357 (363) ** 1998 (1) Cal HN 148 (149) ** 1997 (2) Cal HN 364 (375) ** 1996 (1) CTC 55 (58) (Mad) (There is no need for cancellation of the agreement under S 40(1) of T P Act) ** AIR 1995 All 316 (317) ** 1995 All LJ 1755 (1757) 1995 (3) Bom CR 61 (62) (The agreement of the contract for sale is a document which falls outside Article 25 of the Bombay Stamp Act) ** 1992 Tax LR 559 (567) 1992 (194) ITR 409 (Kant) ** 1992 Rajdhani LR 274 (275) (Delhi) ** (1991) 97 Cur Tax Rep 97 (103) (Kant) ** 1990 Jab LJ 770 (772) (Madh Pra) ** (1989) 2 Cal HN 501 (504) ** 1989 Jab LJ 295 (296) (Madh Pra) ** (1989)

2 Mad LJ 168 (170) ** 1988 (1) Cal HN 258 (264) ** (1988) 1 Cal LJ 307 (312) ** (1985) 1 Cal HN 95 (102) ** AIR 1983 Raj 139 (142) 1982 WLN 572 (Agreement to sell a house — Lease-deed executed on same day between vendor and vendee saying that vendor is put in possession of house as tenant of vendee — Vendee cannot object attachment of house on basis of lease deed.) ** AIR 1981 Cal 404 (409) (DB) ** AIR 1979 Mad 26 (1978) 2 Mad LJ 267 ** 1978 MPLJ 279 ** 1974 WLN 314 (318) (Raj) ** AIR 1971 All 189 (191) (1970) All LJ 969 ** (1968) 2 Mad LJ 574 82 Mad LW 5 ** AIR 1967 Mad 375 (377) ILR (1966) 1 Mad 590 (DB) ** AIR 1966 Mys 299 (303) (Contract of sale — Decree for specific performance — Title passes with execution and registration of sale deed and does not flow from decree — AIR 1955 Cal 267 and AIR 1922 Cal 412 — **Disting.** (1888) ILR 5 Bom 554 **Not foll.**: AIR 1938 All 432 (433) and AIR 1957 Pat 7[illegible] and AIR 1957 Andh Pra 960 and (1954) 2 Mad LJ (Andh) 11 **Rel on**.) ** AIR 1965 Assam 20[illegible] ILR (1964) 16 Assam 380 (DB) (Agreement for the purchase of building — Assessee taking possession of building after adjusting consideration money to seller's account — Assessee does not acquire the ownership till execution of sale-deed — Assessee cannot claim depreciation on the value of building unless he has become the owner of it in the year for which depreciation is claimed.) ** 1965 BLJR 214 (223) (DB) ** (1964) 1 Andh WR 300 (302) ** ILR (1962) Bom 641 (646) (DB). (Transfer of possession under an agreement of sale does not amount to a "permanent alienation" or "transfer" as defined in S. 98A Hyderabad Tenancy and Agricultural Lands Act (21 of 1950) ** AIR 1962 Madh Pra 34 (36) ILR (1961) Madh Pra 797 (DB) ** AIR 1961 Punj 378 (381) ILR (1961) 2 Punj 293 (DB) ** AIR 1960 Madh Pra 3 (4) ** AIR 1957 Ker LJ 1143 (1145) ** AIR 1958 Pat 133 (138) (DB) (It only creates a right which if not enforced in time is not of any avail to defend possession even if already delivered on that basis.) ** AIR 1957 Andh Pra 960 (961) ** AIR 1[illegible] Bom 5[illegible] (32) ILR (1956) Bom 594 (As a mere agreement to sell does not create any interest in the land and as it is an essential condition for the applicability of S. 24 Bombay Agricultural Debtor's Relief Act the B. A. D. R. Court cannot declare an agreement for sale accompanied by delivery of possession in anticipation of the execution of a sale deed as a transfer of the land by way of mortgage.) ** AIR 1957 Trav Co 189 (192) ILR (1956) Trav Co 998 (DB) ** AIR (1956) Cal 462 (463) ILR (1957) 3 Cal 99 ** AIR 1955 Trav Co 195 (196) (DB) (Property mortgaged to *B* sold subsequently to *C* — *C* entering into contract to sell *D* — *B* filing suit on mortgage impleading *C* and purchasing property at sale — *D* also obtaining decree for specific performance — Sale deed executed through Court after *B* purchase — *D* filing suit for possession against *B* — **Held**, that as *D* would not claim title to property under the contract for sale the title continued to remain in *C* and the property was therefore validly sold in execution of the decree against him thus passing the title to *B* — **Held**, also the decree for specific performance by itself did not also alter the position.) ** AIR 1954 Trav Co 10 (24) (DB) ** AIR 1951 Mad 762 (768, 769) Because of this fact the rule of perpetuities which does not apply to mere personal contracts does not affect such a contract as it does in England where under the law of contracts such a contract creates an interest in the property agreed to be sold.) ** AIR 1950 Ajmer 59 (60) Mortgage held must have its effect as against subsequent sale though agreement to sell was executed before mortgage.) ** 1949 Trav Co LR 18 (21) (No present interest in property created by agreement to sell.) ** AIR 1949 Sind 28 (32) ILR (1947) Kar 240 (DB) Payment of price and even delivery of possession would not convey any title until a registered conveyance is executed and does not constitute the person who receives the price a benamidar for the person paying the price in respect of the property.) ** AIR 1947 Nag 254 (256) ILR (1947) Nag 328 (DB) (Where property agreed to be sold is compulsorily acquired the vendee suing for specific performance is not entitled to the compensation money lying with the Collector.) ** AIR 1945 Nag 86 (93) ILR (1944) Nag 552 (DB) ** AIR 1939 Nag 35 (37) * AIR 1939 Mad 220 (223) ** AIR 1937 Bom 142 (143) ILR (1937) Bom 140 ** AIR 1933 Bom 475 (476) ** AIR 1930 Cal 263 (264) (DB) ** AIR (1930) Mad 184 (194) (DB) ** AIR (1929) Cal 494 (495) 57 Cal 274 (DB) ** AIR (1927) Cal 956 (962) 55 Cal 35 (DB) (The law requires a conveyance for the purpose of transfer of title and this cannot be made by a mere agreement.) ** AIR 1927 Nag 177 (178) ** **AIR 1926 Bom 497 (500) ILR 50 Bom 566 (FB).** (Section 14 does not apply to contract for sale.) ** AIR 1925 Pat 732 (732)

rule have exceptions depending upon special features(**16**)

Though the contract for sale does not create any interest or charge it creates an obligation which may be enforced against a transferee with notice of contract or a gratuitous transferee of the property(**17**) An agreement for sale reciting payment of earnest money creates a statutory charge for the earnest money under S. 55(6)(b)(**18**).

Agreement to sell does not require registration as the same is not a non-testamentary document acknowledging the receipt of payment on any consideration on account of creation, declaration, assignment, limitation or extinguishing any right, title or any interest(**19**)

The person in whose favour an agreement for sale of an immovable property is executed has interest in the subject matter of the contract for the purpose of Sec. 202 of Contract Act if not for the purposes of the Transfer of Property Act Here the word "interest" simply means an advantage or a benefit(**20**).

Where the plaintiff enters into agreement with builder to purchase premises and earlier the builder had entered into agreement to purchase with the owner, they both cannot claim any interest by virtue of the agreements in their favour They have no independent right in the property Thus they are not entitled to any notice of illegal construction from municipality They have no locus standi to file suit and claim injunction(**21**) Under the provisions of the T P. Act, the execution of an agreement of sale cannot be held to be sufficient to attract the provisions of S. 6 of the Provincial Insolvency Act Mere agreement of sale does not confer any transfer of interest and therefore it cannot be considered as an act of insolvency committed by the debtor(**22**).

An agreement of sale being not a transfer a fortiorari, the prohibition created under S 4 of A

** AIR 1924 Nag 327 (328) ** AIR 1923 All 514 (515) 45 All 478 (DB) (**Overruled** on another point by AIR 1927 All 170) ** AIR 1922 Bom 84 (88) 47 Bom 191 (DB) ** AIR 1922 Low Bur 25 (26) 11 Low Bur 319 (DB) ** AIR 1920 Bom 210 (211) (DB) ** AIR 1918 Cal 923 (925) (DB) ** AIR 1917 Pat 585 (588) (DB) ** AIR 1916 Mad 298 (303) 39 Mad 462 (DB) ** AIR 1916 Pat 226 (228) 1 Pat LJ 238 (DB) ** AIR 1916 Low Bur 79 (80) ** AIR 1916 Low Bur 67 (67) ** AIR 1914 Cal 335 (336) 41 Cal 148 (DB) ** (1909) 4 Ind Cas 1109 (1109) (DB) (Mad) ** (1905) 7 Bom LR 845 (849) ** (1901) 2 Mad 449 (462) (DB) ** (1900) 13 CPLR 172 (176) ** (1900) 13 CPLR 163 (164) ** (1899) 23 Bom 181 (193) (DB) ** 1898 Pun Re No 65, p 225 (226) ** (1926) 98 Ind Cas 729 (731) (DB) (Mad) (Even if registered) ** (1911) 14 Oudh Cas 139 (141) (*A* entitled to certain property agreement with *B* to give half property in lieu of funds supplied to meet expenses of suit — *B* does not get any interest in property capable of being enforced by suit) ** (1910) 5 Low Bur Rul 6 (6).

[**See also** AIR 1945 Oudh 130 (132) 20 Luck 19 (DB) (Deed of conveyance must clearly profess to sell property and not merely be a promise to sell in future) ** AIR 1926 Bom 24 (25) (DB) (Agreement during suit to divide property after suit) ** **AIR 1931 PC 196 (202) : 58 Ind App 279.** (Property vested in trustee — Trustee is owner) ** AIR 1924 All 396 (397) (Mere contract does not create equitable interest) ** AIR 1937 Pat 483 (486) (DB) (English doctrine whereby inheritance of right under contract for sale has been treated as inheritance of property itself, cannot be applied) ** AIR 1937 Mad 293 (294) (Agreement to sell to mortgagee mortgaged property — Unless title in property mortgaged passed to mortgagee mortgage is not discharged even if possession is already transferred)]

16. ILR (1977) 2 Mad 99 (109)

17. **AIR 1980 SC 1334 : 1980 UJ (SC) 655** ** 1989 Jab LJ 295 (296) (Madh Pra)

18. (1985) 1 Cal HN 95 (102) (DB).

19. 1989 Sringagar LJ 159 (160) (J & K).

20. 1977 Rajdhani LR 487 (491) (DB) (Delhi).

21. 1978 (74) DLT 11 (14).

22. AIR 1996 Mad 143 (145) : 1997 (1) CTC 38

P Vacant Lands in Urban Areas (Prohibition of Alienation) Act, 1972, against alienation of vacant land, would not apply to such a transaction(**23**)

Simply because vendee is already in possession of the property there is no reason why sale of the property by the mortgagor valued at less than Rs 100/- cannot be effected by delivery of possession which of course will be notional in such case(**24**)

A contract for sale does not create any interest in or charge on the property so as to attract the provisions of Section 38 of the Administration of Evacuee Property Ordinance(**25**)

A mere agreement to sell the tenement by a landlord to a tenant does not effect a merger of interest(**26**).

Where the suit for specific performance is filed on the basis of alleged oral agreement to sell the tenanted property by owner in favour of tenant the suit for eviction of tenant cannot be stayed on ground that the suit for specific performance is pending(**27**)

In instant case there existed a prior registered agreement to sell a plot The subsequent purchaser did not make necessary enquiry as regards agreement by inspecting records or by getting it inspected by somebody In the circumstances the subsequent purchaser would be attributed actual or deemed knowledge of the agreement He cannot claim to be bona fide purchaser for value without knowledge of prior agreement of sale(**28**)

In a suit for ejectment and arrears of rent the tenant took a plea that she was not liable to pay rent in view of the agreement to sell the tenanted premises between herself and the landlady, but no such stipulation was however found in the agreement Moreover the tenant herself paid rent for some period after executing the agreement The tenant could not claim ownership before the date of sale, in view of S 54 of the T P. Act Thus the decree for arrears of rent could be passed against the tenant(**29**).

The plaintiff purchased the suit property which was in occupation of tenant, and filed suit for possession. The tenant resisted the suit on ground of agreement of sale in his favour However, the said document was not duly stamped nor reliable It's genuineness was doubtful Mere agreement did not create any interest over the suit property in favour of the tenant The plaintiff was entitled to possession(**30**).

A careful reading of Ss 40, 54 of the T P Act and S 95 of the Trusts Act make it abundantly clear that the subsequent transferee with notice stands in a fiduciary capacity and holds the property in trust to the prior agreement holder, but the prior agreement holder cannot automatically become the owner by seeking declaratory relief and has necessarily to file a suit for specific performance impleading both the vendor and the subsequent transferee(**31**)

Two persons A and B had jointly purchased certain land There was contemporaneous agree-

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23. AIR 2002 Andh Pra 8 (11) : 2002 AIHC 61 2001 (5) Andh LT 473.

24. AIR 1972 Orissa 136 (140 141) 37 Cut LT 1114 (AIR 1928 All 726 (FB) and AIR 1953 Bom 437 (FB). **Dissented from.**)

25. AIR 1970 Guj 12 (DB) (AIR 1956 Cal 462 **Diss. from.**)

26. AIR 1975 Kant 155 : (1974) 2 Kant LJ 208

27. AIR 1989 Orissa 154 (155)

28. AIR 1995 All 357 (366).

29. AIR 1995 Andh Pra 189 (193).

30. 1998 AIHC 3417 (3419) (Kant)

31. AIR 1999 Andh Pra 170 (173) 1999 (2) Andh WR 18 (1975 ALT 334 and AIR 1958 Bom 194 **Held not good law** in view of AIR 1980 SC 1334, AIR 1954 SC 75 AIR 1967 SC 978 and AIR 1980 SC 1334. **Foll.**)

ment of sale executed by B in favour of A agreeing to convey her share in the property to A. When B attempted to sell her share to a third person A called upon her by notice to execute sale deed in his favour. Held that since the agreement of sale was a valid deed, the covenant became a contract between the parties. It is not a prohibition on her right to alienate the property. It is a fetter on her right to deal with her share in the property, a liability burdened with the land. Subsequent purchaser-third person purchased the property with notice of agreement of sale. So he could not get valid title. The agreement of sale could not be said to be void title. The agreement of sale could not be said to be 'void' by operation of rule against perpetuity. When a contract has been executed in which no interest in presenti has been created, the rule of perpetuity has no application. The agreement is in the nature of a perspective right created in favour of the co owner. Therefore, it is enforceable as and when an attempt is made by the co-owner to alienate land to third parties(32).

A party to an agreement to purchase has no right or interest in the property left by the testator and has no locus standi to oppose grant of probate(33).

Even where under an agreement of sale which is subject to permission under the Act, if part of the premises was given in possession and certain amount of consideration was paid there should be no transfer(34).

An order of Chairman of a Municipal Board to sell the land of the Board does not amount to a sale and could utmost be a contract of sale(35).

Where the letter of seller accepting the price offered by the purchaser referred to future negotiation for finalisation of more terms of the contract, it could not be said that there was concluded contract between the parties(36).

Temporary injunction cannot be issued at the instance of person in whose favour agreement to sell was executed to prevent the transferee under the subsequent sale deed from enjoying the possession of the property and getting the sale mutated in his name, till the decree of specific performance is obtained by him and a sale-deed is executed in his favour(37).

Where the testimony of the owner is to the effect that possession is given to the purchaser after execution of the sale deed in respect of suit property, injunction restraining the purchaser from entering into suit property cannot be granted to the plaintiff who alleges that an earlier agreement for sale of the suit property is executed by the owner in his favour. Such contract does not create any interest in suit property(38).

A sale by auction is only a contract for sale(39). A contract for *re-sale* is merely a contract for sale and does not create any interest or charge on the property(40). Sale deeds of two properties

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32. **AIR 1997 SC 1917 (1918) : 1997 AIR SCW 1672 : 1997 (10) SCC 309 .**
33. AIR 1977 Cal 496 (498) (1977) 2 Cal LJ 137 (DB) (AIR 1956 Cal 462 **Held no longer good law in view of AIR 1967 SC 744 and AIR 1977 SC 744)**
34. AIR 1977 Cal 361 (362)
35. 1968 Raj LW 356 (357).
36. AIR 1991 All 343 (349)
37. AIR 1981 Delhi 291 (293) 1981 Rajdhani LR 596 1991 Rajdhani LR 19 (19)
38. AIR 1986 Orissa 74 (76) : (1985) 2 Orissa LR 335
39. 1897 Pun Re No. 52, p. 229 (232) (DB).
40. **AIR 1939 PC 14 (18) : 66 Ind App 50.** (A personal contract to reconvey cannot create any interest in the land itself) ** AIR 1960 Bom 105 (106 107) ILR (1959) Bom 1705 (DB) ** ILR (1950) All 32 (41) (DB) ** AIR 1930 All 101 (103) (DB) ** AIR 1929 Mad 807 (810) ** AIR 1924 All 400 (402) 46 All 333 (DB) ** AIR 1915 Bom 22 (23) 39 Bom 472

[**See also** AIR 1917 Mad 358 (361) (DB) (Sale in execution of decree - Sale attacked on

were executed and subsequently deed for reconveyance was signed. The sale deed did not contain any stipulation about reconveyance which was explained by the seller to be as per the advise given by the legal advisor. The reconveyance deed was signed by the agent of the purchaser and the letters written by the seller to the purchaser supported the existence of reconveyance deed. The reconveyance of one of the properties within the time limit fixed under deed of reconveyance and for the same amount as stipulated in the deed also pointed towards its existence. Thus it was held that reconveyance deed was genuine(41). A executed a document selling certain property to B for certain sum. On the same day a contemporaneous document was executed by B in favour of A agreeing to sell the property in question for same amount within 10 years of the date of execution of the document executed by 'A'. The possession of property remained with 'A' and he was to pay Rs. 80/- p.m. as rent to 'B'. The municipal and other taxes in respect of the property were to be paid by A. The question was about the real nature of transaction between 'A' and 'B'.

The very length of period is suggestive of a transaction of mortgage and not a transaction of absolute sale with a stipulation to reconvey the property. If B wanted to purchase the property for his personal occupation he would not have allowed A to continue as tenant. The property was never mutated to the name of B. These factors already spell out the real intention of the parties that it was transaction of mortgage. Thus the transaction in question was one of the mortgage in essence and substance though it was clothed in garb of a transaction of ostensible sale.

The reason for entering into such transaction of ostensible sale coupled with a contemporaneous agreement to sell within 10 years was that if it was not garbed with this paraphernalia and was given the nomenclature of a mortgage the period of redemption would have been 30 years. This period could not have been curtained without attracting the doctrine of clog or equity of redemption. This was an obvious reason for respecting this device(42).

An agreement to sell is a concession which is granted by a purchaser to the seller for repurchase of the property in case he fulfills his part assigned in the agreement within the time granted by the purchaser.

Plaintiffs who were in need of money entered into an agreement with the defendant to sell some of their property. It was also agreed that the purchaser would execute separate agreement promising to resell the property. In pursuance of the aforesaid agreement the sale deed was in fact executed on 17th Feb., 1969. On the same date an agreement to resell was also executed which was got registered. Before the expiry of the period stipulated in the agreement for repurchase the plaintiff inferred the defendant to transfer the property to him and finally on 11th Oct., 1974 a cheque for the balance consideration was also sent to the defendant. The defendant however neither encashed the cheque nor executed the sale deed. In the meanwhile the State prohibited the transfer of property by an ordinance which took the shape of an Act, and the restrictions on transfers were limited during the period of three months. By some amendments to the Act the life of the Act was extended upto 31st Dec., 1975 by which date the Act was to expire. The fundamental basis upon which the agreement rested was mainly that a concession given by the seller to the purchaser was to be availed within a period of six years by performing his part of the contract and in case the concession was not availed within the period of six years the right to claim repurchase of the property would come to an end. The plaintiffs exercised the right within the stipulated period and even performed their part of contract by depositing the entire amount of balance sale consideration in the Court itself. It was nowhere contemplated in the agreement to sell that in case the sale deed could not be executed within a period of six years the entire contract would stand frustrated.

Held the restrictions being temporary and the time limit having been fixed for which the

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ground of irregularities — Compromise — Agreement to reconvey property on payment of price within fixed period — Agreement held, did not convey any present interest in property.)]

41. AIR 1995 SC 1607 (1609, 1611) : 1995 AIR SCW 2528 : (1995) 4 SCC 15.

42. AIR 1988 SC 1074 (1077, 1078) : 1988 (1) JT 652 (2).

restriction was placed it could not be said that permanent inability has arisen due to which the defendant could not execute the sale deed The first ordinance was only for a period of three months and the subsequent Acts and the Amending Acts are also for very short periods From the intervening laws it can be inferred that the defendant would be able to execute the sale deed within a short period The intervening laws thus by no stretch of imagination could be said to have knocked down the fundamental basis upon which the agreement rested The agreement to repurchase subsisted and the plaintiffs admittedly having exercised their claim within the specified period of six years were entitled to get the sale deed executed by the defendant in their favour(43)

The flat owner entered into an agreement of sale of the flat The agreement did not stipulate transfer of possession to the purchaser any time before or at the time of or after the execution of the agreement of sale without executing a conveyance in respect thereof No interest in the immovable property was intended to be transferred The purchaser was not given possession of the flat at any time The agreement of sale was subsequently cancelled by a deed of cancellation before any such possession could be given In the circumstances, the deed of cancellation which have the effect of reconveyance of the property can fall under Art 15 and not under Art 25 of Bombay Stamp Act

It is well settled that the contract for sale of immovable property does not of itself create any interest in or charge on such property It is merely a document creating right to obtain a sale deed executed in favour of a purchaser By the agreement of sale which was cancelled, there was no conveyance even for the limited purposes of Art 25 That being so, no immovable property or interest therein was conveyed to the purchaser by the said agreement and hence there was nothing to be reconveyed by the flat purchasers to the owners by the deed of cancellation Art 25 will be attracted only to such deeds of cancellation which have the effect of reconveyance of the property already conveyed by a valid document(44) Where an agreement of sale was executed by the vendor debtor prior to attachment of his property but the property was sold by him after attachment the agreement would not confer any interest in the purchaser merely because the agreement was executed in his favour(45) No distinction can be drawn between a contract for sale and a contract for purchase(46), and consequently a contract for pre-emption or for re-purchase does not create any interest or charge on the property(47).

Reading of S 14 along with S 54 makes it manifest that a mere contract for sale of immovable property does not create any interest in the immovable property and it therefore follows that the rule of perpetuity cannot be applied to covenant of pre-emption even though there is no time limit within which option has to be exercised(48)

As the contract for sale does not create any interest in the property, the possession of the transferor subsequent to the agreement to sell cannot be said to be wrongful and the transferor cannot therefore be called to account for the profits of the period subsequent to the date of the agreement to the date of execution of the sale deed(49) Possession of a vendee under an agreement of sale is merely permissive or at the most that of a licensee and is presumed to be so unless and until something occurs to make it adverse(50).

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43. AIR 1984 All 369 (371, 372, 374) : 1984 All CJ 517

44. AIR 1994 Bom 228 (230, 231) : 1994 Mah LJ 1261.

45. 1981 All LJ 436 (438)

46. AIR 1924 Pat 81 (82) (DB).

47. AIR 1960 Assam 178 (181) ILR (1959) 11 Assam 423 (DB) ** AIR 1924 All 400 (402) : 46 All 333 (DB).

48. (1992) 2 Cur CC 652 (655) (DB) (Cal) (1).

49. AIR 1957 Andh Pra 960 (961) ** 1954 Trav-Co 10 (24) (Lessee from transferor – His possession is not wrongful — Person in whose favour there is contract to sale cannot successfully claim mesne profits from lessee.)

50. AIR 1972 J & K 125 (127) : 1972 Kash LJ 110 (FB).

Where the vendee executed a deed of sale in favour of the seller promising to reconvey the property to the seller if he paid a certain sum within a certain period the right claimed by the vendor on the basis of such an agreement to reconvey the property to him does not create any interest in the property and therefore the second paragraph of Section 54 would have no application entitling the Legal Representatives to file a suit for reconveyance on payment of the amount(51)

A sale under a decree in a suit for specific performance crystallises on the date when the decree for specific performance is passed but does not date back to the date on which the agreement of sale was entered into(52)

A sale is deemed to take place on the date a decree is passed in a suit for specific performance of the agreement and not on the day of the agreement of sale(53) Likewise the decree for the specific performance of the contract to sell its effect being only to superadd the sanction of the Court to the agreement and make it enforceable, does not create any interest in favour of the decree-holder The decree-holder gets interest in the property only after the execution of the conveyance(54) But if there is not only a contract to sell but also a payment of part of the price or earnest money the property in view of S 55(6)(b), becomes subject to a charge for the amount paid which can be enforced against the property even when it has been sold in execution(55)

Possession by vendee in pursuance of the contract for sale pending registration is permissive in nature and continues to be so unless something happens to make it adverse The fact that the right to sue for specific performance is barred by limitation does not change the permissive nature of vendors possession(56).

In the undermentioned case(57), *A* received a price from *B* and transferred to him possession of the property contracted to be sold but there was no registered sale deed Some years afterwards the creditors of *A* sought to attach the property as the property of the vendor It was held that the last clause of this section did not apply and that the vendor had no attachable interest in the property The same view was expressed in the cases noted below(58) but has not been followed in other cases(59).

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51. AIR 1977 All 322 (324) : (1977) 3 All LR 123

52. AIR 1977 Punj 38 (40) : 78 Pun LR 947.

53. AIR 1974 Punj 8 (2) (1972 Pun LJ 71) (DB) (AIR 1973 Punj 254 **Reversed.** AIR 1926 Nag 95. **Dissented from.**)

54. AIR 1966 Mys 299 (304) (ILR 5 Bom 554 **Dissented from.**) ** AIR 1956 Cal 147 (148) ILR (1957) 1 Cal 388 (Sale of such decree transfers only the interest of decree holder in the decree and not interest in the property) ** AIR 1953 Nag 167 (169) ILR 1952 Nag 644 (649) (DB) ** AIR 1955 Trav Co 195 (196) (DB) (AIR 1922 Cal 412 (2) and AIR 1926 Nag 95. **Dissented from.**)

55. AIR 1956 Cal 462 (463 464) ILR (1957) 3 Cal 99 (**Held not good law** in view of AIR 1977 SC 774 as stated in AIR 1977 Cal 496.)

56. AIR 1983 Orissa 107 : 55 Cut LT 77 (DB).

57. (1900) 24 Bom 400 (402) (DB) (Under S 55(6)(b) purchaser entitled to charge on property for purchase money paid Vendor is nothing more than a bare trustee.)

58. AIR 1924 Mad 610 (610) ** (1904) 26 All 266 (269, 270) (DB)

[**See also** AIR 1918 Cal 923 (925) (DB) (A vendee who has paid the consideration and is in possession under a contract of sale has until the conveyance is registered, a saleable interest which is transferable by sale.)]

59. (1909) 36 Cal 920 (921, 922) (DB) (Sale for more than Rs 100 — Sale deed not registered — Only possession transferred to vendee — **Held,** there was no sale and vendor was entitled to claim back-possession.) ** (1904) 28 Bom 466 (470) (DB)

Where parties who are in possession of the property as co-tenants enter into an agreement deciding to purchase the property from the owner in equal shares and entire consideration is paid in equal shares a suit by one of the parties for partition before execution of the sale deed would be tenable(**60**).

There was a difference of opinion on the question whether the parties to a sale deed which cannot take effect as a sale for want of any formality such as stamp or registration can fall back upon the contract for sale implied in every sale and enforce its performance. It was held in the undermentioned cases that they could do so(**61**). A different view was taken by the Madras High Court in *Thavarammal v. Lakshmi Ammal*(**62**). In that case the vendee who could have got the document registered failed to do so and it was held that by reason of his default it was not open to him to read into the terms of the document an agreement to sell which was superseded by the conveyance to sell. The Judicial Commissioner's Court of Nagpur had also, in the case noted below(**63**), held that where a sale deed is statutorily void the parties cannot fall back upon the contract for sale as such contract necessarily merged in the sale and perished along with it. See also the undermentioned case in which the High Court of Jammu and Kashmir has held that what is an out and out sale cannot be treated as a contract to sell on the ground of the non-registration of the sale-deed or other defects(**64**). In *James R. R. Skinner v. R. H. Skinner*(**65**) it was held by their Lordships of the Privy Council that a contract for sale though it does not of itself create any interest or charge on immovable property is nevertheless a transaction "affecting" immovable property within the meaning of S. 49 of the Registration Act and so, if such an agreement is found recited in a compulsorily registrable document, that document cannot be used as evidence to support such an agreement. The proviso to S. 49 of the Registration Act added by the Transfer of Property (Amendment) Supplementary Act (21 of 1929) supersedes the view taken by above Privy Council decision and makes it clear that an unregistered document affecting immovable property though required to be compulsorily registered may be received as evidence of a contract in a suit for specific performance under Chap. II of the Specific Relief Act(**66**), (since repealed - see now Specific Relief Act, 1963) or as evidence of part performance of a contract for the purposes of S. 53A of the Transfer of Property Act(**67**) or as evidence of any collateral transaction not required to be effected by a registered instrument(**68**). Where there is an agreement to sell interest in joint family property, a stranger

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60. 1975 All WC 517

61. AIR 1926 Mad 1117 (1119) ** AIR 1924 Pat 433 (434) ** AIR 1916 Low Bur 79 (80) ** (1891) 14 Mad 55 (57) (Unregistered sale deed is admissible in evidence for the purpose of obtaining specific performance of contract.) ** (1889) 12 Mad 505 (508) (DB) ** (1914) 21 Ind Cas 777 (778) (DB) (Mad)

62. AIR 1920 Mad 660 (661) : 43 Mad 822 (DB)

63. AIR 1927 Nag 177 (178, 179).

64. (1948) 7 J & K LR 158 (160).

65. **AIR 1929 PC 269 (271) : 56 Ind App 363.**

[**See also** AIR 1916 Pat 212 (213) ; Pat LJ 455 (DB) (Unregistered sale deed sought to be put in evidence to prove a contract to sell in a suit for specific performance.)]

66. AIR 1960 Mad 33 (39) ILR (1959) Mad 552 (DB) (Words "may be received as evidence of contract" occurring in proviso to S. 49 do not mean may itself be read as contract to execute a document in future.) ** AIR 1956 Assam 154 (157) (But suit for specific performance cannot be founded on unregistered sale deed.) ** ILR (1954) Mys 209 (210, 211) ** AIR 1943 Mad 761 (762).

67. AIR 1957 Bom 138 (140) ILR (1958) Bom 556 (DB) (AIR 1943 Bom 431 **Overruled.**)

68. AIR 1956 Manipur 16 (17) (Unregistered sale deed — Repudiation of sale — Sale deed though unregistered would be admissible in evidence for purpose of recovering purchase money.)

to a suit can be impleaded as he has direct interest, legal or equitable in the subject matter of dispute(69).

Section 54 of T P Act specifically provides that a contract of sale does not of itself create any interest in or charge on immovable property which is subject matter of the contract of sale

Thus where an agreement of sale was entered into during the pendency of the suit which was also not registered, nor delivery of possession took place in pursuance of the agreement of sale when the alleged agreement did not create any interest in the land in the suit

Therefore the non-impleadment of the applicant as a defendant in a suit for injunction for restraining interference with possession of land, principally on the ground that it had entered into an agreement of sale with other defendant in respect of part of the land in suit was proper(70)

Where the agreement to sell a flour mill was executed by the assessee in the relevant assessment year but the sale deed was executed in the following assessment year the title in the mill remained with the assessee in the relevant assessment year, and the value of the mill was includible in its wealth(71).

Agreement for sale — Registration.

A contract for sale of immovable property need not be in writing But the parties may agree that the negotiations between them for the sale of property may be reduced to writing in the form of a written contract(72) A mere agreement to sell immovable property merely creates a right to obtain another document conveying property and is not compulsorily registrable under S 17 of the Registration Act(73) So also is a mere agreement to reconvey immovable property(74) Before

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69. AIR 1968 Mad 142 · (1966) 2 Mad LJ 298

70. AIR 1995 All 316 (317)

71. 1984 Tax LR 1420 (1984) 17 Taxman 73 (Delhi)

72. AIR 1924 Rang 214 (216) : 2 Rang 285 (FB) ** AIR 1977 Guj 158 (160) · 18 Guj LR 83 (FB). (Documents of sale of Bailakhat rights is merely an agreement for sale ** AIR 1964 Orissa 176 (177) · ILR (1964) Cut 89 (DB)

73. AIR 1927 All 287 (287) 49 All 806 (FB) ** AIR 1957 Bom 119 (125) ILR (1957) Bom 668 (DB) (Agreement to sell is admissible in evidence though unregistered) ** 1954 MBLJ HCR 1046 (1050) ** AIR 1955 Raj 70 (72) ILR (1954) 4 Raj 705 (DB) ** ILR (1954) Mys 209 (210 211) ** 1949 Trav-Co LR 18 (21 (Agreement which may be oral can also be specifically enforced Such agreement need not be in writing even) ** AIR 1937 Rang 402 (405) 1938 Rang LR 216 (DB) ** AIR 1933 All 846 (848) 56 All 142 (DB) ** AIR 1932 Lah 95 (95) (DB) Even if executed before amending Act 2 of 1927) ** AIR 1930 Lah 1020 (1023) (DB) ** AIR 1927 Bom 195 (206) 51 Bom 247 ** AIR 1926 Pat 89 (90) (DB) ** AIR 1925 Lah 284 (285) (DB) ** AIR 1924 Lah 337 (339) (DB) ** AIR 1922 Lah 269 (270) (DB) ** AIR 1916 All 342 343) 38 All 184 (DB) ** AIR 1914 Mad 537 (57) 37 Mad 480 (DB) ** (1892) 5 C P L R 102 (102) (Letter though not registered could be received as evidence of agreement) ** (1875) 12 Bom HCR 175 (178 A bargain paper for the purchase of immovable property above the value of Rs 100 providing for execution of a deed of sale at some future date need not be registered and is admissible in evidence — Case under Registration Act of 1871) ** 1931 Mad WN 297 (298) (AIR 1926 PC 94 is superseded by Act II of 1927 — Even without registration contract to sell is admissible in evidence in suit for damages.) ** (1921) 63 Ind Cas 22 (23) (DB) (Lah)

[See also AIR 1930 Mad 683 (688) (Where no interest is created agreement to sell is admissible though unregistered.)]

74 ILR (1950) All 32 (41) (DB) ** AIR 1974 Guj 69 (72) ** AIR 1923 Rang 242 (244) ** AIR 1914 Bom 231 (232) 38 Bom 703 (DB) ** (1910) 6 Ind Cas 549 (550 551) (DB (Cal)

the addition of the explanation in 1927 to S 17 of the Registration Act there was a difference of opinion on the question whether an agreement to sell which acknowledges the receipt of either purchase money or earnest-money was compulsorily registrable, in view of the fact that such receipt creates a charge in favour of the vendee(**75**) In *Daval Singh v Inder Singh*(**76**) it was held by their Lordships of the Privy Council that such an agreement must be registered The explanation added to sub-sec (2) of S 17 of the Registration Act, now makes it clear that such an agreement need not be registered(**77**) Whether the document in question is only a contract to sell and therefore does not require registration or is a sale deed has to be decided according to the tenor of its contents and not on the basis of how the parties have chosen to describe it(**78**) Thus, when the document evidences the transfer of ownership as well as possession for a price partly paid and partly promised it is a transaction of sale which could be validly effected only by the execution of a registered sale deed Simply because it is expressed to be a contract to sell and also contains a stipulation for the execution of a formal deed of sale and its registration it cannot be held to be otherwise(**79**). Although a contract to sell does not create any interest in the property it is an obligation annexed to the ownership of immovable property within the meaning of S 40 of this Act(**80**) and it prevails over any subsequent attachment of the property(**81**)

Though the agreement for sale does not create any right, title or interest under S. 54, but it creates an interest in the property by operation of 2nd paragraph of S 40 and this right prevails by operation of O 38, R 10 Therefore the rigour imposed under S 64, IPC does not prevail The agreement of sale thereby is not void and the attachment before judgment does not prevail over the contract for sale(**82**).

A purchaser of judgment-debtor's property under an agreement of sale is entitled to file an application to set aside a Court sale(**83**)

[**See also** AIR 1926 Bom 131 (132) (DB) (If agreement to re-convey can be treated as separae transaction, it need not be registered.)]

75. (1883) 7 Bom 310 (315) (Need not be registered) ** **(1871) 14 Moo Ind App 129 (131) : 16 Suth WR PC 26 (27).** (Must be registered.) ** (1882) 5 Mad 115 (117) (DB) (Must be registered) ** (1897) 10 CPLR 107 (110) (Need not be registered) ** (1921) 63 Ind Cas 22 (23) (DB) (Lah) (Where agreement to sell can be separated from the receipt of money then the former need not be registered) ** AIR 1917 Lah 43 (44) 1916 Pun Re N 98 (DB) ** (1876) 1 Bom 190 (195) (DB) (Do.)

76. AIR 1926 PC 94 (96) : 53 Ind App 214. (Overruling AIR 1924 Lah 337)

[**See also** AIR 1927 Bom 157 (158) 51 Bom 231 (DB) (AIR 1926 PC 94, **Followed.**) ** (1926) 98 Ind Cas 890 (892) (DB) (Lah). (Do.)]

77. AIR 1934 Pat 495 (497 498) 13 Pat 620 (DB) ** AIR 1931 Cal 171 (172) 58 Cal 449 (DB) (Amending Act II of 1927 supersedes the decision in AIR 1926 PC 94) ** AIR 1929 Mad 243 (245) : 52 Mad 300 (DB).

78. AIR 1964 Orissa 176 (177) · II R (1964) Cut 89 (DB) ** AIR 1961 Andh Pra 424 (426) ** AIR 1959 Mys 194 (197) ILR (1958) Mys 746 (DB) ** ILR (1954) Mys 209 (210, 211)

79. AIR 1961 Andh Pra 424 (426) ** (1977) 1 Ren CJ 1 (4) (Raj) ** AIR 1957 Hyd 37 (39) ILR (1956) Hyd 733 (DB)

80. AIR 1967 SC 978 (981) : (1967) 1 SCR 873 ** AIR 1967 SC 744 (749) : (1967) 1 SCR 293 AIR 1960 Assam 178 (181) II R (1959) 11 Assam 423 (DB) ** AIR 1958 Bom 194 (195) ILR (1958) Bom 234 ** AIR 1935 Mad 193 (194) ** AIR 1917 Mad 4 (5) ** AIR 1942 Mad 67 (68)

See also Section 40, Note 8.

81. AIR 1952 Trav-Co 467 (471) : ILR (1952) Trav-Co 201 (DB)

82. (1987) 1 Andh LT 718 (721).

83. AIR 1968 Andh Pra 334 (336) (1967) 1 Andh WR 288 ** AIR 1953 Mad 409 (412)

While transfer can only be of specific property which is in existence there can be an agreement to transfer future property though there can be no assignment of interest not in existence, but there can be an agreement to assign an interest to be acquired in future**(84)**

The obligation referred to above is recognised by S 3 of the Specific Relief Act (1877) (since repealed see now Specific Relief Act, 1963) and S 91 of the Trusts Act (1882) Section 91 provides that where a person acquires property with notice that another person has entered into an existing contract affecting that property of which performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract**(85)**. **See also Note 8 on S 40**

So long as the contract for sale has not been completed by conveyance, the remedy of the parties is either to sue for damages for breach of the contract or for specific performance of the contract**(86)** In instant case held that the plaintiff had proved by cogent evidence that the disputed

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(Third party who purchases with notice of prior agreement is subject to obligation created by S 91, Trusts Act, and can be compelled to execute sale deed in enforcement of prior agreement by party in whose favour it is But until that is done the person who can enforce the agreement acquires no title)

[**See also** AIR 1960 Madh Pra 3 (4) ** AIR 1957 Trav Co 189 (192 193) ILR (1956) Trav-Co 998 (DB) (Agreement for sale does not vest any interest in the property and if a third party obtains an assignment of the properties in question the party in whose favour the agreement has been executed has to seek specific performance but he cannot challenge the right of the subsequent assignee on the basis of the prior agreement and ( ) sale in his favour of a subsequent date AIR 1953 Mad 409 AIR 1954 Travancore 11 and AIR 1955 Trav Co 195 Rel on)]

84. AIR 1967 All 484 (485) · 1967 All LJ 88

85. **AIR 1967 SC 978 (981) : (1967) 1 SCR 873.**

86. AIR 1966 Mys 299 (303) (Contract for sale — Decree for specific performance — Title passes with execution and registration of sale deed and does not flow from decree ILR 5 Bom 554, Not foll) ** AIR 1962 Madh Pra 25 (27) ILR 1961 Madh Pra 97 (DB) (Contract of sale — Vendor conveying property to person having right of pre-emption pending suit for specific performance of contract of sale — Doctrine of lis pendens applies Specific performance of contract will not be refused merely because of sale in favour of pre emptor) ** AIR 1960 Mad 33 (35) ILR 1950 Mad 552 (DB) Suit for specific performance) ** AIR 1958 Pat 133 (140) (DB) (Control for sale create only a right which if not enforced in time is not of any avail to defend possession even if already delivered on that basis) ** AIR 1957 Andh Pra 960 961) ** AIR 1957 Mad 78 (81) ILR 1957 Mad 290 (DB) (If for some reason after resorting to the proceedings under the Registration Act it becomes impossible to obtain registration or if resort to those proceedings is prevented by other circumstance vendee can bring a suit for specific performance of the contract to sell But that the remedy being an equitable remedy would be refused to the vendee if non-registration is due to his own negligence in not producing the document when handed over to him for registration or where he has made alteration in the document) ** AIR 195 Trav Co 189 (192 193) ILR (1956) Trav-Co 998 (DB) (But he cannot challenge the right of the transferee under the sale deed executed subsequent to the contract to sell in his own favour) ** AIR 1956 Assam 154 (157) ** AIR 1956 Bom 120 122) That both parties are entitled to insist on completion of contract is inherent in contract for sale — Document need not mention that on failure, other party may file suit for specific performance or for damages — Parties may, however, mention what is to happen in case of failure to perform contract) ** AIR 1940 Mad 625 (626) ILR (1940) Mad 852 (Contract by vendors to sell land — One of them minor Vendee going into possession and retaining it for long time without repudiating contract — Purchase price not paid — Suit by vendors for specific performance — Suit held maintainable Right to repudiate held waived) ** AIR 1949 Sind 28 32) ILR (1947) Kar 240 (DB) ** (1907) 7 Ind Cas 408 (409) (DB) (All) ** AIR 1927 Nag 177

document was agreement to sell and not sale deed and therefore the plaintiff could pray for decree for specific performance(**87**) Though relief of specific performance of a contract for sale of a tangible immovable property is discretionary but while exercising such discretion, the Court can enforce the terms settled between the parties, being the agreement for sale as provided in S 54(**88**) Where it is doubtful whether agreement for sale has come into existence; whether consideration had validly passed and whether non performance of contract can provide adequate compensation to the agreement holder the agreement did not confer any right, title or interest in property upon him Proper remedy therefore was to file suit for specific performance and not a suit for injunction(**89**) It has been held in a case from Calcutta High Court that where there is payment under a contract for sale, of the part price or earnest money, the provisions of S 55(6)(b) would be attracted and it will be treated as though the ownership of the property had passed to the pruchaser and such purchaser will be entitled to enforce his charge against the property in case the completion of the sale does not fructify for some reason as, for instance, by the sale of the property in execution against the transferor(**90**) In a subsequent decision by the Division Bench of the same High Court, however, this view was held to be not a correct proposition of law(**91**).

Under Section 54 of the Transfer of Property Act a person having agreement to sell in his favour does not get any right in the property except the right to litigation so as to avoid multiplicity of proceedings Where the defendant-vendor entered into an agreement with a third party to sell a share of the suit property during pendency of the suit for specific performance relating to that property, the third party is entitled to get impleaded in the suit to safeguard its interest(**92**)

Where in a suit for specific performance of contract for sale, it was found that alleged letter of acceptance of offer of price on behalf of the purchaser, by the seller referred to future negotiation for finalisation of more terms of contract, it could not be said that there was concluded contract between the parties against which a decree for specific performance could be granted Actually the defendant was not a contracting party He was acting on behalf of third person Hence unless the third person had agreed to the terms and conditions there could be no contract at all

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(178) (Specific performance or damages) ** AIR 1925 Cal 61 (63) 52 Cal 121 (DB) (Specific performance) ** AIR 1917 Mad 1001 (1009) (DB) (Compensation in addition to specific performance) ** AIR 1917 Pat 585 (589) (DB) (Specific performance or damages) ** AIR 1916 All 366 (367) 38 All 154 (DB) (Suit for specific performance) ** AIR 1915 Mad 305 (306) 37 Mad 403 (DB) (Court cannot compel a party to execute a deed of sale for the whole of the property where he is not the owner of a moiety of the property.)

[**See also AIR 1954 SC 75 (80) : 1954 SCR 360.** (Contract for sale — Insistence of purchaser on a particular form of warranty in the sale deed to be drafted — That would not affect the completeness of the contract of sale already entered into — Such insistence may in certain circumstaces disentitle him to specific performance — Further when it is not persisted in it cannot also amount to a repudiation of the contract) ** AIR 1963 Ker 247 (247) (Contract for sale becoming impossible by act of defendant-seller — He is liable to refund advance paid by plaintiff purchaser) ** AIR 1952 Tripura 28 (29) (Contract found to be one for sale of land by boundary though it mentiond area also — Vendee is not entitled to refuse to complete the bargain on the ground of actual area being less than that mentioned in the agreement or on the ground that necessary permission from Collector to sell entire area was not obtainable by the vendor and recover earnest money and damages from the vendor)]

87. (1992) 2 Sim LC 288 (292) (Him Pra)

88. 1997 (2) Cal LT 321 (356).

89. 1997 (2) Rec CR (Civ) 370 (374) (Punj & Har)

90. AIR 1956 Cal 462 (463, 464) . ILR (1957) 3 Cal 99

91. AIR 1977 Cal 496 (499) (AIR 1956 Cal 462, **Held not good law** in view of AIR 1977 SC 774)

92. 1992 Rajdhani LR 274 (275) (DB)

The decree for specific performance cannot be granted even in view of S. 54 of T. P. Act as the definition therein of contract for sale includes the settlement of the terms between the parties as one of the essentials for completion of a contract.(93)

A suit for specific performance of contract of sale does not relate to any right or interest in land and does not get abated under Section 4 [illegible] of the Bihar Consolidation of Holdings Act.(94) A vendee under an agreement to sell who has paid earnest money is entitled to file an objection to a Court sale under Order XXI Rule 90 C. P. Code.(95) An agreement of sale can be enforced by the assignee of the vendor against the vendee unless the agreement prohibits the assignment.(96) But after the completion of the sale, the remedy of the parties is, in the case of a vendee, a suit for possession, and in the case of a vendor, a suit for recovery of the purchase-money.(97) Where a lessee enters into an agreement of sale of land, there is no merger and the tenant continues to be a tenant specially when the vendor instead of completing the transaction sold the property to a different person.(98)

In a suit for specific performance based on an alleged oral contract for sale, there was no agreement as to the exact amount of advance to be paid. The conduct of the plaintiff in purchasing the stamp papers and obtaining bank draft does not necessarily suggest that there was a completed bargain.(99)

A person on the basis of agreement of sale to him in absence of a sale deed is not entitled to bring a suit for injunction against the purchaser of the same property from his vendor for interfering with his possession as the title to the property had already passed.(100)

Though the agreement for sale does not create any right, title or interest in the property under Section 54 but it creates an interest in the property by operation of 2nd paragraph of S. 54 and this right prevails by operation of O. 38 R. 10 C. P. C. Therefore the [illegible] under S. 64 CPC does not prevail. Thus where an agreement to purchase was entered into by purchaser [illegible] before the suit for recovery of money was filed by plaintiff against the vendor and the sale deed was executed and registered during the pendency of the suit but the purchaser obtained an order of attachment before judgment in respect of the said property, that order would [illegible] charge upon the rights of the purchaser.(101)

The vendor sold the property which was subject to hypothecation with a bank subject to condition that the vendee shall discharge the debt by making payment of [illegible] amount to the

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93. AIR 1991 All 343 (347, 349)

94. AIR 1990 Pat 18 : 1979 BLJR 686 (DB)

95. 1970 Raj LW 245 (246)

96. AIR 1973 Madh Pra 15 : 1972 MPLJ 1000

97. AIR 1916 All 66 (67) [illegible] (DB) ** 1917 [illegible] CPLR [illegible] ** [illegible] 172, 174 (DB) ** 1866 [illegible] Agra 45 (47) (Interest [illegible] their acts and should be considered) ** (1913) 36 Mad 8 (16) (DB)

[See AIR 1925 Cal 61 (63) : 52 Cal [illegible] (DB) [illegible] accrues after he has secured performance of the [illegible] thereof) ** AIR 1926 Cal 339 (340) (DB) : Where it was [illegible] that the kobala will be executed and registered and khas possession would be given [illegible] the tenants — **Held**, the purchaser's right to take possession [illegible] right to the execution of a conveyance by the vendor))

98. (1979) 2 Kant LJ 218 (221) : ILR (1979) 2 Kant 1937 (DB)

99. (1990) 2 Cur Civ C 324 (327) (Andh Pra).

100. 1977 Rev LR 506 : ILR (1980) [illegible] Punj 259, 262 ** (1984) Jab LJ 295, 296 (Madh Pra) ** AIR 1986 Orissa 74 (76) : (1985) 2 Orissa LR 335

101. (1987) 1 Andh LT 718 (721).

Bank. The vendee did not make the payment. It was made by the vendor himself The sale was a conditional one and the vendee did not comply with the condition and therefore the sale became voidable, thus the vendor was entitled to decree for declaration and injunction.(**102**)

Where in a suit for eviction the tenant alleged that he was in possession of the tenanted property after expiry of the lease on the basis of an agreement to sell by the landlord but had not paid the earnest money nor completed the purchase by paying the balance and had replied to the notice for eviction by the landlord alleging that the landlord's title was doubted it could be said that he had repudiated the contract and had disabled himself from performing it.(**103**)

Where the vendor enters into contract for sale of immovable property with the purchaser or his nominee, and ultimately executes the sale deed in favour of the nominee and the purchaser is shown therein as a confirming party, in order to avoid further litigation, the Registrar of Assuarance cannot refuse to register the sale deed by invoking the definition of "immovable property" under S 2(6) of the Registration Act on ground that confirming party should produce Income-tax Clearance Certificate In view of the specific provision in S 54 of the T P Act the confirming party has not acquired any interest which can be transferred What is transfer of property is provided under the T P Act and in this regard the T P Act overrides all other Acts. The scope of Registration Act is only confined to registration and not to transaction The scope of the T P Act is confined to transaction, in other words, create or extinguish right, title or interest in any property The legal effect of contract of sale of immovable property under the T.P. Act cannot be enlarged by invoking S 2 (6) of the Registration Act (**104**)

It is true that it is customary to include a recital regarding of the agreement of reconvegance in the sale-deed itself But where there was an agreement preceeding the sale deed and that agreement contained such clause and sale deed was executed consequent thereto the absence of reference to the agreement of reconveyance in the sale deed would not lead to the inference that the said right was given up by the executant of the sale deed In absence of detailed plea and evidence that before execution of sale deed there was novation and the parties expressly agreed to give go-bye to the agreement of reconveyance, no inference that agreement of reconveyance was given go-bye could be drawn.(**105**)

Where the person in whose favour agreement for sale is entered, is put on information as to the course of action adopted by the Revenue, neither by reason of S. 269 UD (2) nor S. 269 UL (3) could he contend that he has secured an interest in the immovable property contrary to the settled law as adumbarated u/s 54 of the Transfer of Property Act. Thus the transferee who entered into agreement to sell of immovable property has no locus standi to question the order of appropriate authority made u/s. 269 UD (1).

Merely because S 269 UD (2) says "every other person whom the appropriate authority knows to be interested in the property", it does not bring a transferee, who has no interest in its property in whose favour no interest is created by reason of the contract for sale (**106**)

Where a person is a defaulter to the Income-tax department and there is a statutory charge created on his property and the third party enters into an agreement thereafter with the defaulter to purchase the property by the dept , after due notice to defaulter, the third party has no locus standi to file application under R. 61 for setting aside the auction sale on the basis of agreement to sale in his favour. He has only a pecuniary interest under the agreement and not any interest in the property

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102. **1996 (2) Civ LJ 607 (608) (SC).**

103. ILR (1976) 2 Delhi 716 (722).

104. AIR 1989 Cal 65 (70) : (1988) 1 Cal LJ 307.

105. **AIR 1998 SC 3021 (3027) : 1998 AIR SCW 2877 : 1998 All LJ 2149 : 1998 (6) SCC 358.**

106. **(1991) 97 Cur Tax Rep 97 (106, 108, 109) (DB) (Kant).**

as such within the meaning of the expression "persons whose interest are affected" occurring in R 61. Rule 16 disentitles such person or persons from entering into an agreement with the defaulter for purchase of the property on which a statutory charge is created on the issue of notice in form No. ITCP-1 under R. 2. Rule 48 further imposes prohibition on the defaulter from transfering or charging the property in any way and also prohibits all person from taking any benefits under such transfer or charge The expression "persons whose interest are affected" which occurs both in R 60 and R. 61 has to be understood, in the light of the meaning assigned to it u/s 54 of the T P Act meaning the same person.

The Schedule II Rules to the T P Act are framed more or less on the pattern of rules framed under O 21 C PC from the scheme of these rules read together it has to be construed that on application under either of the Rules viz R 60 or R 61 has to be made by the same person **(107)**

Where property agreed to be sold is compulsorily acquired the vendee suing for specific performance is not even entitled to the compensation awarded in respect of such property **(108)** Bona fide purchaser without notice In view of a vendor has only partial interest in the property and disposes of the property of an interest greater than he really has, in such event the vendee has to establish and prove that he had taken reasonable case and made full enquiries about the title of the property purchased by him No person can dispose of an interest in the property that is not vested in him and the only exception is that if the purchaser has purchased the property bona fide after making usual enquiry into the title as a reasonable and prudent man of business would do even if the property has been sold by that person who does not have full interest in the property such purchaser can be protected However the onus lies on the purchaser to establish that he had acted in good faith and purchased the property after making full enquiries into the title of the vender and all reasonable care was taken by him.

Agricultural land was purchased in the instant case Mere mutation entry in revenue record is not a document of title The purchaser had not taken reasonable care to verify the title of the vendor Thus he could not be said to be a bona fide purchaser On the basis of verification of mutation entry such purchaser cannot be said to be entitled to protection under S 41 of the T P Act **(109)**

In the facts and circumstances of the present case it was held that the subsequent purchaser was a bona fide purchaser for value without notice of earlier agreement with plaintiff Therefore the plaintiff would not be entitled to relief of specific performance against the subsequent purchaser **(110)**

In instant case second sale deed in respect of a property came into existence after first sale The later sale deed cannot take away the valuable rights of the vendee of first sale deed **(111)**

The Court can enforce the terms settled between the parties being the agreement for sale as provided in S 54 and not some of such terms, nor any term which has not been settled between the parties The right to claim possession is an additional right, which can be claimed in an appropriate case of specific performance in view of the language of S 22 (1) of the Specific Relief Act 1963 **(112)**

An agreement to sell immovable property was executed It did not stipulate transfer of possession before execution of conveyance The agreement was subsequently cancelled Possession of property was never transferred In the facts, the deed of cancellation of agreement would not amount to reconveyance and would fall under Art 15 and not Art 25 of the Bombay Stamp Act **(113)**

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107. 1992 Tax LR 559 (562 565, 567) (1992) 194 ITR 409 (Kant)

108. AIR 1983 Punj 180 (187) : ILR (1983) 2 Punj 24.

109. 1997 (2) Mah LJ 855 (859) (Bom)

110. AIR 1998 SC 2028 (2038) . 1998 AIR SCW 1883 . 1998 (5) SCC 537.

111. 1997 (1) Civ LJ 811 (812) (Punj & Har)

112. 1997 (2) Cal LJ 321 (356).

113. AIR 1994 Bom 228 (230) : 1994 Mah LJ 1261

Agreement to sell property in Cantonment area was entered into Cantonment authorities granted permission subject to condition that the purchaser would not object resumption The purchaser could not repudiate the contract on ground that the condition imposed prohibited him from resisting even illegal resumption He could not therefore claim refund of earnest money.(**114**)

Where a person enters into agreement to purchase part of the property which is the subject matter of a partition suit, he does not acquire any interest in the property in view of the last para of S 54. Again in view of the doctrine of lis pendens he could not be considered to be either necessary or property party to the partition suit. Having no legal interest he could not be impleaded as a party in the partition suit.(**115**)

The transferee had filed a suit for specific performance on the basis of an agreement for sale in her favour. She also entered into agreement with third party assigning her rights in the suit property and whereunder she purported to transfer the decree that may be passed in her favour, to the third party Also power of attorney was executed by her in favour of third party in order to achieve the said object The transferee had no transferable interest in the property by virtue of agreement to sell in her favour and thus the third party could not be substituted in her place (**116**)

Where if prima facie from the language incorporated in a document that it is a contract of sale of agricultural land, it can be marked exhibit at the time of recording of evidence Mere exhibiting a document does not dispense with its proof.(**117**) As to question whether in cases where the buyer has taken possession in pursuance of the contract for sale, he can resist a suit for possession by the seller on the ground that he is entitled to the specific performance of the contract, see Notes on section 53A.

24. Several sales of the same property — Priority.

Where the common vendor has already disposed of the entire land under five different sale deeds including the two involved in this litigation, both the sale deeds are genuine and of the same date and there is allegation of encroachment of a strip of land made by one purchaser against another, therefore to safeguard the interest of both the parties and it was suggested to suffer the shortfall in equal proposition.(**1**)

Where the suit land was situated in small village and all parties also belonged to that village, subsequent purchaser must be aware of earlier transaction and cannot be treated to be bona fide purchaser for value without notice.(**2**)

See also the undermentioned case.(**3**)

See also Notes 8, 9 and 10 on section 48

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114. AIR 1998 SC 3389 (3392) : 1998 AIR SC 3337 : 1998 All LJ 2579 : 1998 (7) SCC 456.

115. 1999 (1) Cal LT 480 (488).

116. 1997 AIHC 2947 (2962) : 1997 (67) Delhi LT 296

117. 1998 (1) Rajasthan LR 136 (138)

Section 54 — Note 24

1. 1987 Supp SCC 688 (689).

2. AIR 2002 Punj & Har 47 (54) · 2001 (1) Cur LJ (CCR) 271

3. AIR 2002 Mad 131 (143) 2001 (3) Mad LW 603 (Subsequent purchaser for value without notice)

55. RIGHTS AND LIABILITIES OF BUYER AND SELLER.— In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights mentioned in the rules next following, or such of them as are applicable to the property sold :

(1) The seller is bound—

(a) to disclose to the buyer any material defect in the property *[or in the seller's title thereto] of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power,

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

(d) on payment or tender of the amount due in respect of the price, to execute proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents;

(f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same :

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property

which are in the seller's possession or power·

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer, of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require, and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled —

(a) to the rents and profits of the property till the ownership thereof passes to the buyer;

(b) Where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, ^[any transferee without consideration or any transferee with notice of the non-payment], for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part ^[from the date on which possession has been delivered].

(5) The buyer is bound —

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

(b) to pay or tender, at the time and place of completing the sale, the purchase money to the seller or such person as he directs : provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto :

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any

incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled —

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, [B][* * *] to the extent of the seller's interest in the property for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

[A] Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 17.

[B] The words "with notice of the payment" were *omitted* *ibid.*

Synopsis

1. **Scope of the section.**
1A. **Time when of the essence of contract.**
2. **Disclosure of defects — Paragraph 1, clause (a).**
3. **Production of document of title — Paragraph 1, clause (b).**
4. **Answering relevant questions — Paragraph 1, clause (c)**
5. **Payment of price and execution of conveyance — Paragraph 1, clause (d).**
6. **Duty to preserve property and documents of title — Paragraph 1, Clause (e).**
7. **Duty to give possession — Paragraph 1, clause (f).**
8. **Duty to pay public charges, rent and incumbrances — Paragraph 1, clause (g).**
9. **Implied contract for title — Paragraph 2.**
10. **Delivery of documents of title — Paragraph 3.**
11. **Right to rents and profits and interest on purchase-money.**
11A. **Seller's right to rent and profits — Paragraph 4, clause (a).**
12. **Seller's charge for purchase-money — Paragraph 4, clause (b).**
13. **Buyer's duty to disclose facts — Paragraph 5, clause (a).**
14. **Buyer's duty to pay or tender purchase-money — Paragraph 5, clause (b).**
15. **Third party, if can enforce contract between A and B as to payment of purchase-money.**
16. **Liability for loss from destruction, etc., after passing of ownership — Paragraph 5, clause (c).**
17. **Payment by buyer of public charges, etc., on passing of ownership — Paragraph 5, clause (d).**
18. **Property sold subject to incumbrances — Incumbrances found invalid — Who gets the benefit?**
19. **Buyer entitled to rents and profits, etc. — Paragraph 6, clause (a).**
20. **Buyer's charge — Paragraph 6, clause (b).**
21. **Omission to make disclosures referred to in paragraph 1, clause (a) and paragraph 5, clause (a).**
22. **"In the absence of a contract to the contrary."**

1. Scope of the section.

This section deals with the rights and liabilities of the buyer and the seller of immovable property. Some of these rights and liabilities refer to a stage after the contract for sale is entered into and before the completion thereof by the execution of the conveyance, some refer to a stage after the completion of the contract by the execution of a conveyance and some refer to both. In other words this section deals with the rights and liabilities of the parties to a contract for sale as well as those of the parties to a completed conveyance.(1) Paragraph 1, cls. (a), (b), (c), (d) and (g), para 4, Cl. (a), para 5, Cl. (a) and para 6, cl. (b) belong to the first class; para 1, cls. (e) and (f), para 2, para 4, cl. (b), para 5, cls (c) and (d) and para 6, cl. (a) belong to the second class. Paragraph 5, cl. (b) belongs to the third class.

The obligations imposed by the section, except para 2, are in the nature of *statuory obligations* and are not implied *covenants* (2). In certain decisions,(3) however, they are referred to as covenants. It is submitted that the use of the word "covenant" to denote these obligations is not correct. But though the obligations are themselves not covenants, they are duties imposed by law on the parties in the performance of the contract and a failure to fulfil them will amount to a refusal to perform the contract within the meaning of S. 39 of the Contract Act and will entitle the other party to repudiate or put an end to the contract. Once, however, the contract is completed by conveyance, a failure to perform any of these obligations will not entitle the other party to get the sale cancelled or avoided on that ground (4). But this does not apply where such failure renders the *contract itself* void. The reason is that every sale deed is necessarily based upon the contract(5) and, if such contract is void or voidable on the ground of fraud, misrepresentation, coercion, undue influence, mutual mistake, want of consideration, etc., the sale itself which is based upon such contract will also be vitiated to the same extent.(6) Thus, where a wrong property was sold by

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Section 55 — Note 1

1. ILR (1967) Guj 323 (329) ** AIR 1926 Mad 569 (570)

   [See AIR 1916 Bom 1 (2) : 41 Bom 438 (FB). (Section 54 does not exhaust relations which flow from a contract for sale of immovable property — S. 55 imposes many obligations on the vendor and gives corresponding rights to the purchaser with reference to the property contracted to be sold — In the last of the sub-section of that section it is clearly recognised that relief by way of specific performance may in certain events be open to the purchaser — Note : In this case, it was held that the vendee who had entered into possession under a contract for sale could resist a suit for ejectment by the vendor, so long as specific performance could have been enforced by him — See now S. 53A.)]

2. AIR 1924 Mad 544 (546)

3. AIR 1928 Sind 61 (63) 23 Sind LR 237 ** AIR 1924 Pat 822 (822)

   [See AIR 1927 Mad 1072 (1072).]

4. (1866) 1 Agra 85 (86, 87) (DB) (A subsequent default by the purchaser in the due payment of the purchase-money.)

5. AIR 1929 All 837 (839) (DB).

6. AIR 1922 PC 403 (405) : 50 Ind App 69. Sale of a mere expectancy — Agreement to sell rights of reversioners — Void.) ** ILR (1967) Guj 323 (329) (Contract void under S. 23, Contract Act — Buyer held had no charge under S. 55(6)(b).) ** (1898) 22 Bom 176 (180, 181) (DB) (Sale avoided under S. 25 Contract Act, for want of consideration.) ** (1895) 18 Mad 61 (63) (DB). (Sale without consideration is void.) ** (1869) 1 NWPHCR 85 (86) (DB) (Misrepresentation.) ** (1862) 45 ER 1238 (1240) : 4 De GF & J 401 8 Jur (NS) 734 10 WR (Eng) 677 135 RR 212. Clark v. Malpas (Sale void for undue influence.) ** (1884) 33 WR (Eng) 301 (302) 52 LT 49. Nash v. Wooderson. (Sale subject to misleading condition, contract can be rescinded.)

A to B under a mutual mistake of fact between them, it was held that the contract preceding the sale being void under S 20 of the Contract Act, the sale itself was void and that B was entitled, under S 65 of that Act, to recover the purchase-money paid by him (7) Even after a contract is completed by a conveyance, it is open to the buyer to renounce his character of vendee and allow the original relationship between the parties to be resumed.(8)

There was a decree for permanent prohibitory injunction restraining the vendor from executing a sale deed without earmarking the area to be given to the decree holder The vendor sold the property without earmarking the area The sale is invalid and the purchaser could not claim that he had no knowledge of the decree and that he had referred confidence in the vendor (9) The rules in this section are not applicable to sales *in invitum* (10)

Where the parties consiously negotiated but failed in respect of any term or condition, as a result of which the agreement itself could not be finally settled or concluded, there is no question of applying general principles contained in S 55.(11)

The principles underlying the provisions of this section have been applied to cases arising in Provinces to which this Act does not apply (12) But there is no obligation on the Court to so use the Act as if every particular detail of it is the law of the Province (13) Thus a covenant for title was held not to be implied in a sale where the buyer knew the exact state of the seller's title (14) In the undermentioned case(15) it was held that the seller could not rely upon para 4 cl (b) but could rely

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[See also AIR 1927 Rang 90 (91) (Subject matter of sale substantially obtained by purchaser — Sale not cancelled but principle of S 4 Specific Relief Act applied.)]

Also see S 4, Note 4.

7. AIR 1930 All 252 (254) (DB)

[See also (1865) 3 Suth WR 28 (28) (DB) (Vendor having no authority to sell — Sale void — Vendee entitled to get back purchase money.)]

8. AIR 1947 Cal 328 (329) (Thus where a tenant conveyed his interest to his landlord it is open to the latter to renounce his character of vendee by subsequent conduct and resume the old relationship of landlord and tenant.)

9. 1999 AIHC 181 (186) : 1997 (3) Mad LW 816.

10. AIR 1952 Kutch 10 (12) (Section 55 (6) (b) does not apply to Court sales.) ** AIR 1950 EP 74 (76) (DB) ** (1910) 8 Ind Cas 605 (605) (DB Low Bur) (Mortgagee selling under power of sale.)

[See AIR 1966 Mys 299 (303) (Sale deed executed by Court in pursuance of decree for specific performance — It is a transfer by Court on behalf of judgment debtor and it has all the characteristics of a transfer *inter vivos* — Hence section applies.)]

11. (1990) 2 Cur Civ C 688 (697) : (1990) 2 Rev LR 222 (SC).

12. AIR 1919 PC 124 (125). (From Upper Burma.) ** AIR 1942 Lah 275 (278) : ILR (1943) Lah 17 (FB). (The principle of S 55(4) T P Act has been held applicable to the Punjab.) ** AIR 1941 Lah 407 (412) : ILR (1942) Lah 79 (FB). (Principle of S 55(6)(b) applied to the Punjab.) ** AIR 1964 Punj 123 (127) [ILR (1964) 1 Punj 143 (Principle of S 55(4)(b) is applicable to Punjab.) ** (1910) 6 Nag LR 98 (99) (Do.) ** AIR 1937 Pesh 8 (9) (DB) ** AIR 1929 Lah 416 (418) (DB) ** AIR 1923 Lah 590 (590) (DB) ** AIR 1920 Nag 144 (145) (Berar) ** (1908) 4 Low Bur Rul 224 (226) ** 1907 Upp Bur Ru (Evidence 3) ** 1907 Pun Re No 148 p 687 (691) ** (1929) 120 Ind Cas 163 (164) (DB) (Lah) ** (1926) 98 Ind Cas 890 (892) (DB) (Lah) ** 1913 Pun Re No. 39.

[See AIR 1941 Lah 10 (14, 15) : ILR (1941) Lah 568 (DB).]

[See also (1909) 5 Nag LR 70 (75). (Berar.)]

13. AIR 1925 Lah 92 (93)

14. AIR 1925 Lah 92 (93).

15. AIR 1927 Lah 103 (103) : 8 Lah 257 (DB).

upon general principles of equity for his lien In the case noted below(16) it was held that in a suit for possession by a vendee under a completed sale, there being no rigid rules such as those contained in Ss 55(1)(f) and 4(b) in North West Frontier Province, the Court could pass a decree for possession in favour of the buyer *conditional* upon his paying the unpaid purchase money to the seller on the grounds of justice, equity and good conscience.

Where the T P Act is not in force in any area the vendor will not be liable to indemnify the purchaser from any loss as the principle of 'caveat-emptor' alone was applicable at the time when the purchaser got the property.(17)

In a suit between a transferor and a transferee arising out of a sale of property held by the transferor on annual patta from Government, the rights of the parties to the sale are governed by this Act in the absence of a statutory provision prohibiting transfer.(18)

A suit for specific performance of agreement to direct the vendor to apply for permission under Section 47 of Andhra Pradesh Act 21 of 1961 and then to execute a sale deed is maintainable.(19)

Where oral contract to sell immovable property is alleged, heavy burden lies on the party alleging to prove that there was consensus ad idem between the parties (20)

Where the vendee undertook to repay the mortgage debt of the vendor and it formed part of the consideration for sale of property to vendee, possession was delivered and property mutated in name of vendee The mere fact that the mortgage debt was not discharged by the vendee would not make the sale transaction sham or nominal.(21)

In laying down the principle that the boundaries should prevail over the extent, the following principles are applied—

1) Doubtful extents — boundaries should be preferred
2) Absence of material to show exact extent — boundaries should outweigh
3) If recitals clearly show that lesser extent than area covered by boundaries is conveyed then extent should prevail over boundaries.(22)

There was conflict between the area mentioned in the sale deed and its boundaries and as such the executing Court held that the boundaries shall prevail, in the above circumstances the revisional Court remanded the case to the executing Court to record its finding after allowing the parties to lead their evidenceon the objection.(23)

Bona fide purchaser without notice

Agreement to sell property in favour of third party was executed much prior in point of time to the agreement executed in favour of the plaintiff There was no evidence on record to show that the third party had the knowledge of agreement in favour of the plaintiff. Thus the third party purchaser under the circumstances can be said to be bona fide purchaser without notice The plaintiff was therefore not entitled to specific performance (24)

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16. AIR 1944 Pesh 9 (10) (DB).
17. (1970) 2 Mad LJ 520 (525)
18. AIR 1951 Assam 20 ILR (1950) 21 Assam
19. AIR 1970 Andh Pra 19 (DB).
20. 1990 SCFBRC 351 (363) (SC).
21. AIR 1985 Mad 222 (234) : 1984 TLNJ 442
22. (1984) 97 Mad LW 365 (367)
23. (1970) 1 Rent LR 620 (622) (Punj)
24. AIR 2002 SC 1711 (1714, 1715 : 2002 AIR SCW 1653 : 2002 (4) SCC 460 ** AIR 2002

1A. Time when of the essence of contract.

Time is not essence of agreement to sell immovable property unless so provided specifically Vendor did not inform vendee that mutation in favour of vendor is sanctioned, though provided accordingly in the agreement nor did he call upon vendee to get sale deed executed Thus the conduct of the vendor showed that according to him time was not essence of the contract **(1)**

Where the intention of the parties is that time is of the essence of the contract and the vendor fails to execute the sale deed within stipulated time, the contract does not come to an end but it subsists and is voidable at the instance of the vendee **(2)**

It is settled law that in all cases of agreement of reconveyance, time is the essence of contract.**(3)**

The principle under S 55 of the Contract Act that in regard to contracts of sales of immovable property time is not the essence of the contract, does not apply to contracts of reconveyance If a vendor who agrees to sell his immovable property, is given the option to repurchase the property within a particular period, then such an option must be exercised strictly within the said period **(4)**

2. Disclosure of defects — Paragraph 1, clause (a).

This clause obliges the seller to disclose to the buyer any material defect in the property or in the title thereto of which the seller is aware and the buyer is not aware and which the buyer could not, with ordinary care discover **(1)** In other words, the seller is bound to disclose all *latent* defects which are material and of which he is aware, but not *patent* defects **(2)** The duty does not thus extend to *every* defect in the property and, the seller can protect himself against even this limited duty to disclose a latent defect by appropriate clauses as is shown by the words "in the absence of a contract to the contrary" in the beginning of the section

The section will have no application to a case where the person sells property in which he has absolutely no interest **(3)**

Mad 131 (143) 2001 (3) Mad LW 603 (In facts of the case held that subsequent purchaser had no notice of existence of the agreement for sale in favour of the plaintiff)

Section 55 — Note 1-A

1. **AIR 2002 Him Pra 166 (173)**
2. **AIR 1984 (NOC) 320 (DB) (Delhi)**
3. **2000 AIHC 168 (172) : 2000 (2) Mad LW 92**
4. **AIR 1998 SC 3021 (3031) : 1998 AIR SCW 2877 · 1998 All LJ 2149**

Section 55 — Note 2

1. AIR 1964 Orissa 269 (273) (Defect in vendor's title — Onus of proving that non-disclosure was fraudulent lies on purchaser) ** AIR 1961 J & K 66 (70) (The fact that the seller (lessee of land for residential purposes in Jammu and Kashmir) had rendered the land liable to resumption by the State by his wilful default (by breach of the conditions of the lease) is undoubtedly a material defect of title) ** AIR 1957 Madh B 24 (25) ** AIR 1956 Bom 175 (178) (DB) (Material defects of which seller is aware should be disclosed at time when parties enter into agreement of sale — Seller must also answer requisition made by buyer) ** AIR 1950 Lah 106 (115) Pak L R (1950) Lah 1 (Agreement to sale of property at Lahore by A to B — Subsequent notice under S 36 Punjab Town Improvement Act, 1922, for acquisition of property in question — Notice cannot operate as a material defect either in the property or in seller's title thereto) ** AIR 1925 Rang 372 (373) (DB) (A defect in title is a material defect) ** (1906) 75 LJ Ch 175 (178) (1906) 1 Ch 335 (341) : 94 LT 58 · 54 WR (Eng) 244, Carlish v. Salt.
2. (1800) 31 ER 707 (707) 5 Ves 508 5 RR 107 Bowles v. Round ** (1922) 92 LJ Ch 194 (201) : 128 LT 622, Simpson v. Gilley
3. AIR 1977 Andh Pra 90

There is no obligation on the seller to swear an affidavit or create a charge by way of security against any contingent loss that may accrue to the buyer for defect of title.(4)

Material defect.

The words "or in the seller's title thereto" were added by the amending Act of 1929. It gave effect to the view that had been taken before, that defects of title were within the scope of this clause (5). A defect in the title must be distinguished from a defect in the *property*. The latter defect prejudices the buyer in the physical enjoyment of the property whereas the former exposes him to adverse claims.(6)

It is only a *material* defect in the property or in the title thereto that the seller is bound to disclose under this clause. The test of materiality is that the defect must be of such a nature that it might be reasonably supposed that if the buyer had been aware of it he might not have entered into contract at all, for he would be getting something different from what he contracted to buy (7). A prior deed of assignment by which the owner had transferred his right, title and interest in the property is a material defect in title (8). The existence of an incumbrance not known to the buyer and which he could not discover by exercise of reasonable care is a defect in title.(9) so also is the existence of a permanent lease(10) or the existence of a liability of the land being taken over by a company under a local Act,(11) the existence of a restrictive covenant attached to the property sold,(12) the existence of a *non-transferable* permission to build, to a buyer of agricultural land for construction purposes(13) or the existence of a public right of way over the property not discoverable with ordinary care (14). The existence of a nuisance in the neighbourhood of the property sold

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4. ILR (1973) 1 Cal 462

5. AIR 1930 Cal 56, (563) 57 Cal 1189 (DB) (The section does not say anything about delivery of abstract title. The seller is to produce his title deeds for verification if so demanded.) ** AIR 1925 Mad 968 (969) * AIR 1925 Rang 372 (373) (DB) ** AIR 1920 Pat 727 (728) ** AIR 1915 Sind 21 (22) 9 Sind LR 97 ** (1896) 20 Bom 522 (533) (DB).

6. Halsbury, Laws of England Vol XXV, p 297 ** AIR 1936 Nag 4 (6) 31 Nag LR Supp 101.

7. AIR 1955 Bom 16 (20) 59 Bom 83 (DB) (Restrictive conditions in the nature of easements imposed on property are material defects.) ** (1970) 30 ER 311 1 Ves Jr 221, Calcraft v Roebuck (Trifling error in description in sales by auction is not a material defect.) ** (1834) 4 LJ CP 66 (69) : 1 Bing NC 370, Flight v. Booth

[See also (1961) 65 Cal WN 881 (898) (Material defect is one which if not disclosed at the time of auction sale, exposes the purchaser to the risk of adverse claim.)]

8. (1961) 65 Cal WN 881 (891, 892). (AIR 1936 Nag 4, Foll.)

9. ILR (1966) 1 Mad 114 (118) (Simple and unsecured debts not charged on any particular item of property in partition — Not a defect in title.) ** AIR 1960 Andh Pra 405 (406) ** AIR 1957 Madh B 23 (25) ** AIR 1950 EP 278 (280, 281) (DB) (Non-disclosure of a mortgage on the property by the seller is not a material defect in his title covered by S 55(1)(a) unless the buyer can show that he could not by using ordinary care discover the existence of that mortgage.) ** AIR 1925 Mad 968 (969)

10. (1913) 40 Cal 140 (149) (Abstract of title must commence with a document which is root of title.)

11. (1836) 150 ER 540 (544) 1 M & W 520 · Tyr & Gr 851 2 Gale 61 5 LJ (NS) Ex 207 : 46 RR 387, Ballard v Way

12. (1907) 76 LJ Ch 621 (624) (1907) 2 Ch 191 (199), Pemsel v Tucker

13. AIR 1957 Madh B 23 (25) ** (1903) 72 LJ KB 873 (875) (1903) 2 KB 487 (491), 89 LT 350 52 WR (Eng) 23, Molyneux v Hawtrey

14. (1922) 91 LJ Ch 567 (570) (1922) 2 Ch 199 (203) 127 LT 783, Yandle & Sons v Sutton.

is a defect in the property.(**15**) so also is the existence of an underground culvert running through the middle of the property, where the property is sold for residential purposes(**16**) or the existence of an easement over the property.(**17**) But on the purchase of an under-lease it is not a valid objection to the title that the under-lease may be forfeited by the non-performance of the covenants in the original lease (**18**) Notification under S 5 of the Kerala Escheats and Forfeitures Act (1964) was issued in respect of certain property While executing an agreement of sale in respect of that property, the executant did not disclose the existence of the notification to the vendee Held that in view of S 55 (1)(a) the executant was bound to explain the defective nature of title (**19**)

Where the vendor has not disclosed that the property was subject to a claim or pending a lawsuit which would be a material defect in the property the vendee would be entitled to rescind the contract.(**20**)

A notification contacting proposal to acquire a part of the disputed land for construction of road was issued prior to the vendor coming into possession of the land He was not aware of the proposed acquisition. The vendor had agreed to sell the entire land to the vendee From the fact that a small part of land was to go in road widening, it could not be said that the same amounted to any defect in title or material defect in property.(**21**)

Seller must be aware of the defect.

Where at the time of the contract the seller is himself not aware of the defect he cannot obviously disclose it and is, therefore, not bound to disclose it (**22**) But this is subject to a contract to the contrary, for instance, where the seller expressly undertakes to indemnify the buyer if any defect is discovered, he is liable in damages on the discovery of encumbrance even though he was not aware of it.(**23**)

No duty where buyer is aware of the defect.

Where the buyer is aware of the defects there is no duty on the part of the seller to inform him of such defects (**24**) Nor is there any such duty unless the buyer could not, with ordinary care,

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15. (1849) 68 ER 170 (173) : 18 LJ Ch 329 13 Jur 912 7 Hare 410 82 RR 147, Lucas v James.

16. (1902) 71 LJ Ch 666 (667) (1902) 2 Ch 258 87 LT 189 50 WR (Eng) 532 In re Puckett & Smith's Contract

[**See also** (1899) 47 WR (Eng) 203 (204) In re Brewer & Hamkin's Contract (But not where land is not for residential purposes)]

17. AIR 1956 Bom 175 (179, 180) (DB) (An easement of right of way may not be material defect in title but may be material defect in property) ** AIR 1935 Bom 16 19 20 59 Bom 83 (DB) ** (1901) 70 LJ Ch 822 (823) (1901) 2 Ch 825 (828) 85 LT 90 50 WR (Eng) 237, Turner v. Moon.

18. (1855) 52 ER 1192 (1193) 22 Beav 477 ** 111 RR 447 Hayford v Criddle

19. 1996 AIHC 4081 (4088) : 1996 (1) Ker LJ 656

20. ILR (1974) Delhi 689 (701).

21. 1996 (1) Guj LH 179 (183)

22. (1849) 68 ER 170 (173) : 7 Hare 410, Lucas v. James

23. AIR 1957 Trav-Co 59 (60) (DB)

24. AIR 1957 Madh B 23 (25) ** AIR 1925 Mad 968 (969) ** (1849) 68 ER 170 (173) 18 LJ Ch 329, Lucas v. James

[**See also** AIR 1942 Sind 81 (82) ILR (1942) Kar 32 (DB) (Buyer purchasing property with open eyes and obtaining possession – Buyer subsequently suing for return of price on the ground that seller had to part of the property – **Held,** no fraud on the part of seller by non-disclosure under S 55(1)(a), T P Act, was established) ** (1921) 61 Ind Cas 604

discover them **(25)** If the buyer does not avail himself of the knowledge open to him or to his agents he cannot be heard to say that he was deceived by the Vendor's misrepresentation on the principle of caveat emptor.**(26)** Where a prior incumbrance is registered, the buyer can, with ordinary care, discover it, the seller is not therefore under any obligation to disclose it.**(27)** A contrary view has, however, been taken by the High Court of Nagpur in the undermentioned case **(28)** In *Chaturbhuj Sangji v Mansukh Ram Motilal*(**29**) it was held by the Bombay High Court that the buyer could not be said to be guilty of negligence in not asking for the title deeds of an adjoining property, which *prima facie*, he had no right whatever to ask his vendor to produce, and that it was the vendor who was bound to disclose any covenant restricting the enjoyment of the property sold, which would be apparent from an examination of such title deeds.

Effect of non-disclosure.

As has been seen in Note 1, a failure to fulfil an obligation under this clause will amount to a refusal to perform the contract for sale within the meaning of S 39 of the Contract Act and will entitle the other party to repudiate or put an end to the contract On the discovery, therefore, of a defect in title which the seller was bound to disclose under this clause the buyer may retire from the

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(604) (Lah) (Occupancy rights Sale by tenant Purchaser knowing that landlord had right to get sale set aside — Sale set aside — Purchaser held could not recover from vendor money paid by him.)]

25. AIR 1964 Orissa 269 (271) (Defect in vendor's title — Onus of proving that non-disclosure was fraudulent lies on purchaser) ** AIR 1953 Mad 628 (639) (DB) (Particular area in property sold included in Town Planning Scheme — Assuming that Scheme is a material defect in seller's title, purchaser can discover it with ordinary care) ** AIR 1945 Bom 187 (192) (DB) (Per Stone C J) Where the most rudimentary investigation would have discovered the existence of arrears of taxes this clause was held not applicable) ** AIR 1936 Nag 4 (6) : 31 Nag LR Supp 101 ** AIR 1930 Cal 561 (563) 57 Cal 1189 (DB) ** AIR 1915 Sind 21 (22) : 9 Sind LR 97.

[**See also** AIR 1957 Madh B 23 (25) (Sale of land for building purposes — Land agricultural and permission of Government for building essential — Vendor having such permission but permission not transferable These facts not disclosed to vendee It is non-disclosure of material defect in title — Defects held such that buyer could not, with ordinary care, have discovered) ** (1909) 5 LBR 125 (128) (DB) (An enquiry into title which does not extend as to the actual possession of the property for at least twelve years cannot be said to be such an enquiry which a reasonable and prudent man should make) ** AIR 1944 Mad 237 (238) (A deed of conditional sale executed by A in favour of B reciting 'if we do not pay your amount within 5 years we agree to this document being treated as a sale deed' — C an alienee from B, looking into the deed and misunderstanding it as sale deed — **Held,** principle of caveat emptor applied and C must bear the consequences - Section 41 has no application)]

26. AIR 1968 Goa 98 (100).

27. AIR 1962 Madh Pra 144 (145) (Notwithstanding specific mention in the sale deed that there was no incumbrance) ** (1905) 27 All 561 (563) (Mortgage) ** AIR 1915 Sind 21 (22) : 9 Sind LR 97.

[**See also** AIR 1955 All 24 (27) (DB) (The usual thing when a person purchases property is to find out from the Municipal office whether there are any arrears of taxes due and further to find out from the registration office whether there are any encumbrances) ** (1910) 6 Ind Cas 114 (115) (All) (DB) (Purchaser dispossessed by mortgagee under previous usufructuary mortgage Purchaser held must be presumed to have notice of mortgage as it was registered — He could not have an agreement to return purchase money fulfilled)]

28. AIR 1938 Nag 441 (442).

29. AIR 1925 Bom 183 (184, 185) (DB).

contract and refuse to complete it **(30)** He may, however waive his objections to the title, in which case he must complete the contract.**(31)** *Prima facie* where an abstract of title is delivered by the seller to the buyer and the latter takes possession thereafter his conduct will amount to a waiver of objection to any defects that may appear on the abstract **(32)** But the mere taking of possession by itself, does not indicate any waiver of the right to a good title.**(33)** except where the acts done by the buyer afford evidence of an intention to waive the right **(34)** Where the conditions of sale in an auction disclose a weakness in the title and the buyer buys the property without reading them, he would be deemed to have waived his objections to such defects **(35)**

The last clause of this section enacts that an omission to make the disclosure of the nature referred to in this clause is *fraudulent* **(36)** This fraud will entitle the buyer not only to avoid the contract, where the transaction has not passed beyond the stage of contract, but to *set aside the sale*

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30. AIR 1957 Madh B 23 (26) ** AIR 1935 Bom 16 (18) 59 Bom 83 (DB) (Liability of a property to be compulsorily acquired under Land Acquisition Act not disclosed by vendor is a defect in title) ** AIR 1925 Bom 85 (87) 49 Bom 615 (DB) (Non disclosure of a restrictive covenant) ** AIR 1925 Lah 481 (481) 6 Lah 308 (DB) ** (1830) 39 ER 114 (119, 120) 30 RR 123 Dalby v Pulton (If the seller can make out a title after the repudiation it is of no use) ** (1818) 36 ER 600 (601) 19 RR 68 Banks v Lord Kokeby ** (1854) 69 ER 233 (236) 23 LJ Ch 1088 Darlington v Hamilton (Sale of an under lease as lease — The convenants in the original lease not disclosed — Purchaser discovering the defects aliunde held entitled to repudiate the contract for sale ** (1884) 33 WR (Eng) Dig 237 (237) 29 Ch D 661 (671) Ellis v Rogers ** (1885) 52 WR (Eng) 548 (538) 29 Ch D 657 (365), Heywood v Mallalieu ** (1883) 170 ER 1384 (1385) 23 RR 803 Jones v Edney ** (1830) 48 ER 199 (200) 31 RR 112 Hoggert v Scott ** (1883) 52 LJ Ch 889 (890) In re Marsh and Earl Granville. (Affirmed in (1883) 24 Ch D 11)

[See also AIR 1939 Cal 639 (641) (Existence of municipal plan affecting premises sold Refusal of seller to apply for cancellation or variation of plan — Buyer entitled to cancel agreement — Existence of standard plan of Municipality for construction of a road which affected the premises agreed to be sold may be called an encumbrance or removable defect in title. It is the duty of the vendor to remove the defect.)

31. (1820) 37 ER 339 (341) 21 RR 46 Burnell v Brown ** (1830) 48 ER 199 (200) 39 LJ Ch 54 31 RR 112 Hoggart v Scott ** (1859) 8 WR (Eng) Dig 92 (92) 34 LT (OS) 45 Deller v Simonds ** (1838) 160 ER 669 (671) 33 L & C 19 51 RR 361 Hall v Laser ** (1883) 52 LJ Ch 654 (655) 23 Ch D 320 (329) 48 LT 629 31 WR (Eng) 601 In re Gloag and Miller's Contract

32. (1847) 63 ER 1217 (1220) 1 De G & Sm 609 12 Jur 199 75 RR 216 Shackleton v Sutcliffe ** (1857) 53 ER 501 (504) 24 Beav 63 116 RR 235 Bown v Stenson

33. (1847) 63 ER 1217 (1220) 1 De G & Sm 609 12 Jur 199 75 RR 216 Shackleton v Sutcliffe ** (1857) 53 ER 501 (504) 24 Beav 631 116 RR 235 Bown v Stenson

33. (1819) 36 ER 815 (817) 3 Swan 159 19 RR 188 Burroughs v Oakley ** (1854) 43 ER 668 (670) 4 De G M & G 665 102 RR 326 Simpson v Sadd ** (1827) 38 ER 540 (544 545) 3 Russ 171 6 LJ CH 164 27 RR 59 Stevens v Guppy ** (1825) 3 LJ (OS) Ch 100 (101), Boxhall v. Jackson.

34. (1819) 36 ER 815 (818) 3 Swan 159 19 RR 188 Burroughs v Oakley ** (1838) 48 ER 970 (972) 1 Beav 337 2 Jur 1008, Haydon v Bell ** (1853) 23 LJ Ch 593 (594) 2 Eq Rep 485 2 WR (Eng) 89, Sibbald v Lowrie (Purchaser held to have waived his rights to investigate title.)

[See also (1855) 4 WR (Eng) Dig 56 (56) 2 Jur (NS) 179 106 RR 925 Wallis v Woodyear]

35. (1906) 75 LJ Ch 464 (467) (1906) 2 Ch 175 95 LT 412 52 WR (Eng) 451, Blaiberg v Keeves.

36. See Note 21.

itself where the contract has been completed by the execution of the conveyance.**(37)** Before the sale is set aside the buyer can sue for return of the purchase-money. This remedy is independent of a suit for rescission of the sale deed, which the buyer may also bring if he so chooses **(38)** Where the buyer has suffered loss by reason of the fraud, he will, it is conceived, be entitled to claim *damages* from the seller, whether the fraud is discovered before or after conveyance **(39)** The reason is that fraud is by itself a ground of action in tort for damages **(40)** Apart from this clause, where the buyer discovers *only defect in title* after conveyance, he can sue for damages on the implied contract referred to in paragraph 2.

Misrepresentation and misdescription :

Section 19 of the Contract Act provides that where consent to an agreement is caused by misrepresentation, the contract is voidable at the option of the person whose consent was so caused. A *misdescription* is only a form of misrepresentation and where, in a contract for sale, the vendor is found to have made a misrepresentation or misdescription as to a material point, the buyer can on discovery of the true facts, avoid the contract **(41)** On the principles stated in Note 1, the buyer can, where the sale is completed by conveyance, set aside the sale on the ground of such misrepre-

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37. AIR 1963 Raj 38 (41) : ILR (1962) 12 Raj 744 ** AIR 1957 Andh Pra 688 (689) (DB) ** AIR 1942 Sind 81 (82) : ILR (1942) Kar 32 (DB) ** AIR 1926 Cal 385 (389, 390) : 52 Cal 914 (DB) (Where a purchaser discovers defects in the property before conveyance, he can either rescind the contract or successfully oppose a suit for specific performance, but if he discovers material defects after the conveyance he must make out a case of fraud in order to set aside the sale — This he can show by establishing the circumstances bringing the case within para 1(a) ** (1818) 36 ER 625 (626) : 14 RR 261, Edwards v. Mcleay ** AIR 1925 Rang 372 (373) (DB) ** (1818) 171 ER 692 (693) : 20 RR 707, Stevens v. Adamson

[**See also** (1963) Ker LJ 400 (402) (DB) (Sale of immovable property in Travancore (prior to applicability of Transfer of Property Act) — Defects in vendor's title discovered after conveyance — Vendee cannot bring suit for cancellation of sale deed unless fraud is proved))]

38. AIR 1963 Raj 38 (41) : ILR (1962) 12 Raj 744 (It may be that it would be safer in some cases for the purchaser to sue for the rescission of the sale deed also but it would be going too far to lay down as an absolute rule of law that a (suit) for return of the purchase-money on breach of warranty of title would be incapable of being maintained in law without suing for the cancellation of the sale deed. Observations to the contrary in AIR 1942 Sind 81 held obiter, AIR 1933 Lah 262, Disting, AIR 1935 Rang 372 and AIR 1932 All 224 and AIR 1933 All 203 and AIR 1953 Trav-Co 236, Rel on) ** AIR 1953 Trav-Co 236 (237) (DB) (Seller receiving consideration money on false representation that he was owner in possession of property sold — Amounts to fraudulent misrepresentation — Buyer held entitled to decree for refund of purchaser money)

[**But see** AIR 1942 Sind 81 (82) : ILR (1942) Kar 32 (DB).]

39. AIR 1957 Andh Pra 688 (689) (DB) ** AIR 1920 Pat 727 (728) (Non-disclosure of defect — Sale completed - Portion of property lost — Buyer entitled to damages in the form of return of purchase-money.) ** (1886) 9 Mad 89 (91) (DB).

40. AIR 1932 Nag 148 (152) : 28 Nag LR 184 (Obiter : Case under S 19 of the Contract Act.)

See Broom, A Selection of Legal Maxims, 10th Edn , 1939, pp 540, 541 · Halsbury Laws of England, Vol. XXV, para 705 p. 410.

41. AIR 1957 Madh B 23 (26) (Agreement to sell agricultural land for building purposes — Omission to disclose the fact that permission granted by Government for building thereon was non transferable was held to amount to misrepresentation, entitling buyer to rescind contract and to have back his deposit) ** (1834) 41 RR 599 (604, 605) : 4 LJ CP 66 Flight v Booth ** (1838) 173 ER 579 (579), Robinson v Musgrove ** (1853) 65 ER 231 (235) : 1 WR (Eng) 502, Stanton v Tattersall ** (1838) 132 ER 866 (872) : 7 LJ CP 282, Dykes v

sentation.**(42)** A misrepresentation may be a *fraudulent* one or an *innocent* one. In the former case, as in the case of any other kind of fraud, the buyer may claim damages in tort for any loss that he may have sustained by reason of such fraud **(43)** An innocent misrepresentation by a party is not a ground in law for a claim for any damages**(44)** unless there is a special agreement for making compensation for such error or there is a warranty of title **(45)** But where the contract is sought to be enforced by *specific performance* (which is an equitable relief) the Court can, in decreeing specific performance, award compensation to the other party **(46)** The party to whom the misrepresentation is made may also, if he thinks fit, insist that the contract shall be performed and that he should be compensated so as to be put in a position in which he would have been if the representations made had been true **(47)** Where A sold to B a house the size of which was stated to be 107 square yards, but which the buyer, after the conveyance, discovered to be only 86 square yards, and sued the seller for damages it was held by the High Court of Allahabad that unless the misrepresentation could be held to be fraudulent, the buyer had no remedy in damages **(48)**

Blake ** (1868) 37 LJ Ch 830 (833) 18 LT 844 Turquand v Rhodes ** (1874) 43 LJ Ch 635 (637) 30 LT 314, Cabeller v Henty ** (1902) 71 LJ Ch 666 (667) (1902) 2 Ch D 258 (264), In re Puckett and Smith's Contract ** (1892) 4 LJ Ch 643 647 14 Eq 224 Torrence v Bolton ** (1868) 17 WR (Eng) 211 214) 4 Ch App 10, 108) Aberaman Iron Works v Wickens ** (1884) 33 WR Eng Dig 220 220) 28 Ch D 7 (13 Smith v Land and House Property Corporation ** (1888) 37 WR (Eng) 2 7 (218) 40 Ch D 601 (605 609) In re Davies & Casey ** (1900) 69 LJ Ch 879 (883 (1900) 2 Ch 858 (868) Jacobs v. Revell ** (1815) 171 ER 45 (46) : 16 RR 761, Belworth v. Hassell

42. (1909) 4 Ind Cas 389 (390) All (DB) (But where the buyer has tested the statements he cannot be said to have been deceived by them and hence will not be entitled to rescind the contract) ** (1860) 9 WR Eng) 155 156) 3 LT 662 663) Turner v West Bromwich Union Guardians ** (1871) 40 LJ Ch 577 (586) LR 12 Eq 320 Haygarth v Wearing

[**See however** (1905) 74 Ch 199 202) (1905) 1 Ch 326 (333) Seddon v North Eastern Salt Co Ltd (Innocent misrepresentation does not authorise rescission after completion of contract unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken so as to constitute a failure of consideration)]

[**But see** AIR 1933 Sind 144 (145) (DB) (Purchaser has only a limited right to claim compensation if misrepresentation is fraudulent)]

43. AIR 1957 Ker 181 (184) ILR (1957) Ker 475 (DB) (Burden is on plaintiff to establish fraud as alleged by him) ** AIR 1953 Mad 769 (773) ILR (1952) Mad 682 (DB) ** AIR 1932 Nag 148 (150) 28 Nag L R 184 (Misinformation of the income or rental property is fraudulent misrepresentation)

44. AIR 1953 Mad 769 (773 Pr 28 ILR (1952) Mad 682 (Pr 28) (DB) ** (1896) 18 All 322 (324 325) (DB) Misdescription of property must be fraudulent in order to entitle vendee to damages) ** (1883) 52 LJ QB 609 (618, 11 QBD 255 269) Jolliffe v Baker

45. AIR 1958 Andh Pra 278 (280) (Agreement of sale of specified extent of land Provision for adjustment of price in case extent found to be more or less Land found deficient Purchaser held entitled to compensation for deficiency) ** AIR 1953 Mad 769 (773 Pr 28 : ILR (1952) Mad 682 (DB)

46. (1815) 14 RR 231 (235) : G. Co-op. 173, Grant v. Munt.

47. **See** Second paragraph S 19 of the Indian Contract Act ** AIR 1953 Mad 769 (773 (Pr 28) ILR (1952) Mad 682 (DB) (Error in extent of property agreed to be sold Purchaser can claim specific performance with compenstion if he can bring the case within S 14 Specific Relief Act) ** (1811) 34 ER 153 (155) 11 RR 109 Hill v Buckley

48. (1896) 18 All 322 (324, 325) (DB).

[**See also** AIR 1953 Mad 769 (773) Pr 28) ILR (1952) Mad 682 (DB) (Error in extent of property sold Contract completed - Fraud not established nor special agreement for

Where the quantity of land sold was stated by estimation as being "more or less" of a certain extent, and the extent is found to be less, it cannot be said that there is any misrepresentation at all and in a suit for specific performanceof the contract by the seller, the buyer is not entitled to an abatement for the deficiency.(49)

Contract to the contrary.

Where, in an auction sale, the conditions of sale notified that the would-be buyer should satisfy himself as to the nature of the property sold, it was held that there was a "contract to the contrary" and that the seller was not liable to disclose under this clause, any defect in the property (50) Where the buyer agrees to accept the seller's title "without dispute"(51) or with "all defects"(52) he cannot afterwards object to it.

An indemnity clause in a sale deed to cover the losses suffered on account of the vendor's default to pay off prior incumbrances, it was held, could not come into operation so as to cover losses sustained by the vendee of property on account of deficiency in extent (53)

3. Production of document of title — Paragraph 1, clause (b).

It is a well-recognised principle that where a contract for sale is made without any special conditions or stipulations as to title, the seller is bound, at all times, and under all cicumstances, to make out a "marketable title" (1) "The right to a good title," said Sir William Grant, M. R., in *Ogilvie v. Foljambe*,(2) "is a right not growing out of the agreement between the parties but which is given by law The defendant insists on having a good title, not because it is stipulated for by the agreement but on the general right of the purchaser to require it".(3) An agreement in restraint of

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making compensation for errors or warranty regarding extent conveyed, established — Buyer has no right to claim compensation) ** (1883) 52 LJ QB 609 (618) 11 QBD 255 Joliffe v. Baker]

49. (1812) 34 ER 146 (147) : 12 RR 238, Winch v. Winchester

50. (1921) 65 Ind Cas 734 (735) (DB) (Lah).

51. (1846) 63 ER 759 (762) : 15 LJ Ch 173, Duke v. Barnett.

52. (1811) 170 ER 1338 : 13 RR 778, Baglehole v. Walters.

53. AIR 1957 Ker 181 (186) : ILR (1957) Ker 475 (DB).

Section 55 — Note 3

1. AIR 1964 Orissa 269 (274) (Marketable title is one which could be forced on an unwilling purchaser under a contract for sale) ** AIR 1956 Bom 175 (179) (DB) (The title which a party agrees to convey must be a title free from reasonable doubt A party in whose favour an agreement of sale has been executed is entitled to have a marketable title made out for him) ** AIR 1938 Bom 77 (78) (Marketable title means one which could be forced upon the unwilling purchaser under a contract for sale) ** AIR 1928 Lah 154 (155) : 9 Lah 67 (DB) ** AIR 1927 Sind 49 (50) 19 Sind LR 41 ** AIR 1920 Mad 859 (861) (DB) ** (1822) 1 LJ (OS) Ch 148 (151), Hawkins v Shewen ** (1818) 36 ER 600 (601) 2 Swan 222 19 RR 68, Binks v Lord Rokeby ** (1887) 11 Bom 272 (280) (Specific Relief Act S 25.) ** (1891) 15 Bom 657 (667) ** 1884 All WN 169 (170) (DB)

   [**See also** (1820) 37 ER 501 (506) 1 Jac & W 611 21 RR 255, Wilson v Allen (The buyer is entitled to money he has spent in clearing the seller's title) ** (1841) 10 LJ Ch 367 (368), Mackreth v Dunn (Where there are joint purchasers each can have a right to a good title proved) ** (1819) 56 ER 690 (690) 4 Mad 227 20 RR 293, Roffey v Shallcross ** (1824) 2 LJ (OS) Ch 113 (115) 26 RR 188, Johnes v Claughton ** (1842) 134 ER 168 (169) : 11 LJ CP 256, Hall v. Betty.]

2. (1817) 36 ER 21 (25, 26) : 3 Mer 53 : 17 RR 13.

3. **See also** (1866) 2 Bom HCR 406 (408). (Case before Specific Relief Act, 1877 This priciple of English law, held ont applicable to Hindus) ** (1873) 42 LJ Ex 108 (112) LR 8 Ex 175 : 29 LT 293 : 21 WR (Eng) 685, Want v. Stallibrass.

this right must be very clear and unambiguous.(4)

In England a good or marketabgle title has been held to mean such a title as the Court of Chancery would adopt as a sufficient ground for compelling specific performance (5) In this country it would mean a title "free from reasonable doubt" within the meaning of cl (b) of S 17 of the Specific Relief Act, 1963 (formerly, Cl (b) of S 25 of the Specific Relief Act of 1877) (6)

A title which will expose the buyer to litigation or hazard is not such a title as is referred to in S 17 of the Specific Relief Act, 1963 (7) A title depending upon the establishmet of facts and dealings of a complicated and ambiguous nature such as may reasonably be challenged with a practical chance of success is not one which could be forced on an unwilling purchaser (8) A possessory title obtained by the operation of the statute of limitation is a good title (9) In England before the Vendor and Purchaser Act, 1874,(10) it was technical rule following by conveyancers that possession proved for a period of sixty years should be regarded as unobjectionable title to a fee simple A title for sixty years raised an inference that the vendor had a good title and the Courts

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4. (1866) 2 Bom HCR 406 (408) (The case before the Specific Relief Act 1877 — The principle of English law was not applied to Hindus)

5. AIR 1962 Madh Pra 144 (145) ** (1851) 155 ER 800 (803) 6 Ex 873 Jeakes v White As would be a good answer to an ejectment)

   [See also AIR 1968 Mad 161 (164) ILR (1966) 2 Mad 385 (DB) (Sale by trustee of trust property — Beneficiary seeking to avoid sale on the ground that it is in breach of trust and vitiated by fraud — Trustee having power of sale under the deed — Price fetched for properties found to be reasonable fair and proportionate to the value of those properties — Held, sale will not be set aside and purchaser also cannot ask for rescission on the ground of misapplication of moneys already paid) ** 1852 68 ER 813 (816) 10 Hare 1 , 90 RR 243 Pyrke v Waddingham (A doubtful title which a purchaser will not be compelled to accept is not only a title upon which the Court entertains doubts but includes title which although the Court has a favourable opinion of it yet may reasonably and fairly be questioned in the opinion of other competent persons)]

6. AIR 1966 Cal 605 (611) (Good title is title good against everybody Marketable title is title free from reasonable doubt Seller s liability is limited to the title which he has professed to transfer) ** AIR 1964 Orissa 269 (273) (Vendor not in position to give title free from reasonable doubt at time mentioned in agreement for completion of contract — Vendee is entitled to repudiate contract) ** AIR 1961 Raj 196 (201) ILR (1960) 10 Raj 1153 (A marketable title is a title which a vendor would be in a position to force on an unwilling purchaser) ** AIR 1956 Bom 175 (179) (DB) ** AIR 1935 Bom 16 (18) 59 Bom 83 (DB) ** AIR 128 Oudh 475 (477) (DB) ** AIR 1923 Bom 148 (150 152 154 47 Bom 369 (DB) ** (1891) 15 Bom 657 (667)

7. AIR 1922 Sind 33 (36) 15 Sind LR 180 ** (1887) 14 Cal 518 (526) (Title depending upon the construction of an ill expressed document is one open to litigation)

   [See also AIR 1961 Raj 196 (202) ILR (1960) 10 Raj 1153 (A marketable title is a title which reasonably and strictly speaking a vendor would be in position to force on an unwilling purchaser, under all circumstances.)]

8. (1902) 71 LJ Ch 850 (858) (1902) 2 Ch 296 (313 314) In re Douglas and Powell s Contract

   [See also AIR 1940 Mad 739 (743) (DB) (Where the vendor s title depends not on question of law but on a proof of disputed fact he is bound to prove that fact and unless he does it he cannot be said to have made out good title) ** (1858) 141 ER 224 (231) 28 LJ CP 129, Symmons v. Heseltine.)]

9. AIR 1961 Raj 196 (203) ILR (1960) 10 Raj 1153 ** (1912) 81 LJ Ch 588 (591) (1912) 2 Ch 1 (9). In re Atkison and Horsell's Contract.

10. (1874) 37 & 38 Vict., Ch 78.

acted upon it if the vendor could produce no better title, though the rule did not make the title positively a good title **(11)** The Vendor and Purchaser Act, 1874, reduced the period to forty years except in certain cases The period was further reduced to thirty years by S. 44 of the Law of Property Act, 1925.**(12)**

A buyer cannot be compelled to accept a doubtful title **(13)** The failure to make out a marketable title will entitle the buyer to put an end to the contract.**(14)** The seller cannot enforce specific performance of the contract**(15)** unless the buyer has waived the defect in title.**(16)** The same prin-

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11. (1857) 62 ER 66 (71) : 4 Drew 170 Parr v. Lovegrove.

[**See also** (1809) 127 ER 901 (901) : 10 RR 560, Barnwell v. Harris.]

12. 15 Geo V, Ch 20

[**See also** AIR 1924 Bom 357 (357) ILR 48 Bom 368 (Practice of Bombay solicitors was to accept recitals in deeds of over twenty years old in the same way as was done in England under Vendor and Purchaser Act, 1874.)]

13. AIR 1960 Punj 275 (277) ILR (1959) Punj 1463 (DB) ** AIR 1952 Madh B 145 (145) ** (1755) 28 ER 433 (433) 2 Ves Sen 679, Mitchel v Neal ** (1879) 48 LJ Ch 837 (842) 12 Ch D 131 (148), Broad v. Munton.

[**See also** (1855) 24 LJ Ch 246 (248) 3 WR (Eng) 231, McCulloch v Gregory]

14. **AIR 1916 PC 5 (6) : 44 Ind App 30 : 41 Bom 300 (PC)** (**Held**, that agreement as to title had not been complied with and purchaser was entitled to refund of deposit with interest thereon) ** 1976 MPLJ 518 (523) 1976 Hindu LR 751 (Where the buyer felt that the vendor had no marketable title the only remedy available to him was to take back earnest money) ** Air 1960 Punj 275 (277) ILR (1959) Punj 1463 (DB) (Buyer will be justified in declining to carry through the transaction of sale and to accept delivery) ** AIR 1952 Madh B 145 (145) ** AIR 1928 Lah 154 (156) 9 Lah 67 (DB) ** AIR 1927 Bom 195 (202) 51 Bom 247 (D) ** AIR 1925 Sind 220 (220, 221) (DB) (Where in view of the doubtful character of the title of the property if the purchaser had completed the purchase he would have been required to bring a law suit and would not have obtained possession of the land without further litigation held that he was justified in not completing the purchase) ** (1834) 110 ER 1058 (1062) : 5 B & Ad 992, Souter v Drake ** (1854) 139 ER 253 (257) : 98 RR 785, Wilson v Wilson ** (1858) 140 ER 986 (1001) 27 LJ CP 210, Poppleton v Buchanan ** (1827) 38 ER 705 (706) : 4 Russ 5 Bryant v Beek.

[**See also** (1890) 59 LJ Ch 604 (607) 45 Ch D 310 (316), In re Head's Trustees & MacDonald (Title different from that originally contracted) ** (1879) 48 LJ Ch 239 (241) : 10 Ch D 736 (742) Weston v Savage (Contract by S to sell the residue of his lease for twelve years to W — Lessor having right of option to determine the lease at the end of five years — W was not bound to accept what was offered)]

15. AIR 1964 Orissa 269 (274) ** (1828) 38 ER 540 (544, 545) 6 LJ Ch 164 Stevens v Guppy ** (1825) 3 LJ (OS) Ch 100 (101), Boxhall v Jackson ** (1834) 40 ER 97 (97, 98) : 3 My & K 255 : 41 RR 65, Lesturgeon v. Martin.

16. (828) 38 ER 540 (544, 545) 6 LJ Ch 164 27 RR 59, Stevens v Guppy (Purchaser of a share in co-partnership business by taking possession and acting as co-partner does not waive his right to marketable title, when the contract states that a good title shall be made by a stipulated future date) ** (1825) 3 LJ (OS) Ch 100 (101), Boxhall v Jackson ** (1834) 40 ER 97 (98) 41 RR 65, Lesturgeon v Martin ** (1917) 86 LJ Ch 368 (370) (1917) 1 Ch D 414 (419), Alderdale Estate Co v McGrory (Purchaser taking with notice of the defect — Duty to make good title does not exist to the extent to which the purchaser has knowledge) ** (1867) 15 WR (Eng) 860 (861), Henderson v Hudson (Purchaser with knowledge of misdescription — He cannot object on the ground that vendor did not make a good title)

ciple will apply where there is an express *contract* to make out a marketable title and the vendor fails to make it out **(17)** Where a prior conveyance was discovered by the buyer after the contract for sale it was held that he was entitled to rescind the contract even if it appeared that such prior conveyance was a voluntary conveyance in fraud of creditors **(18)** A seller who had no title at the date of the contract but who makes a good title at the date on which the conveyance is to be completed must be held to have a good title and the buyer cannot refuse to complete it on the ground that there was no title at the date of the contract.**(19)**

The obligations imposed by this clause and the next are particular applications of the general duty discussed above, of the seller to make out a good title While this clause enacts that the seller must produce to the buyer on his request all documents of title relating to the property which are in the seller's possession or power, the next clause requires him to answer all relevant questions put to him by the buyer in respect of the property or the title thereto

This clause is silent as to the place of production of the title deeds The seller is not bound to produce to the buyer the documents at the residence of the buyer or at the office of his advocates.**(20)**

The duty of the seller to produce documents of title under this clause arises only "on the request" of the buyer and not if there is no such request **(21)**

Where the vendor informs the buyer that all documents relating to title are reads for inspection, but the buyer does not care to inspect and his version about the same is not convincing it cannot be said that he is ready and willing to perform his part of contract **(22)** Further the seller is bound to produce only such documents which are in his possession or power and not the documents which are not in his possession or power.**(23)** though, if he has *expressly agreed* to produce the title deed such agreement will be a contract to the contrary and he cannot escape liability by relying upon this clause **(24)** Where in a contract for sale of a house, the seller undertook to produce all

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17. AIR 1925 Bom 69 (79) 49 Bom 245 (DB) ** AIR 1925 Bom 64 (65 68 (DB) ** AIR 1924 Bom 282 (288) (DB) ** AIR 1924 Bom 252 257) ** (1882) 31 WR (Eng) Dig 2 0 (210) 9 QBD 616 (620) 47 LJ 491, Cato v Thompson (Knowledge of the purchaser of the restrictive covenants in title will not modify the terms of such express contract) ** (1912) 14 Ind Cas 811 (Low bur).

18. (1872) 21 WR (Eng) 73 (74) : LR 7 Ex 313, Clarke v. Willott

19. (1884) 54 LJ Ch 517 (521) 33 WR (Eng) 64 Games v Bonnor (Subsequent possessory title under statute of limitation is a good marketable title) ** (1890) 59 LJ Ch 636 (637 44 Ch D 218, In re Bryant & Barmingham's Contract.

See also Halsbury, Laws of England, Vol XXV, page 342.

20. AIR 1953 Punj 231 (232) (DB)

21. AIR 1965 Cal 45 (47) (Pr 9) (DB) (Clause in agreement for sale stipulating 'seller shall forthwith deliver' title deeds Construction of — Forthwith means with all reasonable despatch, on request being made – Word 'shall' in conjunction with word 'forthwith' in regard to obligation to deliver title deeds does not militate against a request in regard thereto on part of purchaser and does not amount to a contract to contrary within meaning of S 55(1)(b)) ** AIR 1953 Punj 231 (233) (DB) (Sale to be completed by 23-5-1947 Agreement reciting that seller was absolute owner without any defect in title — No request for examination of documents till 16-5-1947 — Buyer held must be taken to have accepted the title before he made the request) ** AIR 1917 Low Bur 166 (167) (DB)

22. 1996 (2) Mad LW 135 (138).

23. (1864) 68 Cal WN 611 (639, 640) (Clause (1)(b) does not apply where the question is not of production but of possession of title deeds after completion of transaction)

24. AIR 1943 Mad 593 (596, 597) (Some of the documents of title may not be with the seller and they may be in the possession of a mortgagee or a trustee or some other person from

the documents relating to the house," it was held that the seller did not undertake to produce all the documents necessary for making out the complete chain of title. The seller meant to do no more than what this clause says that a seller must do.(25) For instance, the buyer cannot insist on the seller taking out a probate of a Will (26) However, where the seller agreed to sell property but intimated to the purchaser his inability, in spite of best efforts, to obtain "No objection certificate" and "income-tax clearance" and also title deeds from the Bank with which it was mortgaged, the same would not result in frustration of the agreement to sell. The conditions to be fulfilled were not impossible of performance.(27) Where the buyer is not satisfied with the title on the documents which are produced and which alone the seller is bound to produce, and insists on the seller producing documents which are not in his possession or power and which he did not undertake to produce by the terms of the contract for transfer, the seller is entitled to rescind the contract.(28) Where, however, there is a partition between the co-owners of land and the title deeds remain in possession of the owner of the part, the owners of the rest of the land have an equitable right, independent of any covenant or statutory acknowledgment, to enforce production of the title deeds in order to effect the sale of their lands. The purchasers of such lands have, therefore, a right to enforce production of the title deeds for inspection.(29)

Where a contract of sale mentions a sum to be paid as damages in case of its breach and the buyer refuses to carry out the contract after the seller has made out a marketable title the seller is entitled to claim from the buyer reasonable compensation under section 74 of the Contract Act, even without showing that he has actually suffered any loss (30)

4. Answering relevant questions — Paragraph 1, Clause (c).

In England, the usual practice, in an open contract of sale, i.e., a contract in which nothing is said about the method in which the seller is to prove his title but which merely fixes the price for the land contracted to be sold, is for the seller to deliver to the buyer an *abstract of title* which gives a summary of the effect of all the documents by which any dispositions of the property have been made during the period for which title has to be shown, and of all facts affecting the devolution of the title during the same period. On receipt of the abstract the buyer examines it with the original document, and if he considers it necessary makes requisitions and inquiries which are to be answered by the seller. Usually the conditions of sale will fix a time within which such requisitions or inquiries should be made, after the expiry of which the buyer would be deemed to have accepted the title. If there is no stipulation as to time, the buyer must make his objections within a *reasonable time* after the delivery of the abstract. In the event of unreasonable delay the seller can, by notice, limit a reasonable time for sending in objections and, upon the buyer's default, rescind the contract, or the purchaser will be assumed to have accepted the title (1)

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whom they could be procured for the inspection of the buyer — Such documents may be held to be in the power though not in the possession of the seller — But this clause does not throw upon the seller the burden of putting himself to the expense of procuring deed not in his possession or power unless there is a contract to the contrary) ** AIR 1914 Cal 137 (139) : 41 Cal 852 (DB)

25. AIR 1943 Mad 593 (597).
26. AIR 1943 Mad 593 (597).
27. AIR 1999 Delhi 383 (388) : 1999 (81) DLT 228
28. AIR 1966 Cal 605 (610, 611) ** AIR 1943 Md 593 (597).
29. (1964) 68 Cal WN 611 (641).
30. AIR 1929 Mad 783 (784)

Section 55 — Note 4

1. Halsbury Laws of England Vol XXV pp 342, 355 323, 324 foot note ** (1852) 51 ER 770 (772) 1 WR (Eng) 43, Pegg v Wisden (Abstract retained for five months without an objection — Buyer must be deemed to have accepted the title.)

This practice does not obtain in this country The seller has merely to produce under para 1, Cl. (b) at the request of the buyer, all his documents of title for the buyer's examination and is bound to answer, under para. 1, Cl. (c), to the best of his information all relevant questions put to him by the buyer in respect of the property or the title thereto If he gives an answer which he knows to be false he would be guilty of a breach of duty and misrepresentation (2)

Where a requisition is made by the buyer, the seller must have a reasonable time to comply with it, the buyer cannot put an end to the contract before such time (3) The requisition must be specific A general inquiry such as, whether to the knowledge of the seller, there are any incumbrances affecting the property need not be answered by the seller (4) The seller must answer the requisitions made to the best of his information and then it would be open to the buyer to say whether he would accept the title as made out.(5)

An information regarding the income or the rental of the property to be sold is a relevant question within the meaning of this clause.(6)

But answering requisitions made by the buyer under this clause will not absolve the seller from his duty under Cl (a) of this para, to disclose to the buyer any material defect in the property of which he is aware and of which the buyer is not aware (7)

Contract to the contrary.

Even where the seller has, under the contract, an express power of rescission if requisitions are made, which he is unwilling to comply with, it has been held that the power does not enable him to override reasonable requisitions.(8)

5. Payment of price and execution of conveyance — Paragraph 1, clause (d).

This clause provides that on payment or tender of the price and the tender of a proper conveyance by the buyer, the seller must execute the conveyance *at a proper time and place* It is the duty of the buyer not only in the first instance to pay or tender the price, but also to prepare a conveyance and tender it to the seller for execution (1) This, however, does not mean that the buyer is under an

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[See also AIR 1953 Punj 231 (232) (DB) (Agreement for sale made on 24-1-1947 providing for completion of sale on or before 23-5-1947 — No request made by buyer to seller for examination of deeds of title till 16-5-1947 — Buyer held must be taken to have accepted title of seller before he made request — (1852) 51 ER 770, Pegg v Wisden Relon.)]

2. AIR 1932 Nag 148 (149) 28 Nag LR 184 (A false information volunteered by the vendor about income or rental of property amounts to misrepresentation)

3. (1865) 55 ER 680 (681) : 145 RR 561 Micholls v. Corbett

4. (1901) 70 LJ Ch 477 (486) (1901) 2 Ch 231 (258) Taylor v London & Country Banking Co. (In re Ford & Hill, (1879) 48 LJ Ch 327, Followed)

5. (1861) 54 ER 566 (567) : 30 LJ Ch 470, Turpin v. Chambers.

[See also ILR (1955) Nag 236 (246 247) (Where there was no repudiation of the contract by the purchaser, the entire consideration was already received by the seller and the only thing remained was for the seller to execute the sale deed in favour of the purchaser the mere fact that the purchaser questioned the seller about the marketable title would not lead to an inference that he was not ready or he was unwilling to perform his part of the contract.)]

6. AIR 1932 Nag 148 (149) : 28 Nag LR 184

7. AIR 1956 Bom 175 (178) (DB).

8. AIR 1927 Bom 195 (201) : 51 Bom 247 (DB)

Section 55 — Note 5

1. AIR 1919 PC 124 (125) ** 1997 (2) Cal LT 321 (326) ** AIR 1983 Andh Pra 49 (53) (1983) 1 Andh WR 17 (DB) (In a compromise decree, the plaintiff was directed to pay

obligation to the seller to tender a conveyance and that if he does not do it, the seller can compel him to do so. It really means that the seller himself need not do anything at all as regards the tender of the conveyance and if the buyer has not tendered the conveyance, he has no right to complain that the seller has not executed one.(2)

In considering what is a proper time, the general rule to be remembered is that in a contract for sale of land, time is not regarded as being of the essence of the contract,(3) if there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to apply the rule.(4)

But though time is not the essence of the contract the tender of the price and of the proper

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certain money to the defendants as balance of sale consideration within a certain period, failing which interest on delayed payment was to be paid. But this was never made good by the plaintiff despite the compromise decree although sale deed had been executed. The seller had, therefore, first charge on the property that was passed on to the buyer. It could be enforced by bringing the property to sale without a further suit under O. 34 R. 14.) ** AIR 1983 Orissa 107 (113) (1983) 55 Cut LT 77 (DB) (Failure to send such a notice to vendor shows that the vendee is not ready and willing to perform his part of contract in spite of the fact that he has paid full consideration.) ** AIR 1928 Bom 328 (330) (DB) ** AIR 1927 Oudh 159 (160) (DB) (Payment or tender into Court is sufficient payment or tender for the purpose of this section.) ** AIR 1923 Nag 37 (39) (When a purchaser is in actual possession or receipt of the rents and profits he must pay interest upon his purchase-money (unless lying idle with notice of the fact to the vendor) from the time fixed or completion of the transaction.) ** AIR 1920 Mad 423 (424) (DB) ** (1843) 114 ER 957 (960) 4 QB 422 (428) 12 LJ QB 120 62 RR 395, Stephens v. De Medina.

[See (1907-1908) 4 Low Bur Rul 86 (87).]

[See also AIR 1948 PC 192 (194) (Pr 7). (Contract for sale of land — Duty of taking all steps for effecting transfer in his favour resting on vendee — Subsequent enactment requiring a permit for transfer — **Held** it was for vendee to obtain it.)]

[See however AIR 1927 Nag 168 (169) (Where the agreement to sell immovable property makes the money payable "before the Sub-Registrar" it is the duty of the seller to seek out the purchaser with a proper sale deed.)]

2. AIR 1961 Andh Pra 57 (58) (DB) (It cannot be said that if a seller himself prepares a conveyance, he is doing something which the buyer is under law bound to do.)

3. AIR 1964 Orissa 269 (272) (Onus is on plaintiff to prove that time was essence of the contract — in comercial contracts, however, time factor goes to root of matter and is of essence of the contract.) ** AIR 1959 Madh Pra 42 (43) ** AIR 1958 Madh Pra 295 (297) ILR (1957) Madh Pra 330 (DB) ** AIR 1953 Orissa 105 (107) (DB) ** AIR 1925 Mad 211 (212) ** AIR 1920 Cal 651 (653) (DB) ** AIR 1919 Sind 68 (69) 12 Sind LR 144 (DB) ** AIR 1915 Mad 546 (547) (DB)

[See also (1877) 46 LJQB 537 (540) 36 LT 738 25 WR (Eng) 790 2 CPD 342, Patrick v. Milner.]

4. **AIR 1948 PC 192 (194) (Pr 7).** (Contract for sale requiring it to be completed within fixed period — Time becomes essence of contract — Vendee cannot ask for reasonable time beyond the fixed period to enable him to do what he has to do under the contract.) ** AIR 1964 Orissa 269 (272) (Vendor not in a position to give title free from reasonable doubt at time mentioned in agreement for completion of contract — Fact goes to root of matter and entitles vendee to repudiate contract on basis independent from time being essence of contract.) ** ILR (1949) 2 Cal 530 (535) (Time expressly made essence of contract — Default by vendee — Vendor can treat contract as broken.) ** AIR 1953 Orissa 105 (107) (DB) ** AIR 1927 Sind 49 (50), 19 Sind LR 41 ** AIR 1921 Mad 141 (141) (DB) ** AIR 1919 Sind 68 (69) 12 Sind LR 144 (DB) (Affirming.) ** AIR 1915 Mad 546 (547) (DB) (Sale arranged in order to meet expenses of marriage taking place on a certain date — Time is the essence of contract.) ** (1915) 84 LJ Ch 259 (268, 270) (1915) App Cas 386 (401), Stickney v. Keeble ** (1853) 43 ER 112 (114, 115) 98 RR 139, Roberts v. Berry

convevance must be made within a *reasonable time* having regard to the facts of the particular case.(5) Where there is unreasonable delay in the completion of the contract either party can make time the essence of the contract by giving notice to the other limiting the time for performance at the expiration of which he will treat the contract as broken (6) Such limitation of time also must be reasonable.(7)

Where the buyer does not tender the price or the conveyance as required by this section he must be deemed to have refused to perform his part of the contract and this would entitle the seller to put an end to the contract under S 39 of the Contract Act (8) But where the seller refuses to execute a proper document it is not necessary for the buyer to go through the useless form of tendering a conveyance to the seller for execution before he can enforce his contract against the seller by specific performance.(9)

If the seller insists on the purchaser to execute a meaningless indemnity bond which in law he cannot do and makes that a condition for executing the sale deed which he is bound to execute the mere fact that he does so by way of abundant caution cannot justify his action in law or save him from the consequences of such unreasonable conduct (10)

Where the buyer has performed his part of the contract it is the duty of the seller to execute the convevance (11) This duty is not discharged by the execution of a document which is not

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[See also AIR 1958 Punj 289 (293) ILR (1958) Punj 166 (DB) (Time essence of contract Vendor not perfecting title by date when contract had to be completed Vendee failing to pay consideration on that date No breach of contract on [illegible] vendee [illegible] 2 Bom 658 (672) (On the facts time was held to be essence of the contract) ** AIR 1933 Mad 736 (742 743) (DB) (Time was not the essence of contract the buyer was made so afterwards)]

5. AIR 1929 PC 195 (200) ** AIR 1964 Punj 123 (126) ILR (1964) 1 Punj 43 (Stipulation in sale deed that balance of consideration would be paid [illegible] is possible but when vendee would be in position to make payment [illegible] True construction held was that balance would be payable within reasonable time) ** AIR 1958 Punj 111 (115) ILR (1958) Punj 294 (DB) (Reasonable time will all the same be of the essence of the contract)

[See AIR 1925 PC 124 (126) ** AIR 1927 Sind 49 (50) 19 Sind LR 41]

[See also 1963 All 49 (51) (Ordinarily payment of sale consideration must be simultaneous with execution of deed but the rule is subject to contract to the contrary or to order of Court in decree.)]

6. AIR 1964 Orissa 269 (272) (Time essence of contract No performance within fixed period Held, S 55 Contract Act applied) ** AIR 1960 Andh Pra 178 (182) (DB) ** AIR 1958 Punj 111 (115) ILR (1958) Punj 294 ** AIR 1953 Orissa 105 107 (DB) ** AIR 1928 Lah 154 (155 156) 9 Lah 67 (DB) ** AIR 1924 Bom 352 (358) ILR 48 Bom 368 ** AIR 1920 Cal 651 (654) (DB) ** (1843) 49 ER 773 (773) 6 Beav 124 King v Wilson ** (1870) 39 LJ Ch 606 (608) LR 10 Eq 281 Webb v Hughes (Should not terminate abruptly but should give other party reasonable time to complete contract) ** 1888 Bom PJ 75 (DB) ** (1915) 84 LJ Ch 259 (268 270) (1915) 51 App Cas 386 112 LT 664 Stickney v Keeble ** (1892) 61 LJ Ch 113 (115) (1892) 1 Ch 313 (321) 65 LT 706 Compton v Bagley ** (1853) 43 ER 112 (114 115) 22 LJ Ch 398 Roberts v Berry

7. AIR 1920 Cal 651 (654) (DB) ** (1870) 39 LJ Ch 606 (608) 10 LR Eq 281 Webb v Hughes ** (1892) 61 LJ Ch 113 (115) (1892) 1 Ch 313 (321) Compton v Bagley

8. AIR 1960 Andh Pra 178 (181) (DB)

9. AIR 1921 Low Bur 16 (18) 11 Law Bur Rul 94 (DB) ** (1867) 4 Bom HCR (OC) 125 (128) (DB).

10. AIR 1954 Mys 145 (146) : ILR (1954) Mys 274 (DB)

11. AIR 1916 Low Bur 104 (104) Vendor is bound to do everything necessary to complete the title of the vendee including registration of conveyance) ** AIR 1916 LB 73 (73) (Ent

operative to effect a legal transfer **(12)** Thus, the offer of an unregistered document is not a discharge of the obligation. The buyer may refuse to receive it without its being registered.**(13)** Where, however, the seller has executed the conveyance tendered by the buyer and *handed it over to him*, and the buyer has received it, the seller is not under any further obligation to get it registered The buyer can himself present the document for registration and get it registered.**(14)** Where he has allowed the time for registration to elapse it was held by the High Court of Madras that he was not entitled to ask the seller to execute another conveyance **(15)** As to whether the buyer could use for the specific performance of agreement implied in the bargain, see also Note 18 under S. 77 of the AIR Commentary on the Registration Act and the undermentioned cases.**(16)**

When parties enter into an agreement for sale on certain representation made by the vendor as to his title, the conveyance that follows must be in conformity with the terms of the agreement. Thus where the agreement shows that the vendor was a full and absolute owner of the property which he professes to transfer, the disputes raised by the vendor later on would not deprive the agreement of its validity and if the agreement stands, the conveyance must be in conformity with its terms.**(17)**

Where the buyer has paid the price but the conveyance has not been executed for some reason, such as the default of the seller or the contract becoming unenforceable or for some other reasons, the buyer can recover the purchase money paid by him,**(18)** with interest from the date of the demand of the purchase money.**(19)**

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vendor must do all things necessary to complete the vendee's title and registration if it is compulsory) ** AIR 1925 Rang 382 (383) (DB). (Where a purchaser has entered into possession of land and paid the purchase price the vendor is bound to convey on demand to the purchaser under S 55(1)(d)) ** AIR 1921 Low Bur 16 (17) 11 Low Bur Rul 94 (DB) ** (1911) 12 Ind Cas 78 (79) (DB) (Mad) ** AIR 1927 Rang 234 (235)

Note :— This was also the law even before the Act **See** (1873) 20 Suth WR 481 (481) (DB).

12. AIR 1921 Low Bur 16 (17, 18) : 11 Low Bur Rul 94 (DB).

13. AIR 1928 Mad 344 (345) (Purchaser accepting unregistered document — Vendor relieved from tendering registered document.)

14. AIR 1920 Mad 660 (661) (DB) ** AIR 1916 Mad 14 (16) (DB)

[**See also** (1911) 2 MWN 241 (242) 12 Ind Cas 310 (DB) (Vendee, after sale of land and obtaining possession, executing mortgage in favour of vendor, for the sale price — Sale deed not registered owing to default of vendee — Suit by vendor mortgagee to enforce mortgage maintainable — Non-regstration of sale deed no bar to suit)]

15. AIR 1928 Mad 344 (345) ** AIR 1920 Mad 660 (661) (DB). (The completed conveyance cannot be treated as agreement and thus form basis for suit for specific performance.)

16. **AIR 1977 SC 1226 (1228) : 1977 UJ (SC) 201.** (S A No 179 of 1975 D/- 13-8-1975 (All) **Reversed;** 1972 All LJ 549, **Overruled.**) ** 1978 All LJ 733 (Where land agreed to be sold is allotted to some other person during the consolidation of holdings operations and other land is given to the vendor specific performance of the contract cannot be decreed.) ** AIR 1953 Hyd 225 (226, 227) ILR (1953) Hyd 259 (DB) (**Held** that plaintiff was bound to take recourse to remedy under Registration Act before suing for specific performance) ** AIR 1919 Cal 477 (478) (DB) (Vendee could sue for specific performance of agreement to sell which remained unperformed till the document was registered)

17. AIR 1938 Nag 411 (412).

18. AIR 1934 Cal 699 (702) (Vendor failing to perform his part of contract — The surety for vendee not liable to pay any sum under guarantee) ** (1903) 25 All 618 (624, 625) (DB) (11 All 47 Relied on) ** (1867) 4 Bom HCR (OC) 125 (129) (DB) (Money deposited with auctioneer as stake-holder - Action to recover lay against auctioneer and nto against vendor.)

19. (1875) 24 Suth WR 457 (458) (DB) (Interest awarded from date of suit)

In England a buyer can always demand that the conveyance should be executed either in his favour, or in favour of *any person he may nominate* **(20)** This clause merely enacts that the seller shall execute a proper conveyance it does not say that it should necessarily be in favour of the *buyer* It has been held by the High Court of Bombay **(21)** that the rule of English law would apply here also and that the buyer can under this clause, call upon the seller to execute a conveyance in favour of his nominee This view has been followed by the Mysore High Court **(22)** If vendor does not agree to execute a sale deed in favour of the vendee/his nominee the vendor will be liable for breach of contract **(23)** It is also the rule in England that the buyer may require the seller to convey the property in *parcels* on receipt of the whole purchase money and the additional cost of the several conveyances, provided they are executed at the *same* time and not at various times **(24)**

6. Duty to preserve property and documents of title — Paragraph 1, clause (e).

As has been seen in Note 23 on S 54, a contract for sale in England makes the buyer of the property purchased an owner in equity As a consequence of this the seller in possession of the property after the contract for sale is regarded as a trustee for the buyer and is bound, as such, to take as much care of the property and of the documents of the title relating thereto as a prudent man would take of his own property In *Shaw v Foster* **(1)** Lord Cairns said

> I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of equity between the vendor and the purchaser The vendor was the trustee of the property for the purchaser He was a trustee having a personal and substantive interest in the property a *right* to protect that interest and equally a right to assert that interest if anything were done in derogation of it." **(2)**

The above passage deals with the *right* of the vendor to protect the property The vendor has a *duty* to protect the property on the same principle In *Clarke v Ramuz* **(3)** Lord Coleridge, C J observed as follows :

> "The foundation upon which the plaintiff's claim in the action is rested comes to this that upon a contract for the purchase and sale of land though at law the property in the land does not pass until the execution of the conveyance still between the time of the contract and the execution of the conveyance the vendor is in the position of a trustee for the purchaser not exactly in the same position as a trustee in the ordinary sense but that he is subject to certain of the duties of a trustee one of these being to use reasonably care to preserve the property as far as may be in the same State as when the contract was entered into"

In those parts of this country to which S 54 applies the principle that a contract for sale conveys an equitable interest to the buyer is not recognised as is shown by the paragraph in S 54 which enacts that a contract for sale of immovable property does not of itself create any interest in or charge on the property sold Consequently the rule that after a contract for sale the seller is a

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20. (1877) 46 LJ Ch 356 (358) 6 Ch D 469 (474) Egmont (Earl) v Smith

21. AIR 1935 Bom 340 (341, 343) : 59 Bom 582 (DB)

22. AIR 1954 Mys 145 (147) : ILR (1954) Mys 274 (DB)

23. AIR 1972 Mad 36 (37, 38) : (1971) 2 MLJ 481

24. (1877) 46 LJ Ch 356 (358) : 6 Ch D 469, Egmont (Earl) v Smith

Section 55 — Note 6

1. (1873) 42 LJ Ch 49 (56) : LR 5 HL 321.

2. See also the following cases :

(1929) 91 LJ Ch 228 (230) (1922) 1 Ch 162 (163) Golden Bread Co v Hemmings **
(1872) 21 WR (Eng) 179 (180) 8 Ch 173 (177) Phillips v Silvester

3. (1891) 60 LJ QB 679 (681) : (1891) 2 QB 456 (459, 460).

[See also (1887) 56 LJ Ch 840 (843 844) 35 Ch D 390 (397) Royal Bristol Permanent Building Society v Bomash (Philips v Silvester (1872) 8 Ch 173 Followed]

trustee for the buyer would not be applicable This clause must, therefore, be interpreted as applying to a stage after the ownership has passed to the buyer and before the delivery of the property to the buyer (4) The words used, nameky, "between the date of the contract *of* sale and the *delivery* of property" would also seem to make this clear Further the previous clause deals with the duty of the seller to execute the conveyance and this clause coming after it is obviously meant to refer to the seller's duty after the conveyance and before the delivery of property This clause is, however, referred to sometimes as having reference to a stage between the contract *for* sale and the delivery of property on the analogy of English decisions (5) It is submitted that this view is not correct

A loss or destruction of title deeds will be a damage done to the property (6)

7. Duty to give possession — Paragraph 1, clause (f).

This clause imposes an obligation on the seller to deliver to the buyer, such possession of the property, as its nature admits (1) The right to obtain possession or delivery of a tangible immovable property, in respect whereof a contract has been entered by the parties for sale, springs from the contract itself, is the contract contains a term to that effect, and if not, in the absence of contract to the contrary by reason of the statutory right conferred by S 55(1) (2) Once the sale is complete the vendor it bound to deliver possession of the property even though the sale price was not paid at the time of registration as per terms (3) The right to possession, under this clause arises in cases where a conveyance is necessary only on the execution of the conveyance for a contract for sale does not of itself create any interest in or charge on the property sold In a suit for specific performance of the contract for sale, the law allows the plaintiff, for the sake of convenience and in order to avoid multiplicity of suits, to make a claim for possession also (4) But it is not obligatory on the plaintiff

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4. L G Mukerji Law of Transfer of Property 2nd Edition 1931, p 105 S 84 and p 112 S 91 ** AIR 1977 Mad 411 (If the proeprty has deteriorated as a result of natural causes the seller cannot be made liable, and the Judgment Debtor seller was under no liability to maintain a house in a good state of repairs till possession was taken by the Decree Holder) ** ILR (1975) AP 433 (DB) (Violation of provisions of section does not afford a ground to refuse grant of specific performance under Section 20 of Specific Relief Act) ** AIR 1957 Andh pra 960 (961).

5. Shephard and Brown Commentaries on Transfer of Property Act, 7th Edn 1910, p 200** 1956 Ker LT 648 (651) (DB) (Agreement to sell lease-hold interest in verumpattom holding by A in favour of B A is in the position of trustee for B and could only do what a prudent owner could do and could not impose onerous terms so as to bind B — A subsequently executing renewal with enhanced rent in favour of landlord Renewal held not binding on B) ** AIR 1950 Cal 333 (335 336) (The vendor is in the position of a trustee for the purchaser during the period between the contract for sale and the delivery of property, and his duty as such trustee is to protect the property from injury by trespassers)

6. 1956 Madh Bha LJ 456 (461) (DB) ** (1853) 68 ER 1182 (1184) 22 LJ Ch 1063 Brown v Sewell.

Section 55 — Note 7

1. AIR 1960 Punj 51 (53) (The words 'such possession of the proeprty as its nature admits' refer to an incident which is inherent in the proeprty) ** AIR 1956 Andhra Pra 113 (114) (Para 5) ** AIR 1950 Cal 333 (336) (The words 'its nature' in the section mean an incident which is inherent in the property which could be called as its nature) ** AIR 1924 Mad 360 (362) 47 Mad 150 (DB) ** (1909) 4 Ind Cas 63 (64) (DB) (Cal) (Obiter)

2. 1997 (2) Cal LJ 321 (356).

3. (1980) 1 Andh WR 105 : (1980) 1 Ren CR 347 (351).

4. AIR 1971 All 404 ** AIR 1938 Rang 290 (291) ** Air 1925 Bom 181 (182) (DB) ** (1910) 37 Cal 57 (61) (DB) ** (1912) 16 Ind Cas 988 (991) (DB) (Cal)

   [See also AIR 1919 Mad 374 (377) (DB). (Contract to sell — Decree for possession not to be given till title is completed by specific performance.)]

to make such a claim and it is open to him, after the execution of the conveyance, or after the suit for specific performance is decreed, to sue for possession on the basis of his title, and such suit cannot be barred by the operation of O 2, R 2 of the Civil Procedure Code merely by reason of the fact that the prior suit for specific performance did not include a prayer for possession **(5)** The position might be different where there has been *express agreement* not only to convey but also to deliver possession, in such a case the right to the execution of a conveyance and the right to possession may arise coincidentally and a suit for specific performance alone might bar a subsequent suit for possession based on the same agreement **(6)** It has however been held in the undermentioned cases that it is not necessary in a suit for specific performance either to separately claim possession or for the Court to pass a decree for possession The decree for specific performance which provides that the property shall be sold to the plaintiff by the defendants and the sale deed shall be executed within a certain time, failing which the Court will have the sale deed executed by a person nominated by it implies that delivery of possession shall be given in accordance with the provisions of S 55(1)(f) Where therefore a decree for specific performance of a contract of sale is silent as to the relief of delivery of possession even though claimed in the suit, the executing Court is still competent to deliver possession.**(7)**

The relief of possession is inherent in the relief for specific performance of the contract and the vendor is bound to give such possession to the buyer even if no decree for possession is sought for in the plaint for specific performance by the buyer The Court shall have power to grant a decree for possession besides granting relief of specific performance **(8)**

The consent decree cannot be defeated on the ground that a third party has been illegally inducted by the judgment-debtor The executing Court will be fully justified in ignoring the said transfer as null and void and ordering possession to give full effect to decree for specific performance.**(9)**

Proceeding in S 22 of the Specific Relief Act includes execution proceedings the executing Court has power to direct delivery of possession of property to the decree holder even if the decree for specific performance of contract is silent on that point **(10)**

{**But see** AIR 1955 Cal 267 (269) ILR (1956) 2 Cal 850 (DB) (Under this clause unless there is a contract to the contrary giving delivery of possession to the buyer by the seller is an incident of a contract for sale and the right to recover possession springs out of the contract which is being specifically enforced and not as a result of the execution and completion of the conveyance When there is a decree directing the contract to be specifically performed it includes a direction upon the vendor to give delivery of possession to the purchasers.)}

5. AIR 1926 Rang 197 (198) ** AIR 1925 Bom 181 (182) (DB) (Nor it be barred under S 11 C P C) ** AIR 1924 Mad 360 (363) 47 Mad 150 (DB) ** AIR 1918 Nag 221 (222) 14 Nag LR 176 ** AIR 1914 Mad 465 (467) 38 Mad 698 (DB) (**Dissenting from** 22 Mad 24) ** (1908) 4 Nag LR 14 (17) ** (1902) 12 Mad LJ 71 (72) (DB)
6. AIR 1924 Mad 360 (363) : 47 Mad 150 (DB)
7. AIR 1977 All 156 (Even though a decree for specific performance of contract is silent as to the delivery of possession the decree holder is entitled to claim possession in execution of the decree if the defendant is in exclusive possession) ** (1976) 2 Mad LJ 349 ** AIR 1974 Mad 289 (294) ** AIR 1973 Mys 131 (133) (DB) (A decree for specific performance directing execution of the sale deed implies the liability to deliver possession) ** AIR 1971 Tripura 1 (2) ** AIR 1963 Madh Pra 86 (88) ** AIR 1954 All 643 (644) (Prs 2 4) (DB).
8. 1999 (78) DLT 254 (259).
9. AIR 1996 Bom 296 (303) 1996 (3) Bom CR 373 ** (1982) 2 Civ LJ 523 (536) (Madh Pra).
10. 2002 (1) MPLJ 475 (477)

Similarly, relief of possession can be granted at appellate stage **(11)**

It has been seen in Note 5 that an ordinary contract for sale is not only to convey to the purchaser but to convey to such persons as the purchaser shall nominate. This clause is based upon that principle, in that it obliges the seller to give possession to the buyer *or to such person as he directs.***(12)**

Where the property sold is a house, the possession that its nature permits delivery of is vacant possession**(13)** and it may be delivered by giving delivery of the keys **(14)** Similarly, in the case of sale of agricultural land, the purchaser is entitled, in the absence of a contract to the contrary, to demand vacant possession of the land **(15)** Where the property to be sold is in possession of tenant and the vendee had knowledge of the same. The vendee is entitled to symbolic and not actual possession **(16)** Where the property sold is in the possession of tenants, it has been held that the handing over of the title deeds is a sufficient delivery of possession **(17)** But the obligation is subject to a contract to the contrary and even in a case where the buyer knows that the property is in possession of tenants, the deed may provide for delivery of vacant possession to the buyer **(18)** It cannot be said that as soon as, the vendor transfers the property, his possession ipso facto and without more becomes adverse to the vendee. It depends on nature of each case. Where a clause in the sale deed mentioned that proceeding for eviction of tenant is pending, the possession of vendor would become adverse only from the date tenant is evicted and vendor is in position to deliver vacant possession of the property sold.**(19)**

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11. AIR 1982 SC 818 (823) : 1982 All LJ 345 : 1982 UJ (SC) 493.

See also AIR Commentary on Civil Procedure Code, 10th (1985) Edn., O. 21, R. 32, N. 3.

12. AIR 1950 Cal 333 (337) (Therefore, suit for specific performance of an agreement to sell and hand over possession can be brought by buyer along with such person.) ** AIR 1929 Bom 24 (30)

13. AIR 1956 Andhra 113 (114) (Contract might provide for vacant possession even though property is in possession of tenant.) ** AIR 1950 Cal 333 (336) (Presence or absence of tenants in the house agreed to be sold in that sense does not affect the 'nature' of the property. It may very well be that the parties intended that the tenants could be removed before possession is given. "Nature" is something which in this context is irremovable. But whatever may be the position of a house with tenants, a house with trespassers can never be said to be a property whose "nature" does not admit actual and physical possession.) ** 1932 Mad WN 122 (124) (DB)

14. (1801) 31 ER 875 (877) : 5 Ves 818 : 5 RR 176, Guest v. Homfray

15. AIR 1964 Raj 240 (241) : ILR (1964) 14 Raj 806

16. AIR 1992 Punj 18 : ILR (1991) 2 Punj 407 (412)

17. AIR 1964 Raj 240 (241) : ILR (1964) 14 Raj 806 (It is for vendor to prove that vacant possession could not be delivered to purchaser.) ** AIR 1956 Andhra 113 (114) (Possession does not mean personal occupation — Includes landlord's possession.) ** (1910) 8 Ind Cas 605 (605) (DB) (Low Bur) (Buyer acquires the right to receive rent and such acquisition is the possession the nature of proeprty admits.)

[**See also** AIR 1960 Punj 51 (53) (Portion of property in tenant's possession — Tenant to attorn to purchaser under the deed — Purchaser held not entitled to rescind cotnract for not obtaining vacant possession.)]

18. 1964 Ker LT 39 (42) (Purchaser having knowledge of tenancy — Not entitled to vacant possession in absence of cotnract to the contrary.) ** AIR 1956 Andh 113 (114)

[**See also** AIR 1918 Cal 662 (1) 662 (DB) (Speculative purchase — Specific stipulation as to non-liability of vendor for failure to secure possession — Purchaser not entitled to get back purchase money on dispossession.)]

19. 1989 All LJ 1164 (1166).

The obligation under this clause is on the *seller* to give possession and not on the buyer to go and take possession (**20**) But where the property sold is in possession of a trespasser neither the seller nor the buyer can forcibly eject him and get possession They have to proceed according to law for getting possession from him (**21**) Where the vendee sues the trespasser for possession he must bring the suit within the same period of limitation as would be allowed to his vendor as the vendee does not get a better title than the vendor (**22**)

Where the seller fails to give possession after the execution of the conveyance the remedy of the buyer is to sue for recovery of possession and not to sue for specific performance (**23**) So also when the seller refuses or is not in a position to deliver possession of the property agreed to be sold by him to the buyer the buyer can rescind the contract and ask back the earnest money which he has paid under agreement to sell There is no need of filing a suit for specific performance (**24**) In the undermentioned case(**25**) certain property was conveyed by a registered deed The property was in the possession of certain persons without any title The buyer without calling upon the seller to deliver to him possession of the property sold instituted a suit against the wrongdoers in possession and succeeded in getting possession Thereafter he sued the vendor for recovery of the amount of expenses incurred by him in that matter It has held by the Rangoon High Court that he was not entitled to succeed, and that the remedy of the buyer was to sue for the specific performance of the contract for sale or for damages It is submitted that this last observation is not correct After the execution of the conveyance there can be no specific performance of the contract for sale

The breach of a covenant for title will not entitle the buyer to avoid the sale on that ground but will entitle him only to a claim for damages (**26**) It has however been observed by the Madras High Court(**27**) that where possession of a portion of the property sold is not given to the buyer the latter can sue to avoid the sale itself on that ground It is submitted that this view is not correct

Where the buyer knows that he will not get immediate possession and if under his contract he is entitled to such immediate possession of the property contracted to be sold he may under S 39 of the Contract Act put an end to the contract even before he has completed the purchase by paying full consideration.(**28**)

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20. AIR 1916 Pat 222 (222, 223) : 1 Pat LJ 140 (DB)

21. AIR 1960 All 626 (628) . ILR (1960) 1 All 617 (DB).

22. AIR 1914 Cal 734 (736) (DB)

23. 1911 Pun Re No. 18

24. AIR 1981 Madh Pra 158 (160) : 1981 Jab LJ 273

25. AIR 1937 Rang 31 (32)

26. AIR 1933 Lah 262 (263)

[**See also** AIR 1942 Sind 81 (82) ILR (1942) Kar 32 (DB) — Seller having title to part of property and buyer obtaining possession of part of property — **Held**, sale deed executed was not a nullity which the buyer could ignore — Buyer could not ask for return of price before the conveyance was rescinded — Sale deed, however, was voidable because of material defect in seller's title such non-disclosure amounting to fraud under S 55 — Buyer's remedy was suit for rescission of sale deed and for return of price under S 38 Specific Relief Act.)]

Also see Note 9.

27. AIR 1933 Mad 382 (383)

28. AIR 1964 Raj 240 (241) ILR (1964) 14 Raj 806 ** AIR 1960 Punj 5 (54) (Vendee can claim advance that has been paid) ** AIR 1951 Mad 470 (471) ** 1952 Mad WN 122 (124, 125) (DB)

See also the undermentioned case.(29)

8. Duty to pay public charges, rent and encumbrances — Paragraph 1, clause (g).

In *Dost Muhammad v. Sanjad Ahmed*,(1) a case which arose before the passing of this Act, it was held that there was no obligation on the part of the seller to pay a public charge on the property accrued due before the date of the sale, and that if the buyer was compelled to pay such a charge after the completion of the conveyance he could not recover the amount from the seller under Ss. 69 and 70 of the Contract Act. Under this clause this decision would not be correct. The seller(2) is, under this clause, bound to pay—

(1) all public charges(3) and rent accrued due in respect of the property up to the date of the sale,

(2) the *interest* on all incumbrances on such property due on such date,(4) and

(3) *except where the property is sold subject to the incumbrances*, the amount due on all incumbrances on the property then existing.(5)

The buyer can under this clause insist that the obligation under this clause should be fulfilled at or before the execution of the conveyance (6). He is not bound to accept any indemnity from the seller in respect of incumbrances on the property (7). But this does not mean that the seller can escape liability in respect of the payments referred to above by reason merely of the fact that the conveyance has been executed without fulfilling his obligation before that date. Thus, where property is sold *free of encumbrances*, but after the execution of the conveyance it turns out that the

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29. AIR 1963 Mys 159 (161); ILR (1962) Mys 809 (Property in possession of tenant on date of sale — Purchaser suing for possession — Relief of possession against vendors under convenant in deed of sale, and of eviction of tenant defendant under the Rent Act can be combined in one suit.)

Section 55 — Note 8

1. (1883) 6 All 67 (67, 68) (DB).

2. **AIR 1950 PC 99 (103) : 77 Ind App 156.** (A contracting with B to sell certain property — The fact that trustees of the property and not A were the conveying parties does not affect A's liability under the clause — A is 'seller' within this clause.)

3. **AIR 1956 PC 99 (103) : 77 IA 156.** (Including Municipal Taxes accrued due in respect of the property up to the date of the sale.) ** AIR 1954 Nag 65 (69); ILR (1953) Nag 579 (Buyer is not bound to pay municipal taxes to be paid by seller for period prior to date of sale.) ** (191) 8 Ind Cas 435 (435) (Mad).

   [**Note** :— Where a vendor pays an instalment under liability arising before the date of completion he is not entitled to recoupment against the purchaser unless the contract provides for it. Halsbury's Laws of England, 2nd Ed. Supp 918 G citing In re Watford Corporation and Warris Contract (1943) Ch 82 : 59 ITR 98.]

4. AIR 1949 Cal 510 (514) (Pr 24); ILR (1951) 1 Cal 331 (Contract to sell free of encumbrance — Delay caused by vendor — Default to pay interest on existing mortgage of property since date of contract — suit for specific performance — Plea of hardship caused by payment of interest is no defence as it is self-induced.)

5. **AIR 1950 PC 99 (103) : 77 IA 156** ** (1977) 90 Mad LW 454 (459); (1977) 2 Mad LJ 68 (Where there is a clear and categorical term agreed to between the parties that the vendor alone will have to discharge the mortgage due to Bank, he is bound to discharge it, even on assumption that S. 55 of T.P. Act applies to an agreement of sale.) ** AIR 1962 Madh Pra 144 (145) (The fact that buyer was aware of the encumbrance is immaterial.) ** (1911) 38 Cal 458 (464).

6. AIR 1935 Oudh 142 (142) (DB) ** AIR 1926 Mad 569 (570).

7. (1907) 76 LJ Ch 179 (181); (1907) 1 Ch 244 (248); 96 LT 324, In re Weston & Thomas's contract.

property is subject to incumbrances and the buyer is compelled to pay them, he can recover the amount so paid by him from the seller under S 69 of the Contract Act (8) There are, however, some observations, in the undermentioned case,(9) to the contrary, namely, that the provision under this clause is one which cannot be enforced against the seller after the completion of the purchase without an express covenant. In that case the sale was subject to incumbrances and the buyer had expressly, in the sale deed, undertaken to pay, in entirety, a prior mortgage referred to therein and the amount due under which was stated to be 16,300 rupees It turned out that the amount actually due was about 23,000 rupees The buyer having paid off that amount sued the seller for the excess amount paid by him It was held that the buyer having undertaken to pay the mortgage in entirety had no claim against the seller. The observation referred to above was not really necessary for the decision. It is submitted that it is not correct.

The liability to pay electrical dues is between contracting parties and the same cannot be enforced against the third party as it is a personal contract Thus even if landlord's permission is taken for providing electric connection to the tenant, the landlord or purchaser from him will not be liable to pay electrical dues of the tenant who vacated the premises (10)

The seller's obligation to discharge prior incumbrances on the property sold arises in all cases, except where the property is sold subject to incumbrances It is not correct to say that in order to raise this obligation the sale should be *expressed to be free of incumbrances* (11) The mere fact

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8. **AIR 1928 PC 98 (99) : 50 All 371 : 55 Ind App 135 ** (1908) 30 All 172 (175) (FB).** (If vendee has paid enbumbrances he can set-off the amount so paid against unpaid purchase-money) ** AIR 1962 Madh Pra (144 (145) ** 1956 Ker LT 302 (308) (DB) (Property not sold subject to encumbrance — Contract of indemnity by seller is implied if there are encumbrances) ** AIR 1934 Oudh 142 (142) (DB) (Where under the terms of a sale deed, the property is sold free from encumbrance but the vendee fails to obtain possession, and has to pay off an encumbrance existing on the property before he could get possession, he is entitled to recover the money so paid by him and also to damages for the period he was kept out of possession of the property purchased by him) ** AIR 1922 All 508 (509) (DB) ** (1904) 6 Bom LR 832 (834) (DB)

   [See AIR 1926 Oudh 81 (85) 1 Luck 7 (DB (vendor not paying certain simple mortgages in stipulated time — Vendee not suffering any loss owing to such non payment cannot resist a suit to enforce vendor's lien for unpaid purchase money)]

   [See also (1875) 7 NWPHCR 336 (337 338) (DB) (Case before T P Act — Sale of property — Prior mortgage not mentioned in the sale deed and purchaser not aware of the mortgage — Suit by mortgagee before purchaser obtained possession and purchaser satisfying the mortgage-decree which was equal in amount to purchase money — Principle of S 69 Contract Act applied and purchaser was entitled to a decree for possession without payment of purchase-money) ** AIR 1920 Nag 144 (145) Case from Berar — Transfer of Property Act did not apply — **Held**, on grounds of justice equity and good conscience that seller must under the circumstances be deemed to have contracted to indemnify the buyer against loss)]

   Also see Note 9.

9. **AIR 1930 Cal 568 (571, 572) : 57 Cal 683 (DB)**

10. **1999 (3) Pat LJR (HC) 222 (226).**

11. AIR 1934 Oudh 492 (493) 10 Luck 274 (DB) ** AIR 1929 All 791 (791) 51 All 1053 (DB) (Private knowledge of encumbrance by vendee will not matter in the absence of specific contract in a sale deed.)

    [See also AIR 1954 Nag 65 (68) ILR (1953) Nag 579 (Owner of land bound to construct works of development in accordance with agreement with Improvement Trust in consideration of its sanctioning construction of buildings — If expenses for construction of development works are to be encumbrances on property then owner of land is bound to discharge them before he sells the land unless there is agreement to the contrary with buyer) ** AIR

that the buyer is aware of the incumbrances does not relieve the vendor of the liability to get the same discharged (12) But there is no *presumption* that the sale is free of incumbrances. The question is one of fact in each case to be determined on the interpretation of particular document.(13)

In a sale of leasehold property the seller must pay all the rent due up to the date of sale even though a portion of it had been incurred even before the seller himself owned the property.(14)

The liability of the seller to pay prior incumbrances, etc , is a *personal* liability of the seller only and cannot be enforced against the transferee from him after the contract for sale falls through by reason of the seller's non-compliance with this clause (15) In other words, the obligation under this clause is not one which runs with the land and cannot be enforced against any person other than the transferor.(16) Nor can any person other than the buyer enforce it (17) Where even before the sale the prospective purchaser has paid off the arrears of public charges, they cannot be said to be due on the date of the sale within the meaning of this clause, which, therefore, will not apply to the case.(18)

Incumbrance.

The word "incumbrance" in this clause is of sufficient amplitude to include also a recurring liability like that of a maintenance allowance.(19) Where at the date of sale the property is under attachment, the vendor is bound to pay off the money due to the attaching creditor under this clause Where the vendee pays the amount to avert the sale of the property in execution, he is entitled to recover the amount from the vendor.(20)

A trespasser's possession or occupation is a liability on the property Removal of trespassers ordinarily involves litigious proceeding and such litigation is a liability or impediment within the ordinary meaning of the word "imcumbrance (21) "

1937 Rang 287 (292) 14 Rang 786 (DB) (Agreement to convey land in satisfaction of decree amounts, in substance, to sale under S. 54, T. P. Act.)]

12. AIR 1962 Madh Pra 144 (145) ** AIR 1927 Mad 193 (193).

13. AIR 1952 Mys 120 (121) ILR (1953) Mys 29 (Sale purported to be without encumbrance — Buyer knowing existence of charge on property for Government loan and by subsequent letter undertaking to pay it It was held that the sale was subject to encumbrance and buyer was not entitled to reimbursement) ** AIR 1945 All 39 (40, 41) (DB) (Property subject to encumbrance Sale without any reference to discharge of mortgage or retention of any part of consideration by vendee for payment to mortgagee — Sale held subject to encumbrance — AIR 1929 All 791, Expl.)

14. AIR 1924 Pat 822 (822) (DB)

15. AIR 1926 Mad 173 (174) (DB)

16. AIR 1927 Mad 1072 (1072).

17. (1909) 3 Ind Cas 936 (937) (DB) (Mad).

Also see S 40, Note 14.

18. AIR 1945 Bom 187 (195, 196) (DB). (Per Kania, J.)

19. AIR 1934 Oudh 492 (493) : 10 Luck 274 (DB).

[See also 1957 Andh LT 475 (481). (Sale of property subject to maintenance charge — No contract to the contrary - Vendee held entitled to reimbursement under S. 69, Contract Act)]

20. AIR 1972 Mad 36 ** AIR 1946 Mad 244 (245) (DB) (The vendee is not bound to carry on negotiation with the attaching creditor for a reduction of the amount nor is he bound to wait till the property is put up for sale)

21. AIR 1950 Cal 333 (336). (A house in the occupation and possession of a trespasser and wrong-doer cannot be said to be free from all encumbrances.)

See also the undermentioned case.(22)

Contract to the contrary.

Where the seller covenanted with the buyer that if by reason of any prior incumbrances the buyer lost possession, the seller would refund the purchase-money it was held by their Lordships of the Privy Council that the covenant was not contrary to the statutory obligation under this clause, but was only an additional security (23) Where the conveyance is "subject to payment of all rents, taxes, rates, dues and duties now or hereafter to become payable to the Government or to the Municipality," there is a contract to the contrary within the meaning of this clause (24) The recital in a sale deed that the right, title and interest of the vendor in the property as purchased by him in Court auction are being sold is not a contract to the contrary excluding his liability to discharge the existing encumbrances.(25)

The terms of the contract for sale may operate to substitute the date of possession for the date of sale which is otherwise the determining date for the obligation under this clause In such a case, there is a contract to the contrary (26) Mere use of the word 'net' in the price in a sale contract would not be sufficient to exclude the application of this clause (27)

9. Implied contract for title — Paragraph 2.

Paragraph 2 contemplates a *completed* sale(1) and the contract implied by it corresponds to the *covenants for title and for quiet enjoyment* in an English conveyance (2) It has, however been held in the undermentioned cases that this paragraph applies not only to a completed sale but also to an agreement for sale.(3)

Under the Roman law a warrant of title was as a general rule, implied on the part of the seller of land, so that in case of eviction an action for damages lay against him at the instance of the buyer The Common law of England did not recognise this rule but adopted the principle enunciated by

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22. AIR 1954 Nag 65 (68) ILR (1953) Nag 579 (Owner of land bound to construct works of development in accordance with agreement with Improvement Trust in consideration of its sanctioning construction of buildings — If expenses for construction of development works are to be incumbrances on property, then the owner of land is bound to discharge them before he sells the land unless there is an agreement to the contrary with the buyer)

23. **AIR 1928 PC 98 (99) : 55 Ind App 135 (Reversing** AIR 1924 All 937

24. AIR 1945 Bom 187 (192) (DB).

25. AIR 1944 Mad 572 (573)

26. **AIR 1950 PC 99 (103) : 77 Ind App 156.**

27. **AIR 1950 PC 99 (103) : 77 Ind App 156.**

[**See also** 1957 Andh LT 475 (479) (The bare mention of the price in the conveyance does not exclude the statutory covenant.)]

Section 55 — Note 9

1. AIR 1930 Cal 561 (563) : 57 Cal 1189 (DB)

2. **AIR 1918 Mad 1315 (1321) : 40 Mad 338 (FB).** (Per Sadashiv Aiyer J Abdur Rahim J contra) ** (1948) 27 Pat 898 (923 924) (DB) ** AIR 1949 Bom 154 (156) (DB) ** AIR **1930 Cal 561 (563) : 57 Cal 1189 (DB).**

3. AIR 1966 Cal 605 (611) ** AIR 1963 Guj 239 (241) 1963 (2) Cri LJ 369 ** AIR 196. Raj 196 (200) ILR (1960) 10 Raj 1153 ** AIR 1957 Andh Pra 307 (325) ILR (1955) Andh Pra 170 (Per Chandra Reddy J — Section 55 (2) applies to contract for sale and also to completed transactions — AIR 1930 Cal 561 57 Cal 1189 Explained and **Not Followed**) **** AIR 1951 All 93 (116) : ILR (1950) All 1033 (FB).**

[**See also** AIR 1942 All 39 (41) ILR (1942) All 120 (DB) (Sale deed not executed — Seller found to have no title — Paragraph 2 was assumed to apply)]

the maxim *caveat emptor* (let the purchaser beware) (4) The meaning of the rule of *caveat emptor* was stated by Garth, C. J., in *Gour Kishore Shaha v. Chunder Kishore Dutt Muzumdar*(5) as follows :

> "That rule means that the buyer is bound by the law to take care of himself, he is bound to see that what he buys, he buys after satisfying himself that there is a good title It is a very old maxim of law, and a very good one, that, if people will not assist themselves the law will not assist them, if a person chooses to buy a property without looking into the title, he does so at his own risk and the law will not help him to get rid of his bargain."

It was accordingly the practice in England before the year 1881, in order to avoid the effect of the rule of *caveat emptor*, to insert in all conveyances, a covenant for title And this practice was so general that a person agreeing to sell land was regarded as having agreed also to insert the proper covenant in the sale deed. As observed by Lord Elden in *Church v. Brown* (6) "If a man covenants to sell a fee simple estate, free of all incumbrances, and says no more, it is clear, that the covenant carries *in gremio*, and in the bosom of it, the right to proper covenants " In the absence of an express covenant inserted in the conveyance, the rule of *caveat emptor* applied, and the buyer could not hold the seller responsible for any defect of title after the conveyance was executed (7)

This principle was generally followed in this country also before the passing of this Act.(8) specially if the purchaser had knowledge of the defect of title.(9) By the Conveyancing and Law of Property Act, 1881(10) and now by the Law of Property Act, 1925,(11) certain covenants are implied in every English conveyance of free-holds or other interests in the land.(12) They are four in

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4. Broom, A Selection of Legal Maxims, 10th Edn , 1939, page 528 ** (1878) 3 Cal 806 (813) : 5 Ind App 16 (PC).

5. (1876) 25 Suth WR 45 (46) (DB)

6. (1808) 33 ER 752 (754) : 15 Ves 258 · 10 RR 74

7. (1781) 99 ER 415 (417) 2 Doug (KB) 654, Bree v Holbech ** AIR 1956 Trav-Co 80 (83) · ILR (1956) Trav-Co 220 (DB).

8. AIR 1958 Ker 322 (323, 324) (DB) (The law in the former State of Travancore was the same as that which existed before the enactment of the Conveyancing Act of 1881 in England and of the T P. Act in British India Consequently no absolute unqualified covenant for title could be *ipso facto* imported into or implied in a sale deed executed in the State AIR 1953 Trav-Co 236, Rel on) ** (1876) 25 Suth WR 45 (46) (DB) ** (1866) 6 Suth WR 152 (153) (DB). (In the absence of fraud or express warranty of title in a sale of land, the vendee cannot recover from the vendor the consideration money when he finds that the vendor has no title.)

[See also (1886) 9 Mad 89 (91) (DB) (If vendor is, however guilty of fraud, then he will be liable for damages.) ** (1887) 1 CPLR 178 (179).]

[See however (1874) 22 Suth WR 442 (443) (DB) (Where a vendee is dispossessed of the property purchased by him in consequence of the defect of vendor's title to the property the vendor and not the vendee should bear the loss as the latter put faith in the former's act of selling)]

[But see (1867) 2 Agra 199 (199) (DB) (A seller or mortgagor must always be held impliedly to warrant the title of the property sold or mortgaged.)]

9. (1875) 2 Ind App 131 (143) (PC) ** (1902) 23 Bom 519 (522) (DB) ** 1876 Pun Re No 90 page 180 (181) (DB).

10. 44 and 45 Vic, Ch. 41, Section 7(1) (A).

11. 15 Geo V, Ch 20, Section 76.

12. See AIR 1968 Punj 110 (114, 115) : ILR (1967) 2 Punj 426 (FB). (Observations in Amir Chand v Amir Chand, (R S No 420 of 1951, D/- 9-2-59 (Punj) (DB), regarding English law relating to express and implied covenants on which the rules contained in the T. P. Act, are modelled, quoted.)

number that the seller has power to convey the land; that the buyer shall have quiet enjoyment of the land, that the land is free from encumbrances and that the seller will do all further acts necessary to assure the land to the buyer. In the case of conveyances by a trustee or by way of mortgage the covenant implied had reference only to incumbrances created by the person who conveys

This paragraph is framed so as to include all the covenants implied by the English Acts.**(13)** and something more **(14)** Under the English law the vendor covenants against *the act of himself* and the persons through whom he claims otherwise than by purchase for value.**(15)** whereas under this paragraph he warrants the title which he professes to convey and his power to deal with it **(16)**

In this respect this clause is an exception to the doctrine *caveat emptor*, so far as sales of immovable property by act of parties are concerned **(17)** It implies a warranty of title in all sales executed after the Transfer of Property Act came into force whether such warranty be expressed or not in the conveyance.**(18)** The warranty is absolute and, in the absence of a contract to the con-

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13. AIR 1928 Sind 61 (62) : 23 Sind LR 237

14. AIR 1950 EP 74 (78) (DB) (The rule enacted in S 55(2) goes far beyond for the ordinary rule of English Law and is more a technical rule than a rule based on justice equity and good conscience)

15. Topham New Law of Property 4th Edn 1932 Page 371 ** (1893) 62 LJ Ch 347 (351) (1893) 1 Ch 523 (539). David v Sabin

16. AIR 1961 Raj 196 (200) · ILR (1960) 10 Raj 1153

17. (1861) 65 Cal WN 881 (901) ** AIR 1957 Madh B 23 (26) ** (1911) 14 OC 343 347) (DB) ** AIR 1923 Lah 590 (590) (DB) (Principle of the clause was applied though the Act was not extended to the province.) ** (1905) 8 Oudh Cas 345 (347)

[See also AIR 1957 Andh Pra 572 (577) ILR (1956) Andhra 1114 (DB) (There is no scope for the application of *caveat emptor* in the case of a purchaser of specific items by private treaty)]

18. **AIR 1954 SC 75 (80) (Pr 32) : 1954 SCR 360.** (Vendee s insistence on a specific form of warranty of title to be inserted in the sale deed subsequent to the contract for sale cannot affect the contract It might in a given case disentitle him to specific performance But that would depend upon whether his proposal regarding a form of warranty to which he was not entitled was a mere proposal regarding the form of the sale or was a refusal to perform without it) ** **AIR 1951 All 93 (114, 115) : ILR (1950) All 1033 (FB).** (Per Agarwala and Wanchoo, JJ) ** **AIR 1932 Nag 5 (9, 10) · 28 Nag LR 31 (FB)** ** (1968) 70 Punj LR 34 (36) (DB) (Section 55 (2) does not imply an obligation that the seller should make compensation to the buyer should there be found to be a defect in his title subsequently by parting with some other land in lieu of the one in which the title has been found to be defective) ** AIR 1962 Andh Pra 192 (195) (DB) ** (1961) 65 Cal WN 881 (901) ** AIR 1961 J and K 66 (71) ** AIR 1959 Mys 46 (46 47) ILR (1958) Mys 237 (Hence non production of sale deed in evidence in a suit for damages for breach of warranty is immaterial) ** AIR 1957 Andh Pra 307 (324) ILR (1955) Andhra 170 (DB) ** AIR 1957 Madh B 23 (26) ** AIR 1944 All 243 (244) ILR (1944) All 612 ** AIR 1931 Sind 141 (142) 25 Sind LR 173 (This is so whether the buyer has or has not notice of the infirmity of the title of the seller) ** AIR 1930 Sind 12 (12) 24 Sind LR 172 ** AIR 1930 Mad 748 (750) ** AIR 1926 Mad 255 (256) (Statutory covenants attach equally to contract as well as sale) ** AIR 1925 Lah 481 (481) 6 Lah 308 (DB) ** AIR 1924 Cal 148 (150) (DB) ** AIR 1923 All 169 (169) ** AIR 1919 Cal 404 (405) ** AIR 1915 Mad 742 (743) 38 Mad 1 71 (DB) ** AIR 1915 Mad 689 (690) ** AIR 1915 Mad 708 (709) 38 Mad 887 (Knowledge of defect in title should not be imputed to vendee) ** (1904) 15 Mad LJ 396 (399) (DB) ** (1900) 13 CPLR 97 (98) ** (1899) 25 Cal 298 (300) (DB)

[See also **(1887) ILR 9 All 705 (713) (PC).** (Creditor purchasing property in execution of his own decree against Hindu coparcener — Agreement to sell — Purchaser withholding purchase money and demanding absolute warranty of title — Facts known to purchaser — Purchaser held not entitled to specific performance of contract) ** AIR 1949 Bom 154

trary, irrebuttable.(19)

There is an obligation on the part of the transferor (which includes his representative-in-interest) to protect the rights of the transferee This obligation runs with the land (20)

The implied covenant for title incorporated in S 55(2) cannot be set at naught except in cases where there is express contract to the contrary Where the recitals in the sale deed do not constitute clear and unambiguous expression that the vendor has not guaranteed about his title to the property sold but it only contained an offer to compensate the purchaser for any defects in title it is not an express contract overriding the implied covenant statutorily incorporated in S 55(2).(21)

Under S 52(2) in a sale of immovable property there is an implied covenant for title of seller, a title free from all reasonable doubts There is no duty cast on the buyer to enquire as to vendor's title This implied covenant may be excluded only by the contract to the contrary, the onus being on the person who denies it to prove a contract displacing that presumption But mere knowledge or suspicion of the buyer about the defect of title in vendor does not prevent in express or implied covenant This implied covenant may be get rid of only by an express contract to the contrary (22) The liability would be deemed to subsist notwithstanding the fact that the buyer may have some idea as to the defect of the title of the seller.(23)

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(156) (DB) (Section 55(2) makes a departure from the English Law and provides for a statutory guarantee of title in the absence of any contract to the contrary) ** (1887) 1 Mad LJ 162 (163) (DB) ** 1907 Upp Bur Rul 1 (3).]

19. **AIR 1951 All 93 (114, 118) : ILR (1950) All 1033 (FB).** (Per Agarwala and Wanchoo, JJ) ** AIR 1963 Guj 239 (241) 1963 (2) Cri LJ 369 ** AIR 1961 J and K 66 (71) (Such a contract can be either express or implied but the contract must be such as would clearly negative the warranty of title) ** (1961) 65 Cal WN 881 (897, 898) ** AIR 1930 All 771 (773): 52 All 604 (DB) ** AIR 1917 Nag 125 (127)

[See also AIR 1959 Mys 46 (46, 47) ILR (1958) Mys 237 (Suit for damages for breach of warranty — Contract to the contrary not pleaded by defendant — Non-production of sale deed by plaintiff is immaterial and suit cannot be dismissed on that ground) ** AIR 1916 Sind 61 (62) · 9 Sind LR 214]

20. 1996 (2) Mad LW 243 (262).

21. (1988) 2 LS (AP) 352 (355).

22. 2001 (1) Gauhati LR 27 (41)

23. **AIR 1918 Mad 1315 (1320) · 40 Mad 338 (FB).** (Such knowledge of the defect will not mean a contract to the contrary) (Where the vendor failed to disclose the defects known to him in his own title (boundaries dispute), the vendee is entitled to get back the money paid by him as well as damages for the loss of interest on the amount of his deposit) ** (1982) 1 WLR 495 (506) (Eng) ** 1977 Pun LJ 300 (301) (Suit by purchaser for refund of purchase money — Art 116 of Limitation Act (1908) applies) ** AIR 1967 Mad 461 (463) ILR (1967) 1 Mad 95 (This applies only to the case where the buyer, though aware of the defect, believes and accepts the representation of the seller hoping that defect would not affect him) ** (1867) 33 Cut LT 155 (169) (In absence of express contract to the contrary, S 55(1)(a) would be subordinated to S 55(2) when it involves question of warranty of title) ** ILR (1966) 1 Mad 114 (117) ** (1864) 77 Mad LW 555 (557) (Privity of estate between seller and transferee from buyer — Latter entitled to sue for damages for breach of implied covenant in spite of buyer's knowledge of the defect) ** (1861) 65 Cal WN 881 (902) ** AIR 1960 Punj 275 (277) , ILR (1959) Punj 1463 (DB) ** AIR 1959 Mys 46 (47) · ILR (1958) Mys 237 ** AIR 1957 Andh Pra 307 (325) ILR (1955) Andh Pra 170 (DB) (Existence of mortgage on property — Title is incomplete — Knowledge of the purchaser not material) ** AIR 1957 Andh Pra 288 (290) (Knowledge of buyer as regards real state of title is immaterial) ** AIR 1950 Nag 229 (230) ILR (1950) Nag 467 ** AIR 1947 Pat 477 (479) (Implied warranty of title on the part of the seller in favour of the buyer is irrespective of the question whether the buyer has or has not notice of the infirmity of the

Even though there was an agreement for sale in favour of the plaintiff the vendor sold the property to a third party In a suit for specific performance the vendor did not file any written statement but supported the title of the third party/purchaser It could be said that since the vendor did not file written statement his evidence was not supported by pleadings and, therefore, has to be eschewed. There is obligation on the part of seller under S 55 to support the title of the purchaser.**(24)**

Having executed the sale deed claiming that the defendants are the owners of the land, they cannot be allowed to contend that they are not competent to sell the property As between the parties to the contract and persons claiming under them, S 55(2) will govern The warranty of title will stop the defendants from putting forth such contention The plaintiff/vendee is entitled to file a suit for fixation or demarcation of boundary.**(25)**

Section 55(2) deems implied contract for title in every conveyance and even in cases where there is a completed contract of sale, the purchaser is entitled to cancel the contract and seek the refund of purchase money When that is so as regards completed contract, in a contract which is only at an executory stage, it would not be proper in law to force upon the purchaser to purchase the property on the ground that he was aware of the defective or imperfect title at the time of agreement of sale. It does not prevent in law for the purchaser to revise his opinion before the contract is concluded, however, with a qualified liability on the purchaser to compensate any loss or damages which the vendor has sustained in the course of such transaction for which the purchaser has equally contributed by his folly.**(26)**

Even where there is no representation by the transferor that he had authority to transfer the interest which he purported to transfer, such a representation is implied under S 55(2) when nothing is said to the contrary in the deed of transfer The knoweldge of the buyer in such a case is immaterial Even if the buyer knew that the seller has no power to transfer the interest, he is entitled to the benefit of the contract and to enforce the sale according to its terms and may hold the seller responsible in damages.**(27)**

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title of the seller) ** AIR 1945 Mad 205 (206) (The fact that the buyer knew of a defect in the title of the seller prior to the purchase does not preclude him from suing for damages for breach of the covenant of title) ** AIR 1944 All 243 (244) ILR (1944) All 612 (The right which is given to the vendee by the warranty of title express or implied to bring a suit for refund of sale consideration remains even if the vendee had knowledge of the defective title of his vendor AIR 1932 All 546 Followed) ** AIR 1940 Mad 739 (740) (DB) ** AIR 1933 All 389 (390) ** AIR 1932 All 546 (547) 54 All 774 ** AIR 1931 Sind 141 (142) 25 Sind LR 173 ** AIR 1930 Mad 48 (49 50) 52 Mad 787 (DB) ** AIR 1929 Pat 388 (389) 8 Pat 432 (DB) ** AIR 1929 Mad 775 (776) ** AIR 1925 Mad 1209 (1209) ** AIR 1920 Mad 634 (636) (DB) ** AIR 1917 Nag 125 (127) ** AIR 1916 Mad 633 (633) (DB) ** AIR 1915 Mad 742 (743 744) 38 Mad 1171 (DB) ** AIR 1915 Mad 708 (709) 38 Mad 887 ** (1889) 16 Cal 330 (342)

[**See also** (1871) 3 NWPHCR 106 (107) (DB).]

[**See however** AIR 1916 Mad 603 (603) (DB) (If what is conveyed is not full title as for example a sale or karamkari tenure, S 55 cannot warrant a larger title)]

24. 1998 (1) Mad LW 49 (51).

25. 1999 (3) Mad LJ 778 (782).

26. AIR 2001 Kant 141 (146) 2001 AIR Kant HCR 596 2001 (3) Kant LJ 571

27. AIR 1961 Raj 196 (200) (Pr 11) ILR (1960) 10 Raj 1158 (A marketable title is a title which a vendor would be in a position to force on an unwilling purchaser) ** AIR 1986 Ker 30 (31, 32) : 1985 Ker LT 862 (Compensation for loss of property due to defect in title is to be fixed on the value of property as on the date the property was lost and not on the date it was conveyed) ** (1978) 1 Mad LJ 196 (212) ** AIR 1960 All 367 (368) ILR

Title cannot be understood as something equivalent to a process involving making of title In order to convey property the vendor should have a present right or interest which he contracts to convey A title which has not been perfected and which cannot rationally be said to be free from doubt is no title at all **(28)** If the purchaser is compelled to give up possession by reason of extinction of the settlor's title the normal measure of damages follow the general principle of law and the measure of damages is the market value at the time of eviction.**(29)** A covenant for title presupposes a *legal transfer* of property Consequently, this clause will apply only where the sale is a valid one and not where it is invalid **(30)** Where a guardian executed a sale on behalf of a minor on obtaining permission from the District Judge but the permission was found to be ineffective and consequently the sale was held invalid, it was held that the buyer was not entitled to any relief on the covenant for title, against the guardian or the minor.**(31)**

A vendor cannot convey title better than his own If on allotment of land by Govt. it is subsequently found that excess land has been given the excess can be retrieved **(32)** The covenant implied under S 55(2) for quiet enjoyment relates only to the title conveyed and if the title tiself is subject to restrictions there cannot be a covenant for enjoyment of a higher title.**(33)**

This section, and therefore this paragraph, has no application to sale *in invitum.* In auction sale there is no guarantee by the Court or by the decree-holder corresponding to the guarantee under this paragraph **(34)** It is only the right, title and interest of the judgment-debtor that passes to the auction-purchaser, and the latter takes them subject to any claims that may subsequently be made by third parties.**(35)**

(1959) 2 All 521 (DB) (No duty on vendee to made enquiries — Vendee may accept representation by vendor as to his title) ** AIR 1959 Mys 46 (46, 47) ILR (1958) Mys 237 ** AIR 1957 Andh Pra 307 (327) ILR (1955) Andh Pra 170 (DB) ** **AIR 1956 All 225 (229, 230) : ILR (1956) 1 All 313 (FB)** ** ILR (1948) 1 Cal 492 (497)

[But see AIR 1981 Mad 303 (305) (1981) 2 Mad LJ 154 (The principle of damages is based on the representation being made by a party which was believed in and acted upon by another so that he sustained a loss on the basis of the belief in the said representation But where buyer, deliberately purchase the property, having knowledge that vendor's title is defective, with a view to speculate on a litigation, he cannot be granted damages for violation of covenant for title) ** AIR 1967 Mad 461 (463) ILR (1967) 1 Mad 95 (When the buyer himself knew full well that the seller had no title and was entering into the transaction with full knowledge of want of title, this implied warranty cannot be invoked ** AIR 1923 Mad 392 (396) (DB) (Sale conveying for title — Defect in title known to vendee — Implied covenant does not attach to the sale.)]

28. AIR 1975 Mad 379 (382) (DB).

29. (1969) 1 Mad LJ 76 · ILR (1968) 3 Mad 548.

30. AIR 1957 Raj 248 (249) ** AIR 1950 Bom 401 (406) (DB).

31. AIR 1934 All 645 (651) : 56 All 997 (DB).

32. AIR 1979 Punj 201 (202)

33. AIR 1986 Ker 149 (152) : 1986 Ker LJ 83.

34. AIR 1950 East Punj 74 (76) (DB) (Per Kapur, J — Even if S 55(2) is read as a rule of justice, equity and good conscience it is not enforceable by a person who has taken a transfer *in invitum*) ** AIR 1931 Nag 116 (116) 27 Nag LR 318 ** (1829) 116 Ind Cas 546 (547) (Lah) ** AIR 1925 Lah 467 (468) 6 Lah 283 (DB) ** AIR 1924 Cal 172 (172) (DB) (Rent sale) ** (1906) 3 All LJ 820 (823) (DB) ** (1901) 28 Cal 235 (237) (DB) ** (1910) 8 Ind Cas 605 (605) (DB) (Low Bur). (A sale by a mortgage in professed exercise of a power of sale conferred by a mortgage deed is usually a sale *in invitum*)

[See also (1878) 3 Cal 806 (813, 815) : 5 Ind App 116 (PC).]

35. AIR 1937 All 18 (19) ** AIR 1933 All 63 (64, 65) 54 All 948 (DB) ** AIR 1930 Lah 937 (941).

A covenant for title is not the same thing as a contract of *indemnity* **(36)** Section 55(2) implies a covenant for title and nothing more. It does not result in an obligation which can be implied in law that the seller binds himself to pay compensation to the buyer, should there be a defect in his title subsequently by parting with some other land in lieu of the one in which the title has been found to be defective.**(37)**

As will be seen below, a cause of action for a suit for damages for breach of the covenant for title will generally arise on the date of the conveyance itself and the buyer will be entitled to damages even though he has actually not suffered any loss by the breach **(38)** But the cause of action for a suit on a contract of indemnity arises only when loss is actually suffered by the plaintiff **(39)**

Section 55(1) and (2) contemplates implied warranty that seller would make good the title in case either he has no title or defective title Seller can be sued on basis of implied warranty Instant case is one of no title and not defective title sale deed was executed containing a clause indemnifying the purchaser for the loss caused if any on ground of defect in title and some other property of seller was offered as security The suit filed for enforcing the indemnity was enforceable.**(40)**

In a case where misrepresentation by seller amounts to fraud and he had no title in the property sold. The purchaser cannot be deprived of the damages even if he is guilty of not making reasonable enquiries In the instant case negligence in making enquiries on part of the seller was not established.**(41)**

Under the English Law, a covenant for title is an assurance to the buyer that the seller has the very estate in *quantity* and *quality* which he purports to convey **(42)** Where the seller stated that the property was subject to a yearly tenancy but it was found that the tenancy was a permanent one, it was held by the High Court of Bombay following the English Law that on the ground of defect in the *quality* of the property the buyer was entitled to claim damages for breach of the implied contract under this clause **(43)** Where the *quantity* of certain land sold was found to be less than that stated in the sale deed, it was held by the Lahore High Court that a breach of a covenant implied by this clause had been committed **(44)** The undermentioned cases**(45)** have however held that a deficiency in the *quantity* of the land sold does not amount to a breach of an implied covenant of title under this clause It is submitted that this view is not correct

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36. AIR 1950 East Punj 74 (76) (DB) (Suit for return of purchase money based merely on breach of express contract of indemnity contained in deed of sale — It is not open to plaintiff to take advantage of S 55(2) even if that were held to be rule of equity) ** AIR 1950 Mad 621 (623) (DB) (Clause in sale deed held to be one of indemnity ** AIR 1928 Mad 894 (896) 51 Mad 688 (DB) (A contract of indemnity is a personal one) ** (1902) 26 Bom 750 (754) (DB).

[**See however** AIR 1936 Lah 746 (746) (A covenant guaranteeing the non existence of encumbrances necessarily implies such a condition of indemnity)]

37. (1868) 70 Pun LR 34 (DB)

38. AIR 1956 Trav-Co 90 (92) (DB) (The fact that the vendee was still in possession and had not been ousted, would not make the suit premature.)

39. See Article 113 of the Limitation Act, 1963

40. 1997 (4) Andh LD 90 (94, 95).

41. 1997 AIHC 2755 (2759) : 1997 (4) Andh LT 713.

42. Halsbury's Laws of England, Vol. XXV, p. 465.

43. AIR 1916 Bom 279 (280, 281) (DB)

44. AIR 1921 Lah 357 (360)

45. AIR 1957 Ker 181 (185) ILR (1957) Ker 475 (DB) (Sale of property as enclosed by walls

Paragraph 2, if includes covenant for quiet enjoyment.

It has been held in the undermentioned cases(**46**) that this clause imports not only a covenant for *title* but also a covenant for *quiet enjoyment*. A covenant for a *right to convey* is a covenant for title. The covenant for quiet enjoyment is one relating to possession, and means that, the buyer shall not be disturbed in his possession and enjoyment of the property. In the undermentioned cases(**47**) it was held that this clause does not import any contract to *put* the buyer in possession of the property sold.

Sale by a person in fiduciary character.

The proviso to this paragraph enacts that where a sale is made by a person in a *fiduciary character* the implied contract for title is a limited one, namely, that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

It has been held by the Allahabad High Court in *Mt. Maida v. Kishan Bahadur*(**48**) that the liability under the proviso is not enforceable against the person who has acted in a fiduciary character but only against the person on whose behalf the sale is executed, and that even this cannot be done if the sale is *not binding* upon the latter person. In that case a guardian executed a sale on behalf of a minor on obtaining permission from the District Judge, but the permission was found to be ineffective and consequently the sale was not valid as against the ward. It was held that the buyer was not entitled to recover any compensation from the guardian, as the sale had been made by him only in his capacity as guardian, but would have been entitled to recover compensation from the property of minor ward, if the sale had been binding upon him, but that inasmuch as the sale was not valid against the ward it could not be enforced against him also. In the undermentioned case(**49**)

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specifically mentioned as its boundaries — Deficiency in area as stated in deed — **Held**, there was no express or implied warranty.) ** AIR 1916 Mad 526 (526) (DB).

[**See also** AIR 1953 Mad 769 (773); ILR (1952) Mad 682 (DB) (Decision in 1916) AIR 1916 Mad 526 approved but reasoning not approved.)]

46. **AIR 1932 Nag 5 (9) : 28 Nag LR 31 (FB)** ** (1976) 89 Mad LW 405 (407) (Breach of covenant for quiet enjoyment is to be proved by the vendee) ** AIR 1961 J & K 66 (71) ** AIR 1953 Mad 529 (530) (DB) ** AIR 1950 Bom 401 (404, 406) (DB) (There is no justification for the assumption that covenant for title and covenant for quiet enjoyment are broken when title to property terminates by reason of absence of authority of vendor either initial or supervening to transfer.) ** **AIR 1932 Nag 5 (9) : 28 Nag LR 31 (FB)** ** AIR 1948 Nag 382 (385); ILR (1948) Nag 50 (DB) ** AIR 1935 Mad 636 (637) (Assumed) ** AIR 1934 Nag 16 (17); 30 Nag LR 138 (Cause of action arises when buyer is deprived of possession.) ** AIR 1930 Sind 12 (12); 24 Sind LR 172 ** AIR 1928 Sind 61 (62); 23 Sind LR 237 ** AIR 1916 Mad 14 (15) (DB) (It is the duty of the seller to secure his purchaser in quiet and peaceful enjoyment of the property sold, the mere signing of the sale deed does not discharge this obligation which continues till the purchaser gets an indefeasible title to the property.)

[**See also** (1950) 28 Mys LJ 165 (170) (DB) (A mere claim for possession is not enough to constitute a disturbance of possession so as to constitute breach of covenant for quiet enjoyment.) ** AIR 1943 Mad 150 (151) (Dispossession of purchaser by mortgagee — Suit by purchaser for damages for breach of covenant for quiet enjoyment — Limitation starts from date of dispossession.) ** AIR 1936 Oudh 136 (138, 139) (DB). (Mere decree obtained by a claimant does not amount to dispossession of vendee.)]

[**See however** 1957 Ker LT 588 (591) (Covenant for title does not include a covenant for quiet enjoyment — Covenant for quiet enjoyment is a restricted covenant "limited to disturbance by the covenantor or persons claiming under him.")

47. AIR 1948 Nag 382 (385); ILR (1948) Nag 50 (DB) ** AIR 1926 Mad 495 (496).

48. AIR 1934 All 645 (650, 651) : 56 All 997 (DB).

49. AIR 1924 Oudh 99 (100) (But the ward can be so liable if there is express covenant of warranty.)

it was, however, held that a breach of a warranty implied by law in respect of a sale effected by a guardian could not result in a personal liability on the ward for damages; on the well settled principles of law, that a guardian cannot so contract in the name of his ward as to entail the imposition of a personal liability on the ward. In a later case(50) it has been held by the High Court of Allahabad that where the Official Receiver purports to sell property to which the insolvent has ceased to have title, the sale cannot be said to have been made in a fiduciary character within the proviso to paragraph 2.

Benefit of implied contract runs with transferee's interest.

The last portion of this paragraph provides that the *benefit* of the implied contract runs with the transferee's interest (51). Thus, a transferee from the buyer (52), a pre-emptor of the buyer (53), a transferee from the pre-emptor,(54) a Court auction-purchaser in execution of a decree against the buyer,(55) or an appointee of a buyer(56) can take advantage of the contract.

The fact that the covenant was broken by reason of the fraud of the original covenantee is not a defence to an action on the covenant by a subsequent transferee of the property (57).

After the buyer transfers the property purchased by him to a second transferee, he cannot claim the benefit of the covenant in respect of such property unless he shows that he has settled with his transferee and is himself entitled to damages on his covenant (58).

Section 55(2) makes it clear that the benefit of the covenant for title runs with the land and is enforceable by subsequent purchasers of the land and if buyer re-sells to several purchasers, each of the purchasers is entitled to sue on the covenant in respect of his part (59).

Breach of implied contract.

A breach of the implied contract under this paragraph takes place where there is an adverse right or an outstanding interest, charge, or claim, which may prevent the buyer from enjoying the

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50. AIR 1942 All 39 (41) : ILR (1942) All 120 (DB).

51. AIR 1959 Mys 46 (46, 47); ILR (1958) Mys 237 ** ILR [illegible] 948 [illegible]

[See however AIR 1950 East Punj 74 (78) (DB). The right under S. 55(2) does not run with the land in places where T.P. Act is not in force.)]

52. AIR 1932 Nag 5 (9) : 28 Nag LR 31 (FB) ** [illegible] 964 [illegible] Mad LW 555 (557) ** AIR 1938 Nag 257 (259) : ILR (1939) Nag 318 (DB) ** AIR 1938 Mad 96 [illegible] ** AIR [illegible] Bom 361 (363, 364, 365) ** AIR 1917 Mad 296 (297) ** [illegible] ** 1908 Pun Re No. 111, p. 510 (512). (An agreement by vendor to indemnify the purchaser against loss of property at the instance of any claimant extends to cover the loss of property as the suit of a pre-emptor.)

53. AIR 1968 Punj 110 (119) : ILR (1967) 2 Punj 426 (FB) ** AIR [illegible] 931 Nag 166 (168) : 27 Nag LR 392 ** AIR 1930 All 771 (774) : 52 All 604 (DB) ** AIR [illegible] 9 Lah 659 (DB). (Not a covenant to indemnify the vendee.) ** [illegible] (DB) (Lah).

[But see AIR 1950 East Punj 74 (78) (DB). Pre-emptor of the buyer becomes transferee *invitum* cannot get advantage of rule in S. 55(2) which is a technical rule and not a rule of equity.)]

54. AIR 1929 All 293 (295) : 51 All 651 (DB).

55. *See* AIR 1928 Mad 894 (895) : 51 Mad 688 (DB). Per Jackson J. Reddy J. *dubitante*.

56. (1874) 43 LJ Ex 57 (62) : 9 Ex 99, Spoo v. Green.

57. (1893) 62 LJ Ch 347 (352) : (1893) 1 Ch 523 (534), David v. Sabin.

58. AIR 1930 Mad 748 (751).

59. AIR 1982 (NOC) 160 : (1981) 2 Mad LJ 395.

estate **(60)** The very existence of such right or interest is a breach of the contract **(61)**

Illustrations

(1) *A* purports to sell a property to *B* as owner thereof It is found subsequent to the sale that *A is merely a* lease holder *There is a breach of the implied contract under this paragraph.***(62)**

(2) *A* sells property to *B* "free of incumbrances" But subsequently it is found that there are prior incumbrances The statutory contract must be deemed to have been broken by the seller **(63)**

(3) *A* sells to *B* property subject to prior incumbrances The existence of the prior incumbrances cannot be said to be a breach of the implied contract In other words, where *A* transfers the interest which is not larger than what he actually professes to transfer there is no breach of the covenant for title if the buyer is evicted by a superior title holder.**(64)**

(4) *A* sells property to *B* and it is subsequently found that a portion of it has already been granted by *A* to another person There is a clear breach of the covenant of title **(65)** The mere fact that possession of that portion has not been given to the buyer does not debar him from claiming damages for the breach **(66)**

(5) *A* sold property to *B* reciting a prior mortgage to *C*, the amount payable in respect of which was stated to be 366 rupees which was reserved with the buyer for payment to *C* As a matter of fact a larger sum was due to *C* It was held that that fact constituted a breach of the implied contract, and that this was so notwithstanding that *B* did not offer to pay *C* even the amount of 366 rupees reserved with him **(67)**

Where on the date of the sale itself the seller had no title to the whole or part of the property sold, the implied contract is broken *with the execution of the convevance* **(68)** although the buyer

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60. Halsbury's Laws of England, Vol XXV p 465 ** AIR 1950 Bom 401 (406) (DB) (Seller subsequently found to have no title or only a limited interest) ** AIR 1916 Bom 279 (280) (DB) (It amounts to a clear case of a breach of warranty if a vendor professes to sell under his sale deed land burdened only by a yearly tenancy whereas it is burdened by a permanent tenancy.)

61. Halsbury's Laws of England, Vol XXV, p. 465 ** AIR 1957 Andh Pra 307 (327) : ILR 1955 Andh 170 (DB) (The existence of a mortgage over a property would make the title thereto incomplete and knowledge on the part of the purchaser of defects in title of the vendor does not take away his rights to the statutory covenants unless there is a specific provision to cover such defects also.)

62. AIR 1929 All 837 (839) (DB).

[See also (1899) 25 Cal 298 (300) (DB).]

63. AIR 1922 PC 176 (176) ** AIR 1938 Nag 257 (258) ILR (1939) Nag 313 (DB) (Covenant for title includes a covenant that it is free from incumbrances.)

64. AIR 1917 Mad 802 (802) (DB).

65. AIR 1961 Pat 11 (14) (Express covenant in sale deed that in case of defect of title vendee will be compensated – Vendee not obtaining possession over portion due to want of title of vendor – Suit for refund of part of consideration is maintainable) ** AIR 1939 All 170 (172) (DB) (The breach will cover a case where possession is not obtained of the area in question.)

[See also (1910) 6 Ind Cas 890 (890) (DB) (All) (The seller was found subsequently to own only a part of the property sold.)]

66. AIR 1939 All 170 (172) (DB).

67. AIR 1927 All 53 (53) (DB).

68. Halsbury s Laws of England, Vol XXV, p 465 ** (1950) 28 Mys LJ 165 (169) (DB) (In this case under terms of the express covenant right could not accrue to buyer till dispute was not settled by seller) ** AIR 1934 Mad 687 (688) : 57 Mad 1016 ** AIR 1927 Mad 273 (276, 277) ** AIR 1915 Nag 46 (47) : 11 Nag LR 186

[See AIR 1916 Mad 480 (481) (No covenant for title in assignment of a mortgage debt)]

may be ignorant of the breach.**(69)** Where the seller has power to transfer the property on the date of the sale, but the transaction is a *voidable* one at the instance of a third person, a breach of the implied contract will take place when the transaction is avoided by such third person and not on the date of the sale itself **(70)** Thus, a sale by the guardian of a minor or by the manager of a joint Hindu family would be a valid transaction until the minor, or the other member of the family, as the case may be, avoids it as not binding upon him. A breach of the implied covenant will, in such cases, not take place unless and until the transaction is so avoided **(71)**

On a breach of the contract implied by this paragraph the buyer will be entitled to claim damages for such breach under S. 73 of the Contract Act **(72)**

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69. AIR 1915 Mad 766 (767) (DB) ** (1902) 26 Bom 750 (754) (DB)

70. AIR 1932 Nag 3 (4)

[**See also** (1925) 91 Ind Cas 441 (444) (Lah) (DB) (Part of consideration land not for necessity — Suit for refund of that part is not maintainable so long as vendee has suffered no loss) ** AIR 1934 Nag 16 (17) : 30 Nag LR 138]

71. **AIR 1967 SC 359 (361) : (1966) 3 SCR 608.** (Sale of properties by D to X — Execution of sale deed by D for himself and as guardian of his minor son — D agreeing to indemnify any loss that might be caused to X in case sale of his son's half share should later on be set aside — **Held**, on facts, that suit could be brought for damages either on basis of indemnity bond or for breach of covenant of warranty of title, only if vendee were dispossessed from properties.)

72. AIR 1961 J & K 66 (71, 72, 75) (The mere fact that the vendee had knowledge of the defect in vendor's title did not prevent him from recovering damages from the vendor on account of the breach) ** 1958 Andh LT 956 (959) ** AIR 1957 Andh Pra 688 (689) (Breach would not entitle buyer to avoid sale but to damages) ** AIR 1956 Nag 124 (125) : ILR (1956) Nag 74 (A sold a field to B by sale deed containing an express covenant that A would be liable for any defect in title. After the sale, C instituted suit impleading both A and B impeaching the title of A and claiming eviction of B. A remained ex parte though the question of title was a matter within his special knowledge. B therefore compromised the suit and then filed a suit for damages against A for the breach of the covenant. It was held that A was liable for damages) ** 1956 (2) Mys LJ 65 (71) (DB) (Purchase money is generally the measure of damages) ** AIR 1933 Nag 364 (365) ** AIR 1930 Mad 748 (750) (Damages were assessed at the enhanced value of land at the date of eviction — Purchasers cannot claim damages if they have transferred their share before institution of suit) ** (1929) 120 Ind Cas 163 (164) (DB) (Lah) (Damages to be ascertained according to the price at the date of ejectment) ** AIR 1921 Mad 384 (385) : 44 Mad 167 (DB) (If vendee is dispossessed by a third person having a superior title than that of the vendor and if vendor gets a substituted property for the land sold, vendee does not become entitled to it. His only remedy is damages for breach of warranty implied by paragraph 2) ** AIR 1920 Lah 297 (299) : 1 Lah 380 (DB) (Vendee evicted from portions by third person with superior title — Measure of damages is price of land at date of eviction) ** AIR 1917 Nag 125 (127) ** AIR 1916 Bom 277 (281) (DB) ** (1913) 35 All 168 (172) (DB) (Covenant for title indemnifying vendee — Claim by third person — Vendor not settling the claim — Vendee compromising suit by third person and suing vendor for damages — **Held** suit was competent) ** (1902) 5 Oudh Cas 78 (80) (He cannot claim another in substitution of what he lost) ** 1881 All WN 50 (51) (DB) ** (1867) 2 Agra 199 (199) (DB).

[**See also** (1920) 39 MLJ 706 (708) (DB) (A purchasing land for coparcener and selling it to B — A's vendor allotted other land in decree for partition — B cannot ask for substituted land — B can claim only damages for breach of warranty of title) ** 1881 All WN 160 (161) (DB) ** AIR 1921 Lah 357 (360) (DB) (Vendee dispossessed due to defect in vendor's title — Measure of damages is the price of land on date of eviction) ** AIR 1921 Mad 277 (277) (Seller sold his mortgagee rights — The mortgage was found invalid —

In the first class of cases referred to above, time for a suit for damages for a breach of the implied contract will run from the date of the conveyance itself. But in the second class of cases time for such a suit will run from the date when the sale is legally avoided by the person entitled to avoid it. In either class of cases where the sale is effected by a registered document the period of limitation was six years under Art. 116 of the Limitation Act, 1908(**73**) and where the sale is an oral one, the period was three years under Art. 115 of that Act (now Art. 55 of the Limitation Act, 1963). A covenant for *title* is not one which admits of a continuing breach within the meaning of S. 23 of the Limitation Act of 1908 (now S. 22 of the Limitation Act, 1963)(**74**) but a covenant for *quiet enjoyment* is one which admits of such breach (**75**). In cases(**76**) where it has been held that this clause also includes a covenant for quiet possession a breach of such covenant takes place when the buyer is deprived of the possession which had been given to him, and the article applicable to a suit on such breach is either Art. 115 or Art. 116 of the Limitation Act, 1908 (**77**). The Limitation Act of 1963 has, however, omitted Art. 116 and has thus done away with the distinction between the contracts in writing registered and other contracts. Now under the Limitation Act of 1963, Art. 55 provides for a period of limitation of three years for all breaches of contracts not specifically provided for whether in a writing registered or oral.

Apart from any relief which the buyer may claim by way of damages on the implied contract under this paragraph, the buyer has also other remedies open to him. Thus, where the buyer has been placed in possession of the property purchased by him and is subsequently evicted by a person with a superior title, he can recover the purchase money on the ground of *failure of considera*

Seller was held liable for damages. AIR 1916 Mad 480. **Dissented from.**) ** (1875) 12 Bom HCR 10 (13) (DB) (Real area of land was found to fall short of the area specified in the sale deed — Proportional compensation was awarded.) ** AIR 1927 All 53 (53) (Vendor selling property subject to a prior mortgage and leaving certain amount with vendee to pay off mortgagee — Mortgage money was found much more than the amount left with vendee — Held that this fact constituted breach of implied contract.) ** (1897) 21 Bom 175 (186) (DB) (Purchaser evicted from holding — Measure of damages is the value of land on the date of eviction.) ** AIR 1931 Nag. 4 (15). 27 Nag LR 207 (Do.) ** AIR 1924 Cal 148 (150) (DB) (Suit for refund of purchase money for a defect in the title may be regarded as one for damages.) ** AIR 1923 Lah 590 (591) (DB). (Do.) ** AIR 1919 Mad 37 (38) (DB). (Do.) ** AIR 1929 Pat 388 (389) : 8 Pat 432 (DB). (Do.).]

[**See however** AIR 1938 Lah 743 (746, 747) (DB) (Vendees negligent in defending mortgage suit — Not raising proper pleas available to them — No cloud on vendor's title — Vendee not legally entitled to mortgage amount paid by them or litigation cost in spite of indemnity clause.)]

73. AIR 1961 J & K 66 (75, 76) (Breach of covenant of title in registered sale deed — Suit for damages by vendee — Article 116 applies and not Art. 62.) ** **AIR 1932 Nag 5 (9) : 28 Nag LR 31 (FB)** ** AIR 1937 Rang 39 (40, 41) (DB) ** AIR 1936 Oudh 141 (142). 11 Luck 725 (DB) ** AIR 1933 Mad 126 (128) ** AIR 1931 Sind 141 (142). 25 Sind LR 173 ** AIR 1930 Sind 12 (14). 24 Sind LR 172 ** AIR 1929 Mad 775 (776) ** AIR 1927 Mad 273 (277) ** AIR 1926 Mad 255 (255, 256) ** AIR 1926 All 605 (608) (DB) ** AIR 1925 Bom 440 (441) (DB) ** AIR 1919 Mad 757 (757) ** AIR 1915 Mad 742 (743). 38 Mad 1171 (DB) ** (1904) 2 Nag LR 174 (177, 178) ** (1898) 21 Mad 8 (9) (DB) ** (1891) 1 Mad LJ 479 (480) ** (1891) 1 Mad LJ 162 (163) (DB) ** (1911) 11 Ind Cas 337 (338) (DB) (Mad)

74. **See** S. 22, Note 6 of the A.I.R. Commentaries on the Limitation Act, 7th (1997) Edition.

See Halsbury's Laws of England, Vol. XXV, page 465

75. **See** S. 22, Note 7 of the A.I.R. Commentaries on the Limitation Act, 7th (1997) Edition.

76. **See** in this Note under sub-title "Paragraph 2, it includes covenant for quiet enjoyment."

77. AIR 1959 Andh Pra 445 (446) ** AIR 1953 Mad 529 (531) (DB) (Suit by purchaser for breach of covenant — Cause of action either date of decree against him or of his dispossession — Suit filed within six years of either date — **Held** not barred under Art. 116, Limitation Act.) ** AIR 1950 Bom 401 (404, 406) (DB) ** AIR 1934 Nag 16 (17). 30

tion **(78)** The cause of action for such a suit will arise on the date of the loss of possession and the period of limitation will be that prescribed by Art 97 of the Limitation Act, 1908 (now Art 47 of the Act of 1963).**(79)** Where the sale is void *ab initio* the buyer can also recover the purchase money paid by him.**(80)** A mere suit for return of purchase money not based on breach of covenant for title will be covered by Art. 62 of the Indian Limitation Act, 1908 **(81)** Where a sale is free of incumbrances, and the buyer, on discovery of an incumbrance is compelled to pay the incumbrancer, he can under S. 69 of the Contract Act recover the money so paid.**(82)**

Where the sale of property of B by C was adjudged void in a suit for possession by A, on the ground that the property belonged to A and that C had no title to it, the relief of payment of consideration amount by A to B would be inconsistent with the relief of possession granted to A, who was not under any liability to pay B any money that B might have paid to C **(83)**

It is not necessary for the plaintiff, in a suit for damages for the breach of the implied covenant under this paragraph, to show that he has actually suffered loss or damage Thus, where an incumbrance, not disclosed at the time of the sale, is discovered thereafter, the buyer can sue for damages notwithstanding he has not paid off the incumbrance **(84)**

The measure of damages in a suit for damages on the implied contract would be governed as in the case of all contracts by the provisions of S 73 of the Contract Act **(85)** It will include any loss

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Nag LR 138 (Sale deed registered — Article 116 held applicable) ** AIR 1919 Mad 849 (850) (DB) (Continuing covenant for title — Breach arising on declaration of title in other person — Buyer entitled to damages.)

[**See also** AIR 1934 Mad 687 (688) : 57 Mad 1016.]

78. AIR 1953 Mad 529 (531) (DB) ** AIR 1934 Pat 280 (281) (DB) (Vendee negotiating with real owner and retaining possession — Vendor is liable to refund purchase money) ** AIR 1918 Pat 502 (503) : 3 Pat LJ 358 (DB) (In a suit for recovery of purchase money vendor cannot plead that former suit filed against him and vendee by the third party and decided in his favour was wrongly decided) 19 (3 Mad WN 1029 (1031) (DB) ** (1902) 26 Bom 750 (755) (DB) ** (1895) 18 Mad 173 (174) (DB).

79. See AIR Commentaries on the Limitation Act 7th (1997) Edn Notes on Art 47 ** AIR 1959 Mys 46 (47) : ILR (1958) Mys 237

80. See A.I R Commentaries on the Limitation Act, 7th (1997) Edn , Art 24, Note 12

[**See also** (1954) 20 Cut LT 591 (595) (Contract for sale void *ab initio* — Buyer would be entitled to recover purchase money under S 65 Contract Act)]

81. AIR 1974 Pat 319 (DB).

82. AIR 1928 PC 98 (99) : 55 Ind App 135.

Also see Note 8.

83. 1954 Madh BLJ HCR 1685 (1688)

84. AIR 1931 Nag 166 (168) : 27 Nag LR 392

85. AIR 1962 Andh Pra 192 (198) (DB) (Basis of assessing damages would be the market value of the land (subject-matter of sale) as on date of dispossession of vendee) ** AIR 1962 Madh Pra 144 (145) (Mortgage existing on date of sale — Buyer dispossessed of property in its enforcement He is entitled to refund of sale price as damages) ** AIR 1956 Trav-Co 90 (92) (DB) (The fair rule would be to give the defendant such damages as would compensate him for the defective quality of his title) ** AIR 1953 Mad 529 (531) (DB) (Plaintiff must be given the property or its value on the date when he makes the demand by instituting a suit) ** (1950) 28 Mys LJ 165 (171) (DB) (In the case of a breach of covenant for title the measure of damages is the difference between the value of the thing as it is and its value as it was warranted to be Where the defect in title is so

or damage caused to the buyer which naturally arose in the usual course of things from such breach, or which the parties knew, was likely to result from such breach. In *Bunny v. Hopkinson*(86) where A sold some building land to B and after some houses had been built on the land the purchaser was evicted, it was held that purchaser was entitled to recover, not only the value of the land, but also that of the houses subsequently built thereon "I am of opinion" said Sir John Romilly, M.R., "that the measure of damages upon these covenants includes the amount expended in converting the land into the purposes for which it was sold." *Bunny v. Hopkinson*(87) was followed in the undermentioned case by the Judicial Commissioner's Court of Nagpur.(88) It was held in that case that the buyer was entitled on the implied covenant to claim not only the value of the property conveyed but also the value of the improvements effected by the buyer in the ordinary course. See also the undermentioned cases.(89)

Where a recital in the sale deed provided that in case vendee is deprived of land he will be compensated, and the vendee was in fact deprived because of vendor's defective title and he claimed possession of land, it was held that he was entitled to equivalent land or price of land, even though he had not claimed price.(90)

If the vendee is within his rights in calling upon the vendor to satisfy him that the property agreed to be purchased by him was free from encumbrances, the latter is not entitled to call upon the former to pay the balance of sale price and take a conveyance without complying with the requisition or without even telling him that he should be compensated for any loss that might be sustained by him consequent upon his failure to pay off the mortgage debt, if any, outstanding and later on put an end to the contract on the ground that the vendee did not perform his part of the contract.(91)

Against whom can the right be enforced.

By a covenant for good title, a statutory obligation is incurred by the original vendor An obligation means an act which binds a person to some performance In the case of a covenant for title the obligation is to make good the loss or damage caused to the vendee occasioned by the defect in title in the property conveyed and the general rule is that the legal representatives of a deceased-debtor are liable to the extent of the assets which come into their hands upon all contracts

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complete as to pass nothing to the vendee, the purchase money is generally taken to be the measure of damages) ** AIR 1943 Mad 150 (151) (Measure is market value of property on date of dispossession) ** AIR 1930 Mad 748 (750) (Vendee can claim as damages enhanced value of the land at the time of his eviction.) ** AIR 1929 Lah 416 (418) (DB) ** AIR 1921 Lah 357 (360) (DB) (Measure of price is the price at the time of eviction.) ** (1929) 120 Ind Cas 163 (164) (DB) (Lah) (Measure is the price of land at the time of eviction and not compensation in the shape of other land and mesne profits) ** (1908) 32 Bom 165 (171).

See also Footnote 46.

86. (1859) 54 ER 223 (224) 27 Beav 565 29 LJ Ch 93 6 Jur (NS) 187 1 LT 53 · 122 RR 529

87. (1859) 54 ER 223 . 27 Beav 565 29 LJ Ch 93 6 Jur (NS) 187 1 LT 53 122 RR 529.

88. AIR 1931 Nag 14 (16) : 27 Nag LR 207.

89. AIR 1958 Andh Pra 533 (541) (DB) (Damages for breach of contract — Damages are only by way of compensation for loss suffered and not by way of punishment) ** AIR 1957 Andh Pra 307 (325) ILR (1955) Andh 170 (DB) ** AIR 1943 Mad 752 (753) (Sale deed by A and B — Covenant for title by both — B's share in property found encumbered — Both A and B are liable in damages to buyer.)

90. (1988) 1 Land LR 429 (431) (Punj).

91. AIR 1957 Andh Pra 307 (329) ILR (1955) Andh 170 (DB).

of the deceased undischarged at his death.(92) The words 'legal representative' would include heirs at law whether they take by succession or by survivorship, a universal legatee and, in some cases, a person in *de facto* possession of the entire estate(93) but not a person who is in possession of a part of the property of the deceased vendor as a legatee from his universal legatees (94) See also the undermentioned cases.(95)

Sale of several items of properties — Defect of title with regard to some — Effect.

Where several items of properties are sold at one price under a sale deed and some of those items are subsequently found to have been subject to a charge the purchaser as regards those items is entitled to have the contract of sale rescinded and get damages for its breach and need not surrender the items with regard to which there is no such defect (96)

Several vendees taking under single sale deed as tenants-in-common — Covenant is several.

Where two vendees take under a single sale deed as tenants-in-common, the covenants entered into with the vendor are, in the absence of a contract to the contrary several A suit to enforce the covenant can be brought by any vendee without making the other a party to the suit (97)

Contract to the contrary.

The implied covenant for title under this paragraph may be negatived by a contract to the contrary (98) Where there is a covenant in the sale deed that the seller shall not be liable for any defect of title in the property transferred, it will be a contract to the contrary and the statutory covenant will not apply (99) But unless a contract between the parties is *inconsistent* with the statutory covenant for title, it canot be considered to be a contract to the contrary (100) Thus a clause in the sale deed that the seller had not created any incumbrances on the property does not exclude the statutory covenant for title (101) An express warranty of title and possession is not necessarily inconsistent with the statutory covenant under this paragraph and is therefore not a contract to the

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92. AIR 1961 Andh Pra 29 (30)

93. AIR 1961 Andh Pra 29 (31)

94. AIR 1961 Andh Pra 29 (31)

95. AIR 1959 Raj 254 (255) ILR (1958) 8 Raj 850 (Sale of ancestral property by Hindu father — Not for legal necessity or family benefit — Sale set aside at the instance of son — Son not liable to pay back the consideration as father's debt) ** AIR 1952 Punj 298 (299) (DB) (A sale deed executed by A and B showed that the real seller was A and B only had a right of repurchase — The concluding portion of the deed was — we the vendors i e I the executant No 1 will be answerable, if by any reason the property or part thereof goes out of possession of the vendee — B was executant No 1 — The whole tenor of the deed showed that both A and B were answerable if the vendee in any way had to part with property sold — It was held that under S 55 both A and B were answerable if it was found that the vendors had no title to the property and if by that reason the vendee had to suffer)

96. AIR 1945 Mad 205 (206, 207).

97. (1904) 15 Mad LJ 396 (399) (DB)

98. AIR 1962 Andh Pra 192 (195) (DB) (Covenant can be excluded only by an express contract) ** AIR 1960 All 367 (368) ILR (1959) 2 All 521 (DB) ** AIR 1957 Andh Pra 307 (325) ILR (1950) Andh 170 (DB) (Per Chandra Reddi J and Subba Rao, C J Umamaheswaram, J contra) ** AIR 1950 Nag 229 (231) ILR (1950) Nag 467 (Implied covenant cannot be got rid of except by clear and unambiguous expressions) ** AIR 1927 Sind 120 (122) 19 Sind LR 337 ** AIR 1920 Mad 634 (635) (DB)

99. (1907) 30 Mad 284 (286) (DB)

100. See Note 22.

101. AIR 1926 Mad 255 (256) ** (1910) 8 Ind Cas 91 (95) (DB) (Cal) (Clause in the deed that if damage was sustained for any other cause vendor would not be responsible — Clause held sufficient to negative liability.)

contrary.(**102**) A stipulation that if the buyer lost possession of any portion of the property he was entitled to rescind the contract and sue for the consideration,(**103**) or a stipulation that if any legal or other defect in title is found in the future, the seller will be liable for the same,(**104**) or a stipulation that the heirs and reversioners of the seller would have no objection and if they claimed the land, the seller would pay damages, price and costs and take back the land,(**105**) or a stipulation that if any dispute arose through the seller in respect of the land, he would get it settled,(**106**) is not a contract to the contrary excluding the covenant for title. A contract to the contrary cannot be deduced from the mere fact that the buyer was aware of the defect in title (**107**) Where a mortgagee with a power of sale enters into a contract for the sale of the mortgaged property, but before the execution of the conveyance the mortgage is redeemed by the mortgagor, there is no breach of covenant for title by the mortgagee and he is not liable for damages for any such breach He is only liable to return the earnest money. The fact that his agreement provided that he would make out a marketable title does not mean that the mortgagor would not redeem the property.(**108**)

A contract excluding the covenant for title implied by this paragraph must be embodied in the deed itself, and an oral agreement to that effect is not admissible in evidence under S. 92 of the Evidence Act.(**109**)

The benefit of an implied covenant for title may be *waived* by the buyer, who cannot, after such waiver, take advantage of it (**110**) But the waiver, implied in the act of the vendee in paying

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102. AIR 1925 All 704 (705) (Express stipulation as to encumbrances does not exclude vendor's liability to discharge undisclosed encumbrance.)

[**See also** (1929) 120 Ind Cas 163 (164) (Lah).]

103. AIR 1960 All 367 (368) ILR (1959) 2 All 521 ** AIR 1933 All 203 (205) (DB) ** AIR 1932 All 553 (554) ** AIR 1932 All 224 (226) (DB).

[**See also** AIR 1926 Lah 182 (182) (Vendor guaranteeing peaceful enjoyment — Clause not confined to any present defect of title Property lost by pre-emption — Vendor held liable to make good the loss) ** (1912) 15 Ind Cas 334 (334) (Cal) (Attachment of property sold — **Held**, there was no dispossession) ** 1910 Mad WN 502 (502) (DB). (A condition in a sale deed that if the purchaser be dispossessed by Government the vendor will refund the purchase money is lawful)]

104. AIR 1961 Pat 11 (14) (Stipulation is only an additional safeguard) ** AIR 1961 Raj 196 (202) ILR (1960) 10 Raj 1153 (Stipulation that if any trouble arises later on with respect to vendee's title, vendor would make good the loss — Not a contract to the contrary.) ** AIR 1959 Raj 254 (255) ILR (1958) 8 Raj 850 (Sale by Hindu father — Express stipulation to pay back consideration if sale is set aside — Does not exclude statutory liability.)

105. AIR 1923 Lah 590 (591) (DB).

[**See also** (1931) 132 Ind Cas 802 (803) (All) (Provision in the sale deed for damages in case of breach — Vendee was held not entitled to claim costs of litigation in protecting his title)]

106. AIR 1957 Andh Pra 307 (326) ILR (1955) Andhra 170 (DB) (If any disputes arise I (seller) shall settle them at my expenses -- Held not a contract to the contrary.) ** AIR 1915 Mad 689 (690).

107. AIR 1957 Andh Pra 307 (325) ILR (1955) Andh 170 (DB) (Per Chandra Reddy, J. and Subbarao, C J) ** **AIR 1918 Mad 1315 (1319) : 40 Mad 338 (FB).**

108. AIR 1949 Bom 154 (156) (DB).

109. AIR 1957 Andh Pra 307 (325) ILR (1955) Andh 170 (DB) (Per Chandra Reddy, J and Subba Rao, C J , Umamaheswaram, J contra — Clause to contrary must be in clear and definite terms — Clause in deed "if in respect of this property any disputes arise from anyone I (Seller) shall settle them at my own expense," held vague and not sufficient to constitute contract to the contrary) ** AIR 1930 All 771 (774) 52 All 604 (DB).

110. AIR 1957 Andh Pra 307 (326) ILR (1955) Andh 170 (DB). (It was held that taking of possession of property which was given under the terms of the document and subsequent conduct of vendee namely payment of sums of money towards balance of price in the

two sums towards the balance of the price after taking possession under the terms of the document will not refer to an encumbrance removable by the vendor (111)

The mere refusal on the part of the vendor to give a warranty of title does not disentitle the purchaser to a decree for specific performance in terms of the agreement.(112) As to the effect of the term in the agreement for sale that the agreement was 'subject to the approval of title by the purchaser's lawyer see the undermentioned cases.(113)

10. Delivery of documents of title — Paragraph 3.

The title deeds for the property sold belong to the buyer as an *incident of the property sold*, though not granted by express words (1) He is entitled to every deed forming a step in his title in such a shape that he can, if necessary, give it in evidence (2) He is not bound to complete the contract until the title deeds are handed over, unless it is shown that there is some difficulty as to title which prevents the seller from handing them over (3)

If a purchaser does not insist at the time of sale on delivery of title deeds which were with the prior unregistered mortgagee he is guilty of gross negligence and cannot be said to be without notice of prior mortgage.(4)

Where the mortgagee sells the mortgage property under a power of sale which he has under S. 69 of the Transfer of Property Act, the mortgage deed is a document of title and must be handed over to the buyer.(5)

The buyer is not entitled to the title unless the *whole* of the purchase money has been paid to the seller. Where the buyer had executed a promissory note to the seller for the price but did not

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circumstances of the case was not such as would amount to a waiver of his rights to require a good title.) ** AIR 1950 EP 74 (76) (DB) (Suit based on breach of express covenant without alleging any defect of title — Vendee cannot fall back on S. 55(2) and take advantage of implied covenant.) ** (1892) 15 Mad 50 (53) (DB) ** (1890) 13 Mad 158 (165) (DB)

[See also AIR 1923 All 169 (169).]

111. AIR 1957 Andh Pra 307 (326) : ILR (1955) Andhra 170

112. AIR 1951 All 93 (118) : ILR (1950) All 1033 (FB) ** AIR 1938 Nag 411 (412) (Agreement on basis of vendor's representation of absolute title — Vendor subsequently raising disputes as to title — Decree for specific performance must be in terms of agreement — Vendor cannot be permitted to introduce a contract to the contrary in the conveyance depriving vendee of the statutory covenant.)

113. AIR 1959 Andh Pra 256 (260, 261) ** AIR 1914 Cal 777 (2) (780) (Held, that the vendee was entitled to get back the earnest money and his solicitor's costs if the solicitor on reasonable grounds disapproved of the title.)

Section 55 — Note 10

1. (1887) 11 Bom 485 (486) (DB) ** (1847) 74 RR 638 (637) 1 Ex 189, Goode v Burton

See also the following cases :

(1842) 174 ER 675 (675) 66 RR 892, Austin v Croome (Person entitled to the inheritance has a right to the possession of the title deeds.) ** (1832) 110 ER 63 (65) 37 RR 374, Harrington v Price ** (1815) 128 ER 936 (937) 4 Camp 121 Hooper v Ramsbottom ** (1801) 126 ER 1379 (1379) 2 Bos and Pul 451, Parry v Frame ** (1572) 76 ER 1 (3) 1 Co Rep 1, Buckhurst Lord v. Fenner.

2. (1881) 50 LJ Ch 463 (464) 17 Ch D 10 (12), Whitting v Loomes (Purchaser from mortgagor can insist to have the mortgage deed sufficiently stamped.)

3. (1898) 67 LJ Ch 218 (220) (1898) 1 Ch 419 (423), In re Duthy and Jason's contract

4. AIR 1970 Mad 226 (228)

5. AIR 1939 Mad 774 (775) (DB).

tender a proper conveyance to him for execution by him under paragraph 1, Clause (d), it was held in a suit by the seller on the promissory note, that the buyer was not entitled to claim that the seller did not give him the title deeds, and that he was consequently and bound to pay the amount due on the note.(6)

Seller retaining part of property.

A owned property *x* over which there was a right of way in favour of the owner of the property *y*. *A* subsequently purchased property *y* and thus extinguished the easement, but subsequently sold property *y* to *B* without the right of easement It was held that *A* could retain the title deeds of property *y* as they related to property *x* also and so far as the easement was concerned.(7) When the seller retains such deeds, he should enter into a covenant with the buyer to produce them whenever necessary.(8)

Sales to different buyers.

The buyer of the lot of a greatest value is, under the proviso, entitled to the possession of the title deeds, and the seller has no right as against him to retain them even though he had covenanted with the earlier buyers of other portions of the property that he would produce the title deeds when required; but, in such a case, according to the English practice, the purchaser of the greatest value must give a covenant to the seller that he will produce the deeds and indemnify the seller against his liability under the covenants in the prior sale deeds (9) A purchased the largest lot in value and extent But *B* purchased several lots whose aggregate value and extent exceeded those of *A*'s lot It was held that *A* was entitled to the custody of title deeds (10) It is the purchaser of the lot greatest *in value* who is entitled to the custody of title deeds.(11) But if there is a condition that the purchaser of the "largest lot" shall have them, that must mean largest in superficial area.(12)

11. Right to rents and profits and interest on purchase money.

(A) Right to rents and profits.

The right to rents and profits of a property is an incident of the right of ownership and passes with the transfer of ownership. Until, therefore, the ownership passes to the buyer, the seller will be entitled to the rents and profits (paragraph 4, Clause (a)) A contract for sale does not transfer a right in rem. The law, therefore, allows the vendor the right of appropriation of rents and profits till there is a proper conveyance of title against payment of price.(1) Where the agreement to sell did not contain any stipulation that vendee was put in possession of property to be sold and the document was silent as to profits and rents, S 55(4)(a) is attracted. Owner is entitled to profits and rents till loss of ownerships (2) But this provision has no application to a case where in anticipation of the transfer of ownership the prospective buyer is put in possession of the property (3) Where an in-

6. AIR 1919 PC 124 (125).
7. (1906) 75 LJ Ch 768 (769) (1995) 2 Ch 640 (642), In re Lehmann and Walker's contract
8. (1854) 65 ER 354 (354) : 2 WR (Eng) 242, Yates v. Plumbe.
9. AIR 1941 Bom 48 (49) · ILR (1941) Bom 55 (DB)
10. (1855) 52 ER 800 (801) : 111 RR 39, Scott v. Jackman
11. (1854) 69 ER 350 (351) : 23 LJ Ch 957, Griffiths v. Hatchard.
12. (1854) 69 ER 350 (351) : 23 LJ Ch 957, Griffiths v. Hatchard.

Section 55 — Note 11

1. 1970 Jab LJ 252 : 1970 MPLJ 80 ** (1992) 3 Ker LJ 186 (206).
2. AIR 1993 Kant 257 (276) : 1992 (3) Kant LJ 207.
3. AIR 1966 Mys 86 (90, 91) ILR (1963) Mys 1109 ** AIR 1957 Andh Pra 34 (36) ILR (1956) Andh 87 (DB) (In such a case there is no completed transfer and, therefore, the statutory rule has no application.)

tending seller of a plot of land who agrees to sell and give possession to the buyer and the latter constructs not the agreed cottage but a house the seller would be entitled to rents and profits that would accrue from the plot of land, but not from the construction raised by the buyer **(4)** After the ownership passes to the buyer the latter is the person entitled to such rents and profits (para 6 Cl (a).**(5)** If by neglect of the seller no rents and profits are received, he will be liable for what he might with reasonable care have received **(6)** Under this Act the contract for sale itself does not pass ownership in the property to the buyer; the ownership is transferred only on the conveyance executed in pursuance of a contract for sale **(7)** But in England a contract for sale of real property makes the purchaser the owner in equity of the estate**(8)** and the seller must hold the property as trustee for the buyer from the date of the contract until the conveyance is completed **(9)** The trusteeship is, however, a qualified trusteeship **(10)** He is as *legal* owner, entitled to the rents and profits of the land in his own right until the moment when the conveyance is completed or ought to be completed From that moment the rents and profits belong to the buyer If a date is fixed in the contract for completion, the right to rents and profits dates from the day so fixed If no date is fixed it dates from the moment when a good title is made out **(11)** The distinction between legal and equitable estate is not applicable in this country where this Act is in force and no question as to the buyer's right to rents and profits can arise under this Act before the contract for sale has been completed by the execution of the conveyance. It cannot be said that the possession of the vendor is wrongful or that he is bound to account to the purchaser for profits till the sale deed is executed in favour of the purchaser The purchaser therefore cannot sue for mesne profits from the date of contract for sale to the date on which he obtains possession **(12)** In the Punjab where the Act is not in force, it has been held on the analogy of the English law that after the contract for sale the seller is the trustee for the buyer of the property and the buyer is the trustee for the seller in respect of the purchase money and that the seller is not entitled to rents and profits after the date fixed in the contract for completing the said.**(13)**

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4. 1974 Rajdhani LR 252 (DB)

5. AIR 1966 Mys 86 (90) ILR (1963) Mys 1109 ** AIR 1957 Andh Pra 960 (961) 1954 (2) Mad LJ (Andh) 11 (13) ** AIR 1923 Pat 206 (DB) (A lien on property for unpaid purchase money does not entitle vendor to retain possession and hence he is liable for mesne profits to vendee.)

   [See also AIR 1967 Cal 390 (402) (A leasing property to B and then transferring it to C B knowing about transfer after some months — B not paying rent either to A or to C — B is not protected by S. 50.)]

6. (1816) 56 ER 245 (247) 2 Mad 28 17 RR 177 ** Acland v Cuming (1852) 10 ER 222 (223) : 3 HLC 565 : 88 RR 212. Birch v. Joy.

   [See however AIR 1927 Rang 134 (135) (Indemnity clause as to title does not guarantee rents — Failure of tenant to pay rent — Remedy of vendee is against tenant and not against vendor.)]

7. AIR 1966 Mys 86 (90) ILR (1963) Mys 1109 (Title passes only when registered deed is executed) ** AIR 1957 Andh Pra 960 (961)

8. AIR 1916 PC 139 (140) : 44 Ind App 15.

9. Halsbury, Laws of England, Vol. XXV, pages 364, 365.

10. Halsbury, Laws of England, Vol. XXV, page 367.

11. (1904) 73 LJ Ch 279 (281) (1904) 1 Ch 464 (469) 90 LT 533 52 WR (Eng) 450 Piews v Samuel ** AIR 1965 Mad 37 (42) : ILR (1964) 1 Mad 691 (DB)

    Topham, new Law of Property, 4th Edition, 1932, pages 353, 354

12. AIR 1957 Andh Pra 960 (961)

13. AIR 1930 Lah 131 (132) (DB)

If the transferee is assigned arrears of rent through a specific agreement between the parties the transferer and transferee, there is no impediment in buyer getting the rent prior to the date of registration of sale deed Agreement to sell in the instant case provided for induction of the tenant on rent by the transferee There being specific contract between the parties, the transferee was entitled to rent for the period prior to execution of sale deed in his favour.(**14**)

(B) Right to interest on purchase money.

The right to interest on the purchase money rests on other considerations than those referred to above Where, on the passing of ownership, delivery of possession has been given to the buyer but he has not paid the purchase money, the act of taking possession will be regarded as an *implied agreement* on the part of the buyer to pay interest on the purchase money from the date on which he took possession.(**15**) and the seller will have a charge on the property in the hands of the buyer not only for the purchase money but also for the interest so payable (para 4, Clause (b)).(**16**) This would appear to rest on the broad principle that it is inequitable in the absence of an express stipulation that either party to a contract of sale should, at one and the same time, enjoy the benefits flowing from possession of the property and those flowing from the possession of the purchase money; the estate and the purchase money are things mutually exclusive (**17**) In *Ratan Lal v. Municipal Commissioner for the City of Bombay*(**18**) the same principle has been stated by their Lordships of the Privy Council as follows :

> "The Board is of opinion that the right to interest depends upon the following broad and clear consideration Unless there be something in the contract of parties which necessarily imports the opposite, the date when one party enters into possession of the property of another is the proper date from which interest on the unpaid price should run On the one hand, the new owner has possession, use and fruits, on the other, the former owner, parting with these, has interest on the price. This is sound in principle and authority fully warrants it · see especially Sir William Grant's judgment in *Fludyer v. Cocker*.(**19**)

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14. 1999 AIHC 4705 (4706) : 1998 (2) MPLJ 489.

15. **AIR 1970 Andh Pra 262 (FB)** ** AIR 1964 Punj 123 (129) · ILR (1964) I Punj 143 (DB) ** (1806) 33 ER 10 (11) : 12 Ves 25, Fludger v. Cocker.

[See AIR 1956 Andh Pra 113 (114) (Pr 9) (Where physical possession is not delivered to the buyer there is justification for awarding interest to seller on purchase money)

[**See also** (1880) 49 LJ Ch 618 (619) · 15 Ch D 122 (124) 43 LT 173 29 WR (Eng) 73, Ballard v Shutt (Taking of possession carries with it the liability to pay interest on purchase money in the absence of any stipulation to the contrary.)]

[**See however** AIR 1930 Nag 32 (32) (NOTE It has been held in this case that this clause gives interest by way of damages — Submitted not correct — This clause by itself does not give any right to interest — See Note 12 · Further it is the implied agreement to pay interest that gives rise to the right.)]

16. AIR 1957 Mad 630 (631) ** AIR 1956 Andh Pra 113 (114) (Where physical possession is not delivered to the buyer there is no justification for awarding interest to the seller on the purchase price) ** AIR 1925 Mad 660 (668). (Seller not entitled to interest under this clause unless ownership has passed to the buyer and possession of the property is delivered to the buyer.)

17. **AIR 1941 PC 114 (118, 119).** (Interest granted on compensation money paid to the vendee.) ** AIR 1957 Andh Pra 34 (36) ILR (1956) Andh 87 (DB) ** AIR 1957 Mad 630 (631) ** AIR 1952 Mad 678 (679) (DB) ** (1950) 2 Mad LJ 773 (774) (DB) ** (1912) 35 Mad 625 (627) (DB).

[**See also** AIR 1925 Mad 660 (668). (Ownership of property had not passed entirely to the buyer — Interest was not payable.)]

18. **AIR 1918 PC 129 (134) : 45 Ind App 233.**

19. (1805) 33 ER 10 (11) : 12 Ves 25 : 8 RR 275.

Where, however, on the passing of ownership no delivery of possession is given to the buyer, and no purchase money is paid by the buyer to the seller, the position under para 4, Cl (b) read with para 6, Cl. (a) is, that the buyer will be entitled to the rents and profits from the seller from the date of the conveyance but the seller will not be entitled to a charge for interest on the unpaid purchase money,(20) as, under para 4, Cl (b) he is declared to have a charge for the interest only from the date of the delivery of possession and not before.

The right of the seller to interest on the purchase money, being one derived from equity, is not absolute, but will depend upon the equities and circumstances of each case,(21) and also may be negatived by a contract either express or implied (22) Thus, the seller cannot claim interest if the non-payment of the purchase money is due to his own default (23) Similarly, where a portion of the consideration money is retained by the purchaser under the express terms of the contract between the parties to be paid to an encumbrancer, the seller will not be entitled to any interest on such money. Thus, in the undermentioned Madras case(24) the property was sold free from encumbrance and a certain amount was retained by the purchaser for payment to the mortgagee The purchaser agreed to pay the sum to the mortgagee with the interest that might accrue in future according to the terms of the mortgage But he did not pay the sum to the mortgagee as provided in the sale deed. The Madras Agriculturists Relief Act having been passed in the meanwhile, the sellers who were agriculturists brought a suit directing the vendees to deposit the sum in their hands at the time of the sale together with interest from the date of sale and for paying out of the amount thus deposited the sum properly payable to the prior incumbrancer on scaling down the debt and the balance to the sellers as the persons entitled thereto In holding that the sellers were entitled to the balance, but not to the interest Patanjali Sastri J delivering the judgment of the Bench observed

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20. AIR 1956 Andh 113 (114) ** AIR 1952 Mad 678 (679) (DB) ** (1950) 2 Mad LJ 773 (774) (DB) ** AIR 1937 Sind 198 (201) 31 Sind LR 151 (DB) (It was however held that as the vendee was awarded *mesne profits* he could not at the same time refuse to pay interest.)

21. AIR 1952 Mad 678 (679) (DB) ** AIR 1933 Rang 40 (402) (Section 55 does not exclude the application of equitable principles) ** 19 2, 35 Mad 625 (627) (DB)

[**See also** (1912) Mad WN 915 (916) (DB) (Contract to pay interest on purchase money if not paid on specified date — Payment delayed owing to vendor's inability to pass clear title — **Held,** interest became payable only from the date on which vendor could give clear title.)]

[**See however** AIR 1933 Oudh 33 (34, 35) 8 Luck 185 (DB) (Right to interest is statutory right and party cannot be deprived of it on equitable considerations)]

22. AIR 1957 Andh Pra 34 (36) : ILR (1956) Andhra 87

23. AIR 1966 Mys 86 (91) ILR (1963) Mys 1109 ** AIR 1957 Andh Pra 34 (36) ILR (1956) Andhra 87 (Vendor not taking consideration amount though offered by purchaser) ** AIR 1930 Lah 568 (571) 11 Lah 587 (DB) (Case not governed by the Act) ** AIR 1921 Mad 498 (503, 504) (DB) (Where a vendor fails to perform his part of the contract and the circumstances are such as to require the purchaser to keep the purchase money lying idle and unproductive or at least to justify him in doing so the vendor will not be entitled to interest) ** AIR 1918 Oudh 398 (402) 21 Oudh Cas 234 (DB) ** AIR 1918 Mad 716 (717) (DB). (Per Spencer, J.)

[**See also** (1803) 32 ER 309 (310) 8 Ves 146 7 RR 7 Powell v Martyr (In this case money was lying idle without interest to the knowledge of the vendor)]

[**But see** 1893 Bom PJ 349 (DB).]

24. AIR 1943 Mad 482 (486, 487) ILR (1943) Mad 885 (DB)

[**See also** AIR 1953 Mad 370 (371) (DB) (Vendor however held could not demand refund of balance of amount that would remain, after paying off mortgage amount as reduced when vendee had actually paid more than amount deposited towards the principal and also interest.)]

"It is to be observed that both under the terms of the sale deed and under S 55(b) of the Transfer of Property Act, the amount retained by the appellants out of the purchase money for payment to the mortgagee could not be and was not claimed by the respondents, as the property had to be cleared of the encumbrance There was thus no wrongful withholding of money payable to the respondents, nor did the latter suffer any damage by reason of the appellants failure to pay the amount to the mortgagee, according to the stipulation in the sale deed Indeed the delay in payment of the amount has benefited the respondents by reason of Act IV of 1938 having come into force, as they would not otherwise be entitled to put forward their present claim There is thus no legal basis for the respondents claim to interest on the sum reserved with the appellants for payment to the mortgagee It was suggested that interest could be awarded under S 55(4)(b) of the Transfer of Property Act, which provides for a charge on the property sold for the purchase money or any part thereof remaining unpaid and for interest on such amount or part from the date on which possession has been delivered But this general provision clearly pre-supposes that the purchase money or part thereof remaining unpaid is payable to the seller and can have no application to a case where the buyer is entitled and allowed to retain out of the purchase money the amount of an encumbrance on the property for payment to the person entitled thereto"

The fact that the income from the land given in possession of the buyer is less than the interest on the purchase money cannot be, in itself, a circumstance to negative the claim for interest.(25)

Where *before* the ownership has passed to the buyer the latter has paid the purchase money but the seller has not delivered the property to him, and the contract goes off for no default of the buyer, the position of the buyer will be that of a person who has paid money to another not intending to do so gratuitously, the benefit of which is enjoyed by that other, and as such he will, under S 70 of the Contract Act, be entitled to compensation from the seller in addition to the purchase money If interest is awarded as such compensation the buyer will be entitled to the charge on the property for such interest also. (Para 6, Cl. (b)).

Where *before* the owners, has passed to the buyer, the seller has delivered the property but the buyer has not paid the purchase money the seller would, as stated in the beginning of this Note, be entitled to the *rents and profits* of the property until the date of conveyance. It has, however, been held in the undermentioned cases(26) that in such cases the seller would be entitled to *interest* on the purchase money It is submitted that this view is not correct. The seller is not entitled to the purchase money until the date of the conveyance and cannot, therefore, get any interest on it.

The seller is entitled to the rents and profits of the property till the ownership thereof passes to the buyer In law, a transferee cannot claim that as corpus has been transferred to him, the rent accrued prior to the transfer shall also be deemed to have been transferred. In the instant case, the agreement of sale *inter alia* provided for induction of tenant by the buyer There being specific contract between the buyer and the vendor the buyer shall be entitled to rent prior to registration of the sale deed.(27)

See also Note 12

11-A. Seller's right to rent and profits — Paragraph 4, Clause (a).

Mere agreement to sell does not confer any title of interest to purchaser A tenant who enters into agreement to purchase rented premises is liable to pay rent to the owner, since even after execution of agreement to sell, the title continues to vest in owner (1)

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25. AIR 1957 Andh Pra 34 (36) : ILR (1956) Andhra 87 (DB)

26. AIR 1966 Mys 86 (91) ILR (1963) Mys 1109 (Vendee put in possession — Purchase price not fully paid — Circumstance that vendor could not remove doubt over his title not sufficient to relieve vendee from liability to pay interest.) ** AIR 1957 Andh Pra 34 (36) . ILR (1956) Andhra 87 (DB) (Principle of implied agreement applied.) ** AIR 1933 Mad 844 (845, 846) ** AIR 1922 Bom 186 (187) 46 Bom 195 (DB) ** 1893 Bom PJ 349 (DB)

27. 1999 AIHC 4705 (4706) : 1998 (2) MPLJ 439.

Section 55 — Note 11-A

1. AIR 2002 Kant 416 (422) : 2002 AIR - Kant HCR 2443

Where the tenant already in possession of the property entered into agreement with landlord to purchase that property but his suit for specific performance was dismissed the relationship of landlord and tenant continued between them and the tenant could be evicted under the relevant Rent Control Act on his committing default in payment of rent (2)

12. Seller's charge for purchase money — Paragraph 4, Clause (b).

This clause enacts that where the ownership of the property has passed to the buyer before payment of the whole of the purchase money the seller is entitled to a charge on the property in the hands of the buyer for the amount of the purchase money and for interest thereon from the date of the delivery of possession (1) It does not lay down any new rule of law but is merely a statutory recognition of the principles of the English doctrine of equitable lien that had been applied in this country even before the passing of this Act (2) The principle of the English equitable lien was stated by Baron Rolfe in *Goode v. Burton*.(3) as follows :

> "The equitable right of the vendor is inaccurately described by the word 'lien' if that word is to be understood in its legal acceptation which always implies possession by the party setting up the lien of the thing on which it exists the legal principle in such case being that the party having rights which in good conscience he may enforce and which are more or less connected with the thing of which he has possession shall not be compelled to part with his possession till those rights are satisfied But the vendor's right in *equity* is altogether independent of his possession of the land

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2. 2002 AIR - Kant HCR 1007 (1017) 2002 AIHC 1905 ILR (2002) 1 Kant 1694

Section 55 — Note 12

1. **AIR 1936 PC 204 (206) · 63 Ind App 304** ** ILR (1978) Him Pra 632 (642) ** AIR 1960 Ker 234 (The charge available to the vendor for unpaid portion of the purchase money effected in erstwhile Cochin State prior to the extension of the T P Act to Cochin continues under the Cochin T P Act) ** AIR 1967 Andh Pra 708 (1965) 2 Andh WR 401 (Seller not entitled to get back possession of the sold property in default of payment of purchase money) ** AIR 1967 Ker 195 (196 ** 1996 Ker LT 173 (174) (Sale deed containing provision for payment of balance of purchase money remaining unpaid after discharge of not only mortgage money on property but also other personal debts of vendors — Suit for recovery of balance of unpaid purchase money and decree obtained creating a charge on property — Assignment of decree — Decree debt held a liability for which a charge was provided under S 55(4)(b)) ** AIR 1956 Andh Pra 113 (114) ** ILR (1950) 2 Cal 573 (575 to 577) (DB) ** AIR 1949 All 555 (557) ILR (1949) All 692 (DB) (Sale deed executed in respect of certain village for fixed consideration — Along with sale deed agreement executed providing that if as result of settlement proceedings income of village increased above Rs 1 500 vendee would be liable to pay certain extra amount towards sale price of property — Extra amount being part of purchase money held would be deemed to be charge on property sold)

   [See also (1910) 6 Ind Cas 117 (117) (All) (DB) (Vendor can recover consideration but cannot ignore transaction and claim property back) ** 1907 Pun ReNo 148 p 687 (691 692) (DB) ** (1936) 165 Ind Cas 352 (352) (DB) (All) ** **AIR 1942 Lah 275 (278) ILR (1943) Lah 17 (FB).** (On completion of sale vendor automatically acquires a charge on the property sold for unpaid purchase money) ** AIR 1916 Mad 1215 (1217) (DB) (Suit for cancellation of conveyance for failure of consideration — **Held,** if intention was to transfer title, relief should not be granted — Charge for purchase money can only be claimed) ** (1837) 28 LT 547 (547) 21 WR (Eng) 819 Williams v Aylesbury and Buckingham Ry ** (1886) 35 WR (Eng) 180 (184) 33 Ch D 571 Aligood v Merryhent and Darlington Ry. Co.]

2. **AIR 1942 Lah 275 (278) · ILR (1943) Lah 17 (FB)** ** AIR 1926 Oudh 81 (86 87) 1 Luck 7 (DB) ** (1906) 9 Oudh Cas 284 (286) ** (1865) 2 Suth WR 10 (10) (DB) ** (1878) 3 Bom 172 (174) (DB) ** (1866) 3 Bom HCR (AC) 102 (103) (DB)

3. **(1847) 74 RR 633 (637) : 1 Ex 189 : 16 LJ Ex 309 : 11 Jur 851**

or the deeds He has what, though called a lien, is in truth an *equitable charge* on the land, and which in general he may enforce in the same way as any other equitable mortgage."

In one respect, however, there is a difference between the vendor's equitable lien in England and the seller's charge under this paragraph; the former which is a creation of Courts of Equity can be modified according to the circumstances of the case by the Courts of Equity, while the statutory charge under this paragraph is rigorous and inflexible.(4)

Owelty which represents the unpaid price of the excess land taken from one co-sharer and given to another in partition, represents a liability for which the charge under this clause ensures.(5)

It is clear from what has been stated above that the vendor's equitable lien in England and the seller's charge under this Act are both non-possessory; that is, the charge is one which will not entitle the seller to retain possession of the property as against the buyer, but it will merely give him a right to enforce the charge by suit (6) There is a difference of opinion as to whether, in a suit for possession by the buyer, the Court can impose a condition in the decree that the unpaid purchase money should be paid before possession is delivered to the plaintiff. On the one hand it has been held that the seller's charge being non-possessory such a condition cannot be imposed.(7) though the Court can, in order to avoid multiplicity of suits, incorporate the statutory charge in the decree and order that it should be paid within a particular times (8) A contrary view that a condition can be imposed for payment of purchase money before recovery of possession by the buyer has been held in other cases.(9) It is submitted that the latter view is not correct In those provinces to which this

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4. **(1904) 31 Cal 57 (72) : 30 Ind App 238 (PC)** ** AIR 1939 Nag 210 (212) ILR (1939) Nag 636 (And it has the same force as if it is created by act of parties) ** AIR 1939 Mad 590 (591) (Charge is not lost by taking promissory note for unpaid balance.) ** AIR 1932 Bom 247 (248) : 56 Bom 556 (DB) ** AIR 1918 Mad 82 (83) (DB) (Under English law equitable estate does not pass unless the purchase money has been completely paid off.)

   [See AIR 1927 Lah 103 (103) : 8 Lah 257 (DB). (Act not being extended to the Punjab, general principles of equity were applied.)]

5. **AIR 1962 Ker 85 (87, 88) : ILR (1961) 2 Ker 613 (FB).** (It being covered by S 2(c)(vii) is not a debt within Kerala Agriculturists Debt Relief Act, 1958)

6. AIR 1953 Mad 821 (821) (DB) ** AIR 1939 Nag 210 (212) · ILR (1939) Nag 636 ** AIR 1932 Bom 247 (248, 252) 56 Bom 566 (DB) (Per Barlee, J.— The observation of Patkar, J., that the English equitable lien is possessory is not correct) ** AIR 1923 Pat 205 (206) (DB) ** AIR 1920 Mad 164 (164) : 43 Mad 712 (DB) ** (1908) 30 All 125 (127) (DB) Halsbury, Laws of England, Volume XIX, pages 14, 15 ** (1907) 30 Mad 524 (525) (DB).

   [But see (1868) 10 Suth WR 194 (194) (DB) (Vendor may refuse to give delivery until consideration is paid but having given delivery he cannot retake possession.)]

7. AIR 1947 Mad 92 (94) · ILR (1947) Mad 397 (DB) ** AIR 1944 Mad 124 (124, 125) ** AIR 1920 Mad 164 (164) · 43 Mad 712 (DB) ** (1909) 5 MLT 205 (206) (DB)

   [See (1866) 1 Agra 160 (161) (DB).]

8. AIR 1956 Hyd 114 (118) · ILR (1956) Hyd 328 (DB). (Vendor's lien for purchase money may be recognised and enforced in the same action.) ** AIR 1952 Sau 72 (73, 74) ** AIR 1939 Nag 210 (212, 213) : ILR (1939) Nag 636. (A 1932 Bom 247, followed) ** AIR 1937 Sind 198 (200) . 31 Sind LR 150 (DB) (AIR 1932 Bom 247, followed.) ** AIR 1932 Bom 247 (251) ; 56 Bom 556 (DB) (On Letters Patent Appeal from AIR 1929 Bom 60) ** (1911) 34 Mad 543 (544) (DB). (It is not open to Courts of this country to introduce and enforce equities modifying the provisions of statute law The law of India, speaking broadly, knows nothing of the distinction between legal and equitable property, in the sense in which it was administered by the Court of Chancery in England.)

9. AIR 1965 Pat 29 (32) ** (1963) 1 Mys LJ 592 (596) ** 1951 All LJ 750 (751) (DB) ** 1950 Trav-Co LR 477 (483) (DB) ** (1915) 27 Ind Cas 336 (337) (Mad) (DB) ** AIR

Court does not apply, it has been held that there being no statutory provision that the buyer must get possession of the property sold to him whether he has paid the price or not, the Court can impose such a condition of grounds of justice, equity and good conscience **(10)**

Invalid or oral sale

The provision of S. 55(4)(b) creating a statutory charge in favour of the vendor do not apply to the case of an invalid sale or an oral sale.**(11)**

Extent of the charge.

The charge is not only for the unpaid purchase-money but also for the *interest* on such amount from the date on which possession has been delivered **(12)** The words "from the date on which possession has been delivered" did not occur in the paragraph before the amending Act of 1929 The reasons for adding this phrase have been stated by the Special Committee as follows :

> "This clause is also silent as to the date from which the interest on the unpaid purchase money should run It seems fair that it should run from the date when the buyer is put in possession

This paragraph, by itself, does not give the seller any right to interest on the purchase money Its object is to give the seller a charge on the property for the unpaid purchase money and for the interest also *assuming that interest is payable* **(13)** Buyer was in possession of property as tenant He had paid part of the total consideration. Balance to be paid by way of rent He discontinued paying rent. Suit for specific performance was decreed subject to condition that buyer will pay interest on unpaid consideration, since he had use of money besides being in possession of the property.**(14)**

Section 55(4)(b) and S 55(5)(b) should be read together and there is agency coupled with interest and since the plaintiff is not entitled to amount claimed by him as due from defendant there is no equity in his favour to award interest The plaintiff has not proved that he suffered damages

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1945 All 139 (139) ILR (1945) All 183 (DB) (Section does not exclude application of principles of equity — Vendor is not confined to his statutory lien for unpaid purchase money ** AIR 1933 Rang 401 (402) (Section 55 does not exclude application of equitable principles) ** AIR 1918 Low Bur 26 (27) (DB) ** AIR 1914 Cal 239 (241) (DB) ** (1908) 30 All 125 (127) (DB) ** (1904) 27 Mad 28 (30) (DB) (Vendor can retain possession until purchase money is paid) ** (1890) 4 CPLR 92 (93 94) ** (1889) 11 All 244 (252) (DB) ** (1878) 2 Bom 547 (549) (DB) ** (1910) 6 Nag LR 98 (102)

10. AIR 1944 Pesh 9 (10) (DB) (The Transfer of Property Act does not apply to the Punjab and the North-West Frontier Province — The principles underlying S 55 are used as guide or as principles of equity, justice and good conscience in those provinces)

11. AIR 1985 Andh Pra 200 1985 (1) APLJ (HC) 33 (Oral sale — Vendee acquired title by adverse possession — Vendor not entitled to claim charge for unpaid purchase money) ** (1989) 1 Andh LT 389 (398).

12. AIR 1964 Punj 123 (129) ILR (1964) 1 Punj 143 (DB) ** AIR 1956 Andh Pra 113 (114) ** ILR (1950) 2 Cal 573 (575, 577) (DB) ** (1950) 2 Mad LJ (774) (DB) ** 1913 Pun Re No 39 (Though the Act is not extended to the Punjab, the principle was applied) ** (1890) 13 Mad 158 (165) (DB).

[**See also** 1960 Ker LT 10 (11) (DB) (An express provision in sale deed creating charge on property sold for interest on unpaid purchase money — Not a contract contrary to S 55)]

13. 1912) 35 Mad 625 (627) (DB).

[**See also** AIR 1943 Mad 482 (487) ** ILR (1943) Mad 885 (DB) (Section 55(4)(b) which provides for charge on property sold for purchase money or any part thereof and for interest on such amount, presupposes that the purchase money remaining unpaid is payable to the seller and can have no application where the buyer is entitled and allowed to retain out of the purchase money the amount of an encumbrance on the property for pament to the person entitled thereto.)]

14. AIR 1990 Andh Pra 72 (75) : (1989) 2 Andh LT 449

due to non-payment of money.(15)

As to when the seller gets a right to interest see Note 11

A decree for profits passed on account of sharers' liability to account for same to the other sharers cannot be characterised as unpaid purchase money due from a vendee of an immovable property Thus liability of sharer for which a charge is provided under this section is not a debt coming within purview of S 2(3)(g) of Kerala Debt Relief Act 1977 (16)

Ownership must have passed before the payment of purchase money.

The paragraph will not apply unless the ownership of the property has passed to the buyer (17) Nor will it apply where ownership has passed to the buyer *after* the payment of purchase money A sold certain property to B for 935 rupees directing B to pay 435 rupees to C D pre-empted B by depositing 935 rupees into the Court This was drawn by B who did not, however, pay C, who therefore recovered it from A A thereupon sued D to enforce his charge It was held that D got the property only after he had paid the purchase money and this clause did not apply (18)

There was a specific condition in a sale deed that entire amount of consideration would be paid only on delivery of possession of entire property However, possession of only a part of the property was given to purchase in 1984 and possession of remaining part was given in 1986 Therefore S 55(4)(b) wold not be attracted and the vendor could not claim charge against the sold property (19) Since there was no term for payment of interest on unpaid amount of purchase money in agreement for purchase of property, and since possession had not been delivered to buyer, the said interest would not payable to seller by the buyer (20)

Where the seller himself is not entitled to the property sold at the time of the sale, he cannot have a charge on such property A agreed to purchase property from B and, before completion of the purchase sold the property to C and asked B to execute the conveyance in favour of C B, executed the conveyance to C who did not however, pay the purchase money to A It was held that A had no charge on the property in C's hands.(21)

Transfer of charge.

The charge given by this paragraph to the seller is an interest in immovable property(22) and is transferable as such (23) It may be attached by a creditor of the seller in execution of a decree against the latter.(24)

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15. 2000 (3) Mad LW 412 (419).

16. ILR (1979) 2 Ker 166 (172).

17. AIR 1939 Rang 46 (47) (DB) ** AIR 1925 Mad 660 (668)

18. AIR 1914 All 349 (349) (DB).

19. 1996 AIHC 5139 (5150) (Him Pra).

20. (1977) 13 Delhi LT 369 (376).

21. AIR 1941 Mad 128 (129) (DB)

22. AIR 1934 Mad 615 (616) (DB) (Confirming AIR 1933 Mad 181 on Letters Patent Appeal.)

23. **AIR 1918 Mad 1045 (1048) : 39 Mad 997 (FB)** ** AIR 1938 Mad 457 (458) (DB) ** AIR 1934 Lah 348 (349) (DB) ** AIR 1931 Nag 89 (90) 27 Nag LR 288 ** AIR 1927 Nag 332 (333) ** AIR 1918 Mad 1012 (1014) (DB) (It also requires a proper conveyance) ** AIR 1915 Cal 543 (544) : 42 Cal 849 (DB).

    Also see Section 100, Note 19.

24. AIR 1941 Bom 198 (200) ILR (1941) Bom 290 (DB) (Property was only agreed to be sold before attachment — Same rule applies) ** AIR 1937 Lah 608 (609) (Vendor of immovable property leaving purchase money with vendee for payment to his creditors —

Enforceability against transferees.

The words "any transferee without consideration or any transferee with notice of the non-payment" were inserted in this paragraph by the amending Act of 1929. Even before the amendment, it had been held that the seller could always follow the property in the hands of the transferee with notice of non-payment (**25**) The Madras High Court(**26**) went further and held that the charge was enforceable even against a transferee without notice of the non-payment. The amendment gives statutory recognition to the former view(**27**) and it is now clear that the charge can be enforced against a transferee from the buyer with notice of the non-payment(**28**) but cannot be enforced against a *bona fide* purchaser without notice (**29**)

If the property which was the subject-matter of contract of sale vests in the State Govt. the unpaid vendor's lien is not enforceable against the Government (**30**)

Several buyers.

Where property is sold to several purchasers in several shares, the seller has a lien for the whole of unpaid purchase money on the whole of the property in the hands of the buyers. He is not concerned with the proportion of the purchase money paid by each of them (**31**)

Exclusion of charge.

A charge for unpaid purchase money pre supposes that *purchase money* in whole or in part is payable by the buyer to the seller. Where the consideration for transfer is a *covenant* to pay a sum of money no purchase money is due and consequently the seller's charge for purchase money does not arise. But where the consideration is a *sum of money* which the buyer covenants to pay, that sum is purchase money and consequently the seller will have a charge therefor under this clause (**32**)

Vendee failing to pay it within reasonable time. — Vendor is entitled to recover it as debt as he has lien on property for unpaid purchase money. — Such money in hands of vendee is liable to attachment in execution of decree against vendor.) ** AIR 1955 Mad 822 (823) : 59 Mad 1 (DB) ** AIR 1926 Mad 903 (903) ** (1909) 31 All 443 (444) (Though the property itself cannot be proceeded against.)

But the creditor cannot directly enforce the charge — see the following case ** (1883) 9 Cal 167 (172) (SB).

25. AIR 1931 Rang 139 (143) : 9 Rang 56 (DB) ** AIR 1926 Oudh 81 (87) : 1 Luck 7 (DB) ** AIR 1921 All 54 (54) : 43 All 314 (DB) ** AIR 1916 All 264 (265) : 38 All 254 (DB) ** 1883 Pun Re No. 66, p. 194 (196) (DB)

[**See however** (1865) 3 Suth WR 138 (139) (DB) : Persons who allow property to leave their possession before the purchase money is completely paid cannot certainly recover from third parties who are purchasers in good faith and for valuable consideration even if these persons should be held to have had notice of the amount of the consideration money still remaining unpaid.)]

26. AIR 1937 Mad 92 (93)

27. AIR 1931 Rang 139 (143) : 9 Rang 56 (DB)

28. ILR (1948) 1 Cal 492 (498) ** AIR 1941 Lah 10 (15) : ILR (1941) Lah 568 (DB) (Letters Patent Appeal from AIR 1939 Lah 273) ** AIR 1939 Mad 876 (877) ** AIR 1932 Oudh 88 (90) : 7 Luck 405 (DB) ** (1808) 33 ER 778 (785) : 15 Ves 329 : 10 RR 85. Mackreth v Symmons.

29. AIR 1965 Ker 28 (29) ** AIR 1960 Punj 296 (297) (DB) ** ILR (1950) 2 Cal 573 (575, 577) (DB) ** AIR 1922 Mad 335 (336) (DB) ** (1882) 51 LJ Ch 281 (287, 288) : 21 Ch D 685 : 46 LT 83 : 30 WR (Eng) 402. Kettlewell v. Watson.

30. ILR (1978) Him Pra 632 (640) (DB)

31. AIR 1934 Lah 348 (349) (DB).

32. AIR 1954 Mad 508 (512) : ILR (1954) Mad 484 (DB).

Where for instance A sells property to B in consideration of 1,000 rupees payable in a particular way, the consideration is *the sum of money* and not the undertaking by the buyer to pay it in a particular way; consequently, the seller will have a charge for that amount. On the other hand, where the consideration for the sale is a covenant by the buyer, such as a covenant to pay an annuity to the seller,(33) or a promise to allot certain shares of a company in future,(34) there is no purchase money due, the consideration for the sale being the *covenant* itself; consequently, no question of any charge for unpaid purchase money arises. The distinction between the two classes of cases is referred to by their Lordship of the Privy Council in *Webb v. Macpherson*(35) as follows :

> "It was said that no charge ever arose, because the purchase was not in consideration of a sum of money, part of which was paid down and the payment of the balance of which was deferred, but it was a purchase in consideration of a particular covenant. There is no doubt, both on principle and authority, that a conveyance or sale in consideration of a covenant to pay a sum of money in the future is different from a sale in consideration of money which the purchaser covenants to pay. The distinction may seem fine, but it is a real distinction, and it is one which, if made out, might have had the effect which the High Court have given to it."

The question whether a separate agreement for payment of the purchase money is to be in addition to or in *substitution* of any charge, so that the sale can be considered to be one in consideration of a covenant depends upon the intention of the parties, to be gathered from the document itself and the surrounding circumstances.(36)

Even where consideration for a sale is a *sum of money* the seller's charge may still be excluded by a "contract to the contrary."(37) In the case of *Webb v. Macpherson*,(38) above referred to, where the sale was in consideration of a sum of money which the buyer undertook to pay by instalments, their Lordships of the Privy Council held that such undertaking was not a "contract to the contrary" within the meaning of this section. Their Lordships observed as follows :

> ". . . . . .the Transfer of Property Act gives a statutory charge upon the estate to an unpaid vendor unless it be excluded by contract . . You have to find something, either express contract, or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the statute In their Lordships' opinion there is no ground whatever for saying that the charge is excluded by a mere personal contract to defer payment of a portion of purchase money, or to take the purchase money by instalments, nor is it, in their Lordships' opinion, excluded by any contract, covenant, or agreement, with respect to the purchase money which is not

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33. (1830) 57 ER 1085 (1086) 3 Sim 499 30 RR 193, Clarke v Royle ** (1843) 60 ER 157 (159) 13 Sim 406 60 RR 371, Buckland v Pocknell ** (1862) 54 ER 1172 (1173) : 31 Beav 346 135 RR 461, Collins v Collins ** (1823) 57 ER 174 (178) 1 Sim and S 434, Winter v Lord Anson ** (1835) 40 ER 250 (253, 254) 3 My and K 635 41 RR 164, Parrot v. Sweetland

34. AIR 1939 Rang 46 (47) (DB) (31 Cal 57 (PC), Followed)

[See also AIR 1927 Lah 103 (104) : 8 Lah 257 (DB).]

35. **(1904) 31 Cal 57 (73) : 30 Ind App 238 (PC).**

[See also 1962 Ker LJ 1242 (1244) (DB) (ILR 31 Cal 57 (PC), **Rel. on.**) ** ILR (1962) 2 Ker 740 (742) (Recital in sale deed that certain amount out of purchase money is reserved as first charge on property sold — It imports personal liability to pay and does not exclude it.) ** ILR (1950) 2 Cal 573 (575, 577) (DB).]

36. AIR 1918 Mad 82 (83) (DB) ** 1883 Pun Re No. 66, page 194 (197) (DB).

[See also (1823) 57 ER 174 (177) 1 Sim and S 434, Winter v Lord Anson.]

37. (1876) 25 WR (Eng) 481 (482) 4 Ch D 562 (565) 46 LJ Ch 554 · 36 LT 343 25 WR (Eng) 481, In re Brentwood Brick and Coal Co ** (1801) 31 ER 1152 (1156), Austen v. Halsey.

38. **(1904) 31 Cal 57 (72) : 30 Ind App 238 (PC).**

inconsistent with the continuance of the charge.(39)

A mere undertaking by the buyer to discharge the debt due to the creditor of the seller from out of money in consideration of which the sale is made is not inconsistent with the existence of the charge and is not "a contract to the contrary" The charge is, therefore, not excluded by such an undertaking.(40) The purchase money in such cases does not lose its character as such by the direction to any another.(41) Nor is the charge excluded merely by the seller accepting a promissory note or other personal undertaking from the buyer of third party.(42) or by a recital that the purchase money is reserved with the buyer in order that he may execute an hypothecation bond for

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39. AIR 1918 Mad 1045 (1047) : 39 Mad 997 (FB).

See also the undermentioned cases :

** **AIR 1942 Lah 275 (278) : ILR (1943) Lah 17 (FB).** (Vendor's charge for unpaid purchase money is not excluded by a mere personal covenant to defer payment or to take it by instalments 31 Cal 57 (PC), **Followed.**) ** AIR 1962 Mad 423 (424) ** AIR 1939 Mad 590 (591) (Accepting interest by the vendor on the promissory note executed for unpaid purchase money does not extinguish his charge) ** AIR 1937 Mad 92 (93) (Statutory charge subsists in spite of the agreement by vendor to accept unpaid purchase money on the happening of certain future event.) ** AIR 1927 Lah 103 (103) 8 Lah 257 (DB) (General principles of equity were applied as the Act is not extended to the Punjab.)

40. AIR 1967 Ker 195 (196) (Stipulation that vendee to discharge mortgage debt of vendor) ** (1948) 27 Pat 898 (907) (DB) ** **AIR 1942 Lah 275 (278) : ILR (1943) Lah 17 (FB).** (Charge subsists even though vendor has directed the amount to be paid to his creditors or other nominees) ** **AIR 1918 Mad 1045 (1048) : 39 Mad 997 (FB). (Overruling** 33 Mad 446 and 10 Ind Cas 98) ** AIR 1939 Mad 876 (877) (Except in a case of privity between the creditor and vendee) ** AIR 1938 Mad 457 (458) (DB) ** AIR 1934 Oudh 240 (242) : 10 Luck 26 (DB) ** AIR 1933 Oudh 33 (34) 8 Luck 185 (DB) (It is immaterial if the vendor has paid his creditors) ** AIR 1921 All 54 (54) 43 All 314 (DB) ** AIR 1920 Mad 385 (385, 386) (DB) (A complete agreement between the purchaser and the vendor's creditors will exclude the charge) ** AIR 1918 Mad 1012 (1014) (DB) ** (1928) 108 Ind Cas 291 (292) (Mad) (AIR 1918 Mad 1045, **Followed.**) ** (1910) 7 Ind Cas 639 (640) (All)

[**But see** (1913) 18 Ind Cas 336 (336) (All) (Referring with approval to 33 Mad 446 which was **Overruled** in AIR 1918 Mad 1045 (FB) ** AIR 1916 Oudh 143 (144, 145) (Follows 33 Mad 446 which was subsequently **Overruled** in AIR 1918 Mad 1045 (FB)

41. AIR 1942 Lah 275 (278) : ILR (1943) Lah 17 (FB). (Fact that the money is, by agreement, made payable at a future date or that the vendor has asked the vendee to pay it to a third person makes no difference It is nonetheless an existing and completed obligation and as regards it, the relationship between the vendor and the vendee is that of a creditor and debtor) ** AIR 1933 Oudh 33 (34) 8 Luck 185 (DB) ** AIR 1942 Bom 61 (70) (DB)

42. AIR 1967 Ker 195 (196) ** AIR 1967 Mad 127 (128 129) (DB) ** AIR 1962 Mad 423 (429) ** 1950 Trav-Co LR 140 (143, 144) (DB) ** AIR 1945 Mad 407 (409) (Deed styled "release deed" by one Hindu coparcener to another conveying share in family property for consideration — Held to be sale — Lien for unpaid purchase money — Right to — Execution of promissory note and decree on note — Lien not excluded) ** AIR 1943 Mad 28 (29) : ILR (1943) Mad 405 (DB) (Buyer executing promissory note kept alive by payments — **Held,** unpaid vendor's lien continues while vendor has an enforceable claim against the buyer in respect of the purchase money) ** AIR 193 Mad 590 (592) (The acceptance of interest under the pro-note would not indicate waiver of the charge)

[**See also** 1936 Mad WN 549 (551) (Endorsement of promissory note taken by vendor for balance of purchase money — Statutory charge not excluded — Charge can be enforced by vendor on getting re-endorsement of note in his favour) ** AIR 1930 Lah 568 (570) 11 Lah 587 (DB) ** AIR 1929 Mad 242 (242 243) (Only part of purchase money paid — Balance agreed to be paid afterwards — Sale is not in consideration merely of covenant to pay and vendor's charge is not lost) ** AIR 1928 Mad 486 (486) (DB) (There was an

that amount in favour of the seller(43) or by a recital that the consideration of money has been received.(44) In the undermentioned case of the Bombay High Court(45) it was held that where the purchaser agreed to pay the purchase money only after redemption of a mortgage on the property, this was a contract to the contrary and no charge arose.

Where a *mortgage* is taken by the seller from the buyer for the purchase money due, and thus a higher security than that afforded by the charge is taken, the inference would be that the charge is excluded or abandoned,(46) though such inference may be rebutted by a proof of an agreement to the contrary (47) In *R.M. A. R. S Chettyar Firm v. Daw Ngwe,*(48) where the seller had taken two promissory notes and a mortgage for the purchase money, it was held that the purchase money was replaced by the notes and the mortgage and that the question of any outstanding purchase money was at once settled; it was no longer purchase money which had not been paid, but was transformed into debts due on a mortgage and on two promissory notes there was, therefore, no question of a charge for outstanding purchase money A contrary view, namely, that the acceptance of a mortgage would not exclude the seller's charge was expressed in the undermentioned cases (49) It is submit-

express stipulation that buyer should not alienate property until pronote was discharged — **Held**, this negatived the intention to abandon charge) ** AIR 1927 Mad 219 (221) : 50 Mad 548 (DB) (AIR 1926 Mad 903 Approved) ** AIR 1927 Lah 103 (104) 8 Lah 257 (DB) ** AIR 1925 Mad 215 (217) (DB) ** AIR 1924 Mad 854 (854) (Vendor's acceptance of bond by vendee to pay purchase money on happening of given event does not exclude vendor's charge for unpaid purchase money) ** AIR 1921 All 74 (75) 43 All 544 (DB) (Agreement to pay in instalments) ** 1883 Pun Re No 66 p 194 (197) (DB) ** (1913) 18 Ind Cas 81 (82) (DB) (Mad) (It makes no difference if pronote was taken even before the execution of conveyance) ** (1911) 11 Ind Cas 890 (891) (DB) (Mad) ** (1813) 35 ER 335 (337) 2 Ves and B 306 13 RR 101, Grant v Mills (Acceptance of bills of exchange is not accepting a security for money but only accepting a mode of payment) ** (1827) 38 ER 658 (660) 3 Russ 488 6 LJ Ch 7 27 RR 171, Winter v Lord Anson ** (1843) 60 ER 157 (159) : 13 Sim 406 : 60 RR 371, **Buckland v. Pocknell.**

[**See however** AIR 1918 Mad 82 (83) (DB) (Promissory notes taken for money — It was held that the consideration was intended to be the covenant under the promissory note and not money)]

43. **(1913) 18 Ind Cas 199 (201) (DB) (Mad).**

44. Halsbury Laws of England, Vol XIX p 15 ** AIR 1926 Oudh 81 (83) 1 Luck 7 (DB) ** **AIR 1916 Oudh 143 (145) ** 1883 Pun Re No. 66, p. 194 (197)**

[**See however AIR 1918 Mad 82 (84) (DB).**]

45. **AIR 1942 Bom 67 (71) (DB).**

46. Halsbury, Laws of England, Vol XIX, page 31 ** AIR 1973 Ker 181 ** AIR 1927 Mad 219 (221) 50 Mad 548 (DB) (Unregistered mortgage does not exclude lien) ** AIR 1919 Nag 109 (111) 15 Nag LR 109 ** (1808) 33 ER 778 (785) 15 Ves 329 10 RR 85, **Macreth v. Symmons.**

[**See also** ILR (1950) 2 Cal 573 (575) (DB). (If it is found that there is a transaction merely to secure the vendor's lien by taking some security or bond under S 55(4)(b), T P Act then the case will not be hit by the Bengal Money-Lenders Act But, if on the other hand, it was really in the nature of an investment, over and above being a security for the unpaid purchase money, then it was a loan under the Bengal Money-Lenders Act)]

47. **Halsbury, Laws of England, Vol. XIX, page 31.**

48. **AIR 1934 Rang 190 (192).**

49. AIR 1951 Trav-Co 39 (40) (DB) (Vendee executing hypothecation bond for balance of purchase money — Additional item included as security — Lien held not lost) ** **AIR 1930 Lah 568 (570) : 11 Lah 587 (DB).**

ted that this view is not correct. Where a mortgage is executed, but is not registered, it is, however, clear that the lien is not excluded.(50)

Where in pursuance of an undertaking by the buyer to pay the creditor of the seller, the buyer enters into an agreement with the creditor and makes himself liable directly to him for the amount, the seller is freed from the liability to pay the creditor, and there is no longer any purchase money payable by the buyer to the seller Consequently, there is no longer any charge for unpaid purchase money (51) In the undermentioned case(52) it was held that the novation between the buyer and the creditor was a "contract to the contrary" and that there was consequently no charge It is submitted that this reasoning is not correct A *subsequent* contract between the buyer and a third party cannot operate as a contract between the *seller* and the *buyer* that no charge should exist

Where it is agreed between *the seller the buyer and a third party* that the buyer should pay the purchase money to the party, and not to the seller, there is no longer any purchase money payable to the seller and consequently there is no charge (53) Similarly where A, the father of B, a minor, sold property to X for 2,600 rupees out of which a sum of 800 rupees was left with the buyer on condition that he should keep it until B attained majority and then pay it over to B, it was held that A had no charge under this clause for any purchase money (54) See also the undermentioned cases.(55)

Extinguishment and revival of charge.

Where at the time of the sale there is a contract to the contrary excluding a charge, the charge does not arise at all, and there is no question of its revival later on (56) But where a charge arises under this clause, but is extinguished subsequently it may, under certain circumstances revive In the undermentioned cases (57) A sold property to B who did not pay a part of the purchase money C pre-empted B and paid the purchase money to A Subsequently, the pre-emption was set aside and A and B for the unpaid purchase money It was held that as soon as C paid the purchase money to A, his charge under this clause was extinguished, and could not be enforced until A refunded to C the money received by him from C It was assumed that on such repayment, the charge would revive in favour of A.

Estoppel.

Where in lieu in payment of balance of consideration under a sale the vendee executes a pronote for the amount in favour of the vendor the vendor's lien cannot be said to be kept alive (58)

Where the seller endorsed upon the sale deed a receipt for the full purchase money and delivered the title deeds to the buyer, and third person relying upon this endorsement took a transfer of

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50. AIR 1927 Mad 219 (221) 50 Mad 548 ** AIR 1920 Mad 152 (152)

51. **AIR 1918 Mad 1045 (1049) : 39 Mad 997 (FB)** ** AIR 1939 Mad 876 (877) ** AIR 1927 Mad 219 (221) 50 Mad 548 (DB) (Third party taking a pronote from vendee) ** (1913) 36 Mad 348 (350) (DB).

52. AIR 1927 Mad 219 (221) : 50 Mad 548 (DB)

53. (1910) 8 Ind Cas 674 (675) (DB) (Lah)

54. AIR 1939 Mad 722 (724) (DB)

55. AIR 1964 Punj 123 (128) ILR (1964) 1 Pun, 143 (DB) (Principles of interpretation of contract to contrary excluding charge for purchase money stated) ** (1948) 27 Pat 898 (914, 915) (DB) (Sale of property subject to usufructuary mortgage and in possession of mortgagee — Amount retained with purchaser to redeem mortgage Amount not payable to vendor — He has no charge for it under Cl. (4)(b).)

56. AIR 1927 Mad 219 (225) : 50 Mad 548 (DB).

57. (1913) 16 Oudh Cas 1 (3).

58. AIR 1972 Ker 164 (165).

the property by way of mortgage, it was held that the seller was estopped under S. 115 of the Evidence Act from claiming a charge for the unpaid purchase money against the transferee.(59) Independent of any question of estoppel it is clear that the transferee under the above circumstances would be a *bona fide* transferee without notice of the non-payment, against whom the charge is not enforceable under this clause.

Limitation.

A charge under this clause is enforceable within 12 years from the date of the conveyance under Art. 62 of the Limitation Act of 1963. Limitation for a suit to enforce money charged upon immovable property by way of unpaid purchase money is 12 years under Art. 132 of the Indian Limitation Act, 1908 and not under Art. 111.(60) See the AIR Commentaries on the Limitation Act, 7th (1997) Edn., Art. 62, Note 7.

13. Buyer's duty to disclose facts — Paragraph 5, Clause (a).

This paragraph imposes an obligation on the buyer to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware but of which the seller is not aware and which materially increases the value of such interest. The words "nature or the extent of the seller's interest" have reference to the *title* of the seller to the property sold.(1) Consequently it is conceived, that apart from facts relating to title, the buyer is not bound to disclose to the seller any facts which may make it desirable for him to purchase the property.(2) It has been held in England that a vendee is not bound to disclose to the seller a coal mine existing under the land sold of which he is, but the seller is not, aware.(3) This would also be the law under this clause for, the fact of the existence of the coal mine, cannot be said to have reference to the *title* of the seller of the property.

But though the non-disclosure of a fact not relating to title would not be a breach of the obligation under this paragraph, the same may nevertheless be a material factor in considering whether a Court could enforce *specific performance* of the contract. In *Ellard v. Lord Landaff*.(4) a tenant obtained an agreement for lease in consideration of an old lease and suppressed the fact that the life on which the old lease depended was *in extremis*. In refusing specific performance of the contract Lord Eldon, L.C., observed as follows :

> "All the material facts must be known to both parties; and is it not against all principles of equity, that one party, knowing the material ingredient in an agreement, shall be permitted to suppress it, and still call for specific performance?"

The principle of *Ellard's case* appears to have been followed by the Indian Legislature in S. 22 of the Specific Relief Act, 1877, Illustration (a), which is based on the facts of that case (now S. 20 of the Act of 1963, which however has omitted the illustration).

14. Buyer's duty to pay or tender purchase money — Paragraph 5, Clause (b).

Where there is a contract for sale, it is the obligation of the buyer under the contract to pay the purchase money; the obligation of the seller is to execute the conveyance.(1) This clause enacts that

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59. (1909) 33 Bom 53 (61) (DB).

60. AIR 1978 All 436 (439).

Section 55 — Note 13

1. See (1896) 20 Bom 522 (532, 533) (DB).
2. (1856) 111 RR 414 (417) : 4 WR (Eng) Dig 53, Dolman v. Nokes.
3. (1788) 29 ER 224 (234) : 2 RR 55, Fox v. Mackreth.
   [See also (1821) 37 ER 814 (818) : 23 RR 15, Turner v. Harvey.]
4. (1810) 12 RR 22 (27) : 1 Ball and B 241.

Section 55 — Note 14

1. AIR 1981 SC 519 (521) : 1980 UJ (SC) 739. (If a guardian has entered into a contract for

this obligation to pay the purchase money, in cases not covered by the proviso, is to be discharged *at the time and place of completing the sale*, and that such payment must be made *to the seller or such person as he directs.*(2) It is the duty of the buyer to pay or tender the amount of consideration to the real owner.(3) Where recitals in sale deed showed that payment of full consideration and passing of title were intended to be simultaneous, and where balance consideration had not been paid, vendees would not acquire title to suit property, merely on execution of sale deed.(4) In cases coming within the proviso, it is provided that the amount of any incumbrance existing at the date of the sale, may be retained by the buyer and paid to the persons entitled thereto. But the clause does not say anything as to when such payment is to be made. Under S 46 of the Contract Act, where no time for the performance of the contract is specified, the engagement must be performed within a *reasonable time* the question "what is a reasonable time" being, in each particular case, a question of fact. In cases covered by the proviso, therefore, the buyer must pay the amount retained by him to the persons entitled to it within a reasonable time from the date of the sale, though in some cases(5) it has been held that the payment must be made *forthwith* on the date of the sale deed and, in the undermentioned cases(6) that there is no breach of contract until the payment by the buyer becomes impossible. The buyer is, however, not bound to pay or tender the purchase money unless the seller is ready and willing to perform his part of the bargain by executing the conveyance (7)

Section 55(5)(b) does not require the buyer to deposit the purchase money in Court when his tender is refused by the seller. As such the tender will not become invalid for non-deposit.(8)

It has been seen in Notes 5 and 17 on S. 54 that a sale is not completed until the registration of the instrument of sale is completed and that it cannot be said to have been completed earlier because the instrument, by which it is effected, commences to operate from the date of its execution, after it has been registered.(9) It has accordingly been held in the undermentioned cases(10) that the duty of the buyer under this clause is to pay the purchase money at the time of the registration as the date of the registration is the date of the completion of the sale.

The principle underlying the proviso is that where a person contracts to buy property free from incumbrances, he agrees to pay full value for the property and that where there are incumbrances thereon, it is but just that he should retain the amount of the incumbrances out of the purchase money and pay it to the persons entitled to it, in order to safeguard himself (11) But this is all he can

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purchase of immovable property on behalf of minor, the liability to pay the purchase money would be that of the minor) ** AIR 1937 Pat 44 (47) (DB) (This is statutory obligation and not a part of the contract.)

2. **AIR 1954 Trav-Co 427 (429) : ILR (1954) Trav-Co 609 (FB) ** AIR 1942 Lah 275 (278) : ILR (1943) Lah 17 (FB).** (Obligation to pay unpaid purchase price to vendor arises at the moment the sale transaction is completed.) ** AIR 1932 All 454 (456) (DB)

3. (1992) 1 Bank CLR 1 (10) (Madh Pra).

4. ILR (1978) 1 Cut 98 (103, 104).

5. AIR 1936 All 598 (599) (DB) ** AIR 1929 All 121 (123) (DB) ** AIR 1925 All 488 (490)

6. AIR 1927 Oudh 455 (456) : 2 Luck 731 (DB).

   [**See also** (1905) 16 Mad LJ 20 (22) (DB).]

7. AIR 1923 Sind 50 (52) : 16 Sind LR 278 (DB).

   [**See also** (1910) 10 Ind Cas 526 (Cal) (Purchaser not bound to pay balance till vendor has put property in condition in which it was to be conveyed.)]

8. AIR 1973 Pat 386 (388, 389).

9. **AIR 1961 SC 1747 (1749) : (1962) 2 SCR 474.**

10. AIR 1955 Pat 201 (206) (DB) ** AIR 1937 Nag 246 (247) : ILR (1938) Nag 45 (49). (Section 55, Cl 1(b) referred to in the reports is a mistake for S 55, Cl 5(b))

11. AIR 1955 Pat 201 (207) (DB). (This is a statutory right of the buyer and there need not be any express agreement in this respect.)

do; he cannot break the contract on the ground that the property is subject to incumbrances.(12) The amount retained by the buyer will be "purchase money" and if it is not paid by the buyer to the incumbrancer,(13) or if there is any unexpended balance in the hands of the vendee as a result of a statutory reduction of the debt by the scaling down of the debt under some Debt Relief Legislation(14) it must be paid to the seller In this respect a sale free of incumbrances differs from the sale subject to incumbrances. In the latter case what is sold is really the equity of redemption. The amount payable on the incumbrance is really not "purchase money" at all and the seller is not concerned as to whether and when the money is paid(15) though there is, in such cases, an implied contract by the buyer to *indemnify* the seller against any loss caused to the seller by reason of a non-payment of the incumbrance.(16)

A vendee undertaking to pay a part of the mortgage debt retains part of the consideration knowing that entire mortgage would not be satisfied by the amount is bound by his bargain and will be responsible for damage if failure to make the payment results in a suit by the mortgagee saddling costs on both the vendor and the vendee.(17) The difference between the two classes of cases has been explained by Patanjali Sastri, J , in *Subba Rao v. Varadiah*(18) as follows :

> "On the sale of property subject to incumbrances, the bargain relates to the vendor's interest in the property such as it is, that is to say, his equity of redemption and the discharge of the incumbrances is the sole concern of the purchaser as between himself and the vendor who is only entitled to be indemnified against the incumbrances, while in the case of sale free from incumbrances, the price is fixed with reference to the full value of the property, the liability to discharge all the incumbrances being thrown on the vendor, the vendee, however, being given the right to retain out of the price an amount sufficient to clear the incumbrances But as the liability to pay them off is that of the vendor who has to implement his sale by providing a clear title, the vendee must be regarded as paying the amount retained to the incumbrancer on behalf of the vendor out of the purchase money payable to the latter under the contract of sale In other words, the vendee acts as the agent of the vendor as regards the disposal of the sum retained, although the agency is one which cannot be revoked as the vendee has himself an interest in the money being applied in the manner indicated. (See S. 202, Contract Act.)
>
> If this is the position, as we apprehended it is where immovable property is sold free from incumbrances, it follows that the vendor is entitled to call upon the buyer to account to him for any portion of the purchase money which it has become no longer necessary to apply in accordance with the stipulation in that behalf."

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12. AIR 1917 Low Bur 166 (167) (DB) ** (1907) 4 Low Bur Rul 86 (87) ** (1847) 41 ER 1002 (1005) 2 Ph 413 78 RR 123, Lacey v Ingle ** (1907-1908) 4 Low Bur Rul 224 (226) (Principles of S 55(5)(b) applied, though T P Act was not in force in the province)

13. AIR 1957 Andh Pra 688 (689) (DB) (The buyer acts as the agent of the seller as regards the disposal of the sum retained.) ** AIR 1936 Mad 528 (530)

14. 1972 Ker LR 463 (DB) ** AIR 1943 Mad 482 (486) ILR (1943) Mad 885 (DB) (But the vendor is not entitled to any interest on the purchase money as there is no wrongful withholding of money payable to him nor does the vendor suffer any damage by reason of the vendee's failure to pay the amount to the incumbrancer) ** AIR 1942 Mad 525 (526) (DB) (Debt scaled down under Madras Agriculturists Relief Act, 1938.)

    [See however AIR 1953 Mad 370 (371) (DB) (Debt reduced under Madras Act 4 of 1938 — Amount paid by vendee far in excess of amount left with him — Vendor held was not entitled to claim any money as balance of unpaid purchase money.)]

15. AIR 1916 Oudh 143 (144) ** (1883) 10 Cal 92 (95).

16. AIR 1940 Lah 321 (325) ILR (1941) Lah 353 (DB) ** AIR 1933 Mad 424 (426) 56 Mad 724 ** AIR 1918 Mad 1135 (1136) (DB) ** (1912) 16 Ind Cas 73 (74) (DB) (Cal)

17. 1967 Ker LJ 101 (104) (DB)

18. AIR 1943 Mad 482 (484) ILR (1943) Mad 885 (DB)

In a case from Columbia,(19) their Lordships of the Privy Council stated that the buyer's contract of indemnity in regard to the mortgage debt subject to which the property is sold, is founded upon the doctrine that the purchaser of an equity of redemption is bound under an obligation of conscience to indemnify the vendor against the liability on the mortgage debt, and went on to observe :

> "The obligation, as Fletcher Moulton, L J , said in Mills v United Counties Bank Ltd (20) is based on good sense and 'it relates to every case where you can reasonably imply that it was the intention of the parties that such an indemnity should be given"

Hence, in the particular circumstances of a case it may not be fair and reasonable to imply such a contract of indemnity It is the modern practice in ordinary sales of an equity of redemption to insert an express covenant of indemnity by the purchaser where such a covenant is part of the agreement.(21)

The question whether a sale is free of incumbrances or is one subject to incumbrances is a question of fact.(22) The true test would appear to be whether after the sale the seller remains liable either personally or in respect of his other properties If he is so liable the sale is really one free of incumbrances although the parties might have stated it to be one subject to incumbrances (23) On the other hand, if he is not so liable the sale though stated to be free of incumbrances is really one subject to incumbrances.(24)

Where the sale deed itself contains a direction by the seller to the buyer to pay a third person and the matter does not fall within the proviso, the question whether the money retained by the buyer for payment to the third person is "purchase money" which the seller is entitled to recover in the event of non-payment to the third person, depends upon the nature of the direction and the intention of the parties The test to be applied is to find out whether the covenant implied in the direction is a pure contract of indemnity or not If the covenant is a pure contract of indemnity the seller will not be entitled to claim any money as the balance of the purchase money still remaining with the buyer and as being payable to him But if it is not a contract of pure indemnity, he may have to pay the purchase money in accordance with the directions of the seller and the latter would be entitled to receive the same if either the directions are not complied with, or the purpose, for which the said money was retained in the hands of the buyer became incapable of fulfilment (25)

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19. **AIR 1936 PC 65 (69).**

    [**See also** AIR 1940 Lah 321 (323) ILR (1941) Lah 353 (DB) ((1802) 7 Ves 332 (336) **Rel. on.**)]

20. **(1912) 1 Ch 231 : 81 LJ Ch 210 : 105 LT 742 · 28 TLR 40**

21. **AIR 1936 PC 65 (70).**

22. **See** AIR 1943 Mad 482 (485) ILR (1943) Mad 885 (DB) (A sale deed after stating the amount of consideration to be Rs 1 100 and the amount of mortgage incumbrance on the property to be Rs 5,682 provided as follows — "By way of your having agreed to pay to the mortgagee without our having any concern with the same the said sum together with interest that may accrue due in future according to the terms of the mortgage and get the property released from the mortgage, the said sum of Rs 5 682 has been received by us" **Held** that the terms of the sale showed that the price of the property was fixed on the basis of its full value excluding the incumbrance from consideration and credit was given towards the payment of such price in respect of the amount payable to mortgagee and that therefore the sale was free of incumbrances)

23. **AIR 1934 All 406 (418) : 56 All 766 (FB).**

24. **AIR 1934 All 406 (422) : 56 All 766 (FB)** ** AIR 1935 Lah 50 (51)

    [**See also** AIR 1926 All 352 (356) (DB).]

25. AIR 1948 All 307 (308) ILR (1948) All 207 (DB) ** AIR 1945 All 139 (140) ILR (1945)

In this class of cases, where the direction specifies a time within which the payment is to be made, the payment must be made within that time. Where no time is specified such payment must, under S. 46 of the Contract Act, be made within a reasonable time from the date of the sale deed.(26) A contrary view has, however, been held in the undermentioned cases(27) namely that the payment must be made on the date of the sale itself.

The direction to pay the purchase money or part of it to a simple money creditor of the seller is ordinarily revocable at any time before payment has actually been made. The seller can also vary the direction and ask the buyer to pay it to himself or to any other person. But in such a case, if the sale is free of encumbrances the vendee will be entitled to retain such amount as may be necessary to pay off the encumbrances.(28)

As to whether title passes before consideration is fully paid, see S. 54, Note 14.

Remedy of seller.

The seller is always entitled to recover *personally* from the buyer the unpaid purchase money as a debt due.(29) A suit for so recovering it would be governed by Art. 111, Limitation Act, 1908 (now by Art. 53 of the Limitation Act, 1963) (30) This personal liability of the buyer cannot be

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All 183 (DB). (Portion of consideration reserved in hands of vendee for payment to vendor's creditor — Amount not paid to creditor — Vendor is entitled to the amount : AIR 1940 All 351, **Relied on.**) ** AIR 1936 Mad 528 (530) ** AIR 1919 Mad 367 (368) (DB).

See also Note 18.

26. AIR 1957 Andh Pra 688 (689) (DB) ** AIR 1937 Lah 608 (609) ** AIR 1933 All 386 (388) · 55 All 490 (DB) ** AIR 1931 All 95 (97) : 52 All 761 (DB) ** (1907) 6 Cal LJ 398 (402) (DB)

[**See** AIR 1952 Trav-Co 466 (467) (DB). (Portion of purchase money retained for payment to vendor's decree-holder — Default — Cause of action for enforcing seller's remedies arises on date on which property is sold in execution.)]

27. AIR 1957 Trav-Co 221 (222) (Suit to enforce vendor's lien — Time started from date of sale itself.) ** (1948) 27 Pat 898 (910) (DB). (Per Mahabir Prasad, J.) ** (1912) 34 All 429 (433) (DB).

[**See also** AIR 1924 Nag 111 (111). (Sale of property subject to encumbrance — Purchaser paying of mortgage as undertaken — Purchaser acts in his own right under S. 55(5)(b) and not as an agent of mortgagor.)]

28. AIR 1942 Mad 583 (584).

[**See also AIR 1942 Lah 275 (277, 278) : ILR (1943) Lah 17 (FB).** (Per Tek Chand, J., in order of reference — Part of purchase money left with vendee with instructions to pay it to vendor's creditors — Vendor can revoke instructions and require amount to be paid to himself except under certain special circumstances as when the person to be paid has a charge on the property sold which has to be redeemed with a part of sale consideration so that the vendee may get the property free from incumbrances.)]

29. **AIR 1942 Lah 275 (278) : ILR (1943) Lah 17 (FB)** ** AIR 1936 All 870 (872) (DB) ** AIR 1931 All 99 (100, 101) 52 All 901 (DB) ** AIR 1919 Mad 367 (368) (DB). (Buyer undertaking to pay simple money debts — Non-payment — Seller can recall direction to pay and recover the purchase money.) ** AIR 1914 All 131 (132, 133) ** (1905) 2 All LJ 379 (383) (DB).

[**See** AIR 1945 All 156 (158) : ILR (1945) All 204 (DB). (It may be that a vendee, who is competent to enter into a contract, incurs a personal liability with respect to unpaid purchase money. But if the vendee happens to be a minor or a ward of Court and is as such disqualified from entering into a contract it is manifest that he cannot incur such a personal liability. In such a case, the only remedy open to a vendor is to recover the unpaid purchase money by enforcement of the statutory charge against the property sold.)]

[**See also** AIR 1935 Lah 50 (51).]

30. See the A.I.R Commentaries on the Limitation Act, 7th (1997) Edn., Notes on Art. 53.

transferred by him to any other person. Thus, a transferee from the buyer is not personally liable to the seller for the unpaid purchase money.(31) Where there is an express contract embodied in the registered sale deed for payment of purchase money, a suit for recovery of such money on that contract personally from the buyer would be governed by Art. 116 of the Limitation Act, 1908, (now by Art. 53 of the Limitation Act, 1963, as Art. 116 has been omitted by the Act).(32) But apart from the personal remedy which the seller may have under this clause or on any express contract which he may have entered into in the deed of sale, the seller has, under para 4, Cl. (b), a charge on the property in the hands of the buyer for the purchase money and for interest from the date of the delivery of possession.(33) (See Note 12) Unpaid purchase money left with the vendee is a "debt" due by him to the vendor and can be attached in execution of a decree against the vendor,(34) except, it is conceived, when the case comes under para 5, Cl. (b) of this section in which case, the vendee will have a statutory right of retaining the money to pay off encumbrances on the property in his own interests.

Where the buyer under a contract for sale does not pay the purchase money at the time of completing the sale, the seller will be entitled to put an end to the contract under S 39 of the Contract Act. He may also claim damages under S. 73 of the Contract Act.(35) Similarly, whether the buyers retains the amount of any incumbrance by virtue of the proviso and does not pay it to the persons entitled thereto within a reasonable time from the date of the sale, the seller would be entitled to sue for damages under S. 73 of the Contract Act(36) though he would not be able to

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31. AIR 1924 Mad 358 (359) (DB) ** AIR 1914 All 131 (134)

32. See the A.I.R. Commentaries on the Limitation Act 7th (1997) Edn., Art. 53 and Notes thereon.

33. AIR 1931 All 99 (101) · 52 All 901 (DB) (Assumed) ** AIR 1914 All 131 (133) (Latter is available even if the former is barred.) ** (1905) 2 All LJ 379 (383) (DB)

34. **AIR 1942 Lah 275 (278, 279) : ILR (1943) Lah 17 (FB).** (If at the instance of a decree-holder of vendor a prohibitory order under O 21, R 46, Civil PC., is served on vendee before he has paid out the amount to the nominees of vendor in accordance with directions set out in sale deed attachment is good and neither vendee nor vendor can object — Decree-holder need not wait until a reasonable time has elapsed from sale within which vendee could have paid, but has neglected to pay vendor's nominees but can attach the money immediately.)

[See also AIR 1954 Mad 729 (730). (Mortgagor selling mortgaged property — Part of consideration retained by vendee for paying of the mortgage — Suit on mortgage in which subsequent mortgagee was impleaded — Subsequent mortgagee paying off earlier mortgage and getting mortgagor's right to recover unpaid purchase money attached before judgment — Attachment made absolute later — Properties brought to sale by him and purchased by himself — Right to unpaid purchase money sold in execution of personal decree obtained by the subsequent mortgagee — It was held, that the proceedings taken were perfectly legal.) ** AIR 1942 Mad 650 (651). (Right of vendor to unpaid purchase money from vendee is attachable as a debt where vendee admits liability to pay but claims for defer such payment till vendors pays off other incumbrances — Obligation to pay for property purchased springs into being by virtue of very transaction of sale itself — Right which is given to vendee by S. 55(5)(b) is not a right to say that he is under no obligation, but a right to postpone discharge of that obligation.)]

35. AIR 1932 All 454 (456) (DB) (Interest at reasonable rate on the purchase money paid was held to be sufficient damages.)

[See AIR 1936 All 598 (599) (DB).]

36. AIR 1940 Lah 321 (325) · ILR (1941) Lah 353 (DB) (Vendee of mortgaged property undertaking to pay off mortgagee out of amount left with him — Default in payment — Liability of vendee — Measure of damages — Effect of vendee's conduct) ** AIR 1937

avoid the sale itself on the ground of the breach of the obligation under this clause. The words "and shall pay the amount to the persons entitled thereto" must, however, be taken to apply only when the amount retained is sufficient to discharge the prior incumbrance.(37) Where A sold to B property free of incumbrances and stated that a certain amount was to be retained to pay C, a prior incumbrancer, and it was found that it was insufficient to pay C, it was held that B was not bound to pay the amount either to A or to C, but may retain it until the property is made free of the incumbrance.(38)

In a claim for purchase money against the buyer it is not necessary that the seller should show that he had suffered any damage on the ground of any non-payment The reason is that the purchase money is payable not as any *compensation* for any loss suffered by the seller but as a *debt due*.(39) Even in a suit for damages for breach of the obligation to pay the purchase money, the general trend of opinion is that the seller is not bound to show that he has actually suffered any damage(40)

Nag 246 (247, 248) ILR (1938) Nag 45 (Debt of a creditor not mentioned by the vendor paid, payment unwarranted.) ** AIR 1934 All 617 (617) ** AIR 1928 Oudh 148 (151) (DB) (On the death of vendee, his son was held responsible for paying damages) ** (1907) 6 Cal LJ 398 (402) (DB).

37. AIR 1940 Cal 380 (382) ** (1912) 15 Ind Cas 854 (855) (All) (21 All 223 26 Ind App 45 (PC). **Followed.**)

38. ILR (1957) Cut 545 (548) (Vendee cannot retain the balance of purchase money on ground that he has paid in excess of the stipulated amount in discharging the encumbrance without waiting for vendor's contribution) ** **(1899) 21 All 223 (226, 227) : 26 Ind App 45 (PC)** ** AIR 1942 Mad 650 (651) (Money left with vendee to pay mortgagee not sufficient to pay off mortgage — He may defer payment till vendor contributes remainder of the sum to pay him off completely 21 All 223 (PC). **Followed.**) ** AIR 1940 Cal 380 (383)

[**See however** AIR 1926 Mad 1031 (1032) (DB) (In this case it was clearly understood between the parties that prior mortgages were subsisting and that the payment by the vendee would not fully discharge the liability 21 All 223 (PC). **Distinguished.**)] The buyer must make an attempt to pay the incumbrancer at a reasonably early period so as to discover whether the amount retained is short of the amount due, see AIR 1917 Oudh 128 (130, 131).

39. **AIR 1934 All 406 (422) : 56 All 766 (FB)** ** AIR 1944 Mad 330 (332) · ILR (1945) Mad 26 (DB) ** AIR 1937 Lah 608 (609) ** AIR 1936 All 870 (872) (DB) ** AIR 1931 All 95 (97) 52 All 761 (DB) ** AIR 1919 Mad 367 (368) (DB) ** AIR 1914 All 131 (132) ** (1913) 36 Mad 348 (351) (DB).

[**See also** AIR 1925 Lah 405 (406) (Money left with vendee to redeem mortgages on property other than the property sold — Vendee not redeeming — Vendor's duty was to redeem property or ask vendee to refund money) ** (1906) 16 Mad LJ 20 (21) (DB)]

40. 1936 All LJ 1081 (1082) (DB) (Vendor held entitled to recover interest at 1 p c p m on the amount left with vendee) ** AIR 1931 All 754 (755) 53 All 946 (DB) ** AIR 1930 Pat 46 (49) . 8 Pat 860 ** (1909) 4 Ind Cas 1121 (1122) (DB) (Mad). (Direction in sale deed to pay third party — Money not so paid — Vendor can recover purchase money with interest — He need not have paid the creditor before filing the suit 23 Mad 441. **Followed.**) ** (1909) 1 Ind Cas 621 (622) (Mad) (23 Mad 441. **Followed.**) ** (1910) 34 Mad 479 (481) ** (1912) 34 All 429 (433) (DB)

[**See also** AIR 1914 Mad 655 (656) 38 Mad 791 (DB) (Where the defendant's promise is an absolute one to do a particular thing as to discharge or acquit the plaintiff from such a bond, an action may be brought the moment he has failed to perform his contract, and a plea of non-damnification would be bad.)]

though a contrary view has been held in some cases **(41)**

But where a claim is made by the seller for damages as on a breach of an implied or an express contract of indemnity, he is bound to show loss or damage before he can succeed A suit of that kind would be governed by Art. 83 of the Limitation Act, 1908 or by Art 116 of that Act where the contract of indemnity is contained in a registered deed.**(42)** (now by Arts 13 and 55 of the Limitation Act, 1963.)

There is no provision in S 55 which makes the obligation of the buyer to pay the purchase money to the seller under S 55(5)(b) conditional upon the fulfilment of the contract provided for in S. 55(2). A breach of the covenant for title or quiet enjoyment is therefore no bar to a suit by the seller for recovery of purchase money.**(43)**

The Zamindar's right of "Zarechaharum" in U P to recover ¼th of the sale consideration of a house sold by a Riyaya cannot be said to be an encumbrance and, therefore, S 55(5)(b) would not be attracted.**(44)**

Contract to the contrary.

This clause applies only where there is no contract to the contrary Where the purchase money is contracted to be paid before the Sub Registrar, there is a contract to the contrary and the amount need not be paid at the time of the execution of the sale deed **(45)** In *Ram Raghubir Lal v United Refineries (Bhurma) Ltd.***(46)** A agreed to sell to X or his nominee certain immovable property There was no provision that in the case a nominee being mentioned, X should remain liable for the balance of the purchase money The conveyance was made to a nominee as buyer who undertook to pay the balance. It was held by their Lordships of the Privy Council that the nominee was substituted for X and that the latter was therefore not under a personal liability to pay the purchase money.

A sold certain property to B A part of the purchase price was left with B for payment to C a simple money creditor of A As part of the same transaction of sale A undertook to pay immediately an existing incumbrance on the property In case of A's failure to do so B was to pay it off and recover it from A On A's failure to discharge the mortgage, B declined to pay the amount left with him either to C or A. It was held that as the property was sold free from incumbrances B was entitled to retain the amount left with him to pay off the incumbrance and that either the direction to pay to C or A's undertaking to discharge the mortgage could not be regarded as contract to the contrary so as to preclude B from retaining the amount for the purpose of discharging the mortgaged.**(47)**

Tender of amount.

A *tender* of purchase-money is sufficient to discharge the obligation under this clause **(48)** .

Receipt of consideration — Onus of proof.

As regards the onus of proving the receipt of consideration for a sale, see the undermentioned case.**(49)**

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41. **AIR 1934 All 406 (422) : 56 All 766 (FB)** ** AIR 1933 Nag 379 (382) 29 Nag LR 298 (DB) ** (1906) 16 Mad LJ 20 (22) (DB) ** (1904) 14 Mad LJ 285 (286) (DB)
42. See the A I R Commentaries on the Limitation Act, 7th (1997) Edn , Arts 55 and 113
43. AIR 1957 Andh Pra 688 (689, 690) (DB).
44. AIR 1973 All 162 (163) (**Held no longer good law** in 1981 All LJ 1111 on ground that the custom of "Zarechaharum" is unreasonable.]
45. (1910) 8 Ind Cas 804 (804) (DB) (Mad).
46. **AIR 1933 PC 143 (145) : 60 Ind App 183.**
47. AIR 1942 Mad 583 (583, 584).
48. (1910) 8 Ind Cas 804 (804) (DB) (Mad).
49. AIR 1957 Andh Pra 557 (559, 560) (DB)

15. Third party, if can enforce contract between *A* and *B* as to payment of purchase-money.

Where *A* sell property to *B* and *B*, the buyer, retains a portion of the purchase-money for paying a third party. *B* does not thereby become personally liable to the third party.(1) Even where *B expressly* undertakes with A to pay a creditor of the latter, such creditor cannot enforce the contract, as he has no privity of contract with *B*.(2) the general principle being that a third party cannot enforce a contract between *A* and *B*.(3) The buyer does not, by reason merely of his contract with the seller, become a trustee for the creditor.(4) A contrary view has, however, been expressed in the undermentioned cases(5).

But where the parties to the contract stand in a *fiduciary* relation to the stranger such as that of trustee, a guardian, etc., the stranger may enforce the contract which is for his benefit.(6) In the undermentioned case(7) where *A* agreed with his son *B* before the marriage of the latter, to pay *B's* intended wife *karchi pandan* monthly of the value of Rs. 500 for her life, it was held that the wife was, in equity, entitled to enforce her claim against *A*.

Where on the strength of the contract between *A* and *B*, that *B* should pay a third party, *B* enters into direct, relationship with the third party and makes himself personally liable to him, the third party can sue *B* on the contract(8).

16. Liability for loss from destruction, etc., after passing of ownership Paragraph 5, clause (c).

In England a contract for sale of real property makes the buyer, the owner in equity of the

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Section 55 — Note 15

1. **AIR 1923 PC 54 (54).** (AIR 1919 Pat 583, Affirmed.) ** **(1912) 34 All 63 (64) : 39 Ind App 7 (PC)** ** AIR 1954 All 348 (349, 350) (Sale of mortgaged property by mortgagor — Portion of consideration left in hands of vendee to pay off debts due to mortgagee — Mortgagee cannot recover amount from vendee is no trust is created in his favour.) ** AIR 1949 Nag 319 (324) ILR (1949) Nag 122 (DB) ** AIR 1936 Oudh 316 (315) · 12 Luck 215 (DB) ** (1800) 31 ER 724 (726) : 5 Ves 534, Butler v Butler.
2. **AIR 1930 Mad 382 (389) : 53 Mad 270 (FB)** ** **AIR 1942 Lah 275 (278) : ILR (1943) Lah 17 (FB).** (Creditors cannot sue vendee for the amount) ** AIR 1919 Pat 583 (584) 78 Ind Cas 545 (546) (DB) ** AIR 1934 All 770 (772). (Creditor has no charge on the property.) ** AIR 1934 Pat 1 (2) (But if usufructuary mortgagee is dispossessed by such transferee then transferee is liable to repay the mortgage debt.) ** AIR 1930 Mad 567 (567, 568) ** AIR 1926 Pat 474 (477) · 5 Pat 468 (DB) ** AIR 1923 Lah 459 (460).
3. **AIR 1922 PC 176 (177)** ** AIR 1954 All 348 (349) ** **(1911) 9 Ind Cas 988 (989) (Cal).**

   [See also AIR 1933 Lah 658 (658) (Vendee paying the mortgagee — Sale declared void subsequently — Remedy of the vendee lies against the vendor and not against the mortgagee.)]
4. **AIR 1942 Lah 275 (278) : ILR (1943) Lah 17 (FB)** ** AIR 1954 All 348 (350) ** AIR 1925 Cal 599 (602) · 52 Cal 100 (DB) ** AIR 1916 All 232 (233) : 38 All 209 (DB).
5. AIR 1949 Orissa 14 (17) ** AIR 1933 Lah 178 (179) ** AIR 1927 Mad 421 (421) ** AIR 1918 Cal 941 (942) (DB) (Following AIR 1914 Cal 129.) ** AIR 1914 Cal 129 (131) 41 Cal 137 (DB) (This case was decided on its peculiar facts.)
6. AIR 1932 Oudh 82 (84) . 7 Luck 292 ** AIR 1918 Cal 941 (942) ** AIR 1914 Cal 129 (131) : 41 Cal 137 (DB). (Buyer communicated to the creditor and acknowledged the liability.)
7. **(1910) 32 All 410 (413) : 37 Ind App 152 (PC).**
8. AIR 1952 Mys 109 (110) . ILR (1952) Mys 316 (DB) (Suit will be governed by Art. 116, Limitation Act, if the obligation to pay arises directly under registered instrument.) ** AIR 1935 Mad 115 (116) (DB).

estate, with the consequence that he has to bear any loss arising from the destruction, injury or deterioration of the property not caused by the seller.(1) If the seller in possession spends money for repairing any such damage or injury, he can recover the amount from the buyer.(2) But if the loss or destruction is due to the fault or the negligence of the seller(3) or if he delays the completion of the contract(4) the loss must be borne by the seller himself. This clause is based on the above principles of English law. The only difference being that under the Act ownership passes only by conveyance, while under the English law the contract for sale itself passes the ownership in equity to the buyer.(5)

Where the ownership of property had passed to buyer, and case of buyer, that seller had purposely and with a view to cause loss to him removed the superstructure from property had not been established seller could not be made liable for loss in view of S. 55(5)(c).(6)

17. Payment by buyer of public charges, etc., on passing of ownership — Paragraph 5, clause (d).

As between the buyer and the seller, the buyer under this clause is under an obligation to pay—

(1) all public charges which may become payable in respect of the property,

(2) rent which may become payable in respect of the property, and

(3) the principal monies due on any incumbrances *subject to which the property is sold* and the interest thereon *afterwards accruing due*(1).

The liability of the buyer under this clause attaches as an incident of the property sold, in the absence of a contract to the contrary, and is complete when the property passes.(2) The rights and liabilities are, however, only *as between the buyer and the seller* and do not in any way affect the rights of third parties. Where property which was the subject of a yearly tax was sold in the middle of the year, it was held in the undermentioned case(3) that the buyer was as against the municipality, liable to pay the whole tax and not merely for instalments accruing due after the date of sale.

If the buyer fails to make a payment which he is, under this clause, bound to pay, with the consequence that the seller is forced to pay it, the seller will be entitled to recover such amount from the buyer under S. 69 of the Contract Act. Similarly, where the seller is bound to make a payment, as for instance rent accruing due prior to the date of sales(4) and he fails to pay it and the

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Section 55 — Note 16

1. (1692) 23 ER 781 (781) : 2 Vern 28, Cass v Rudele ** (1964) 33 LJ Ch 639 (640) : 12 WR (Eng) 683, Poolle v Adams ** (1801) 31 ER 1088 (1089) : 6 Ves 349, Paine v Meller ** (1805) 32 ER 1205 (1206) : 11 Ves 559 Ex parte Minor (The contract not being complete and binding the loss fell upon the vendor.) ** (1816) 56 ER 195 (198) : 1 Mad 532, Hartford v. Purner.
2. (1849) 50 ER 1061 (1064) : 12 Beav 260, Robertson v Skelton ** (1864) 33 LJ Ch 639 (640) : 12 WR (Eng) 683, Poole v. Adams.

   [**See also** (1881) 20 WR (Eng) 546 (548) : 18 Ch D 1, Rayner v Preston.]
3. (1873) 21 WR (Eng) 179 (180) : 42 LJ Ch 225, Phillips v Silvester
4. (1816) 56 ER 550 (550) : 3 Mad 394, Foster v Deacon
5. 1956 Madh BLJ 456 (461) (DB). (Ownership passing to buyer — Buyer must bear the loss caused by deterioration in property not caused by seller.)
6. AIR 1977 Mad 411 (413) : (1977) 1 Mad LJ 494.

Section 55 — Note 17

1. **See** (1907) 30 Mad 461 (461, 463) (Same principles apply to court sales.)
2. (1906) 29 Mad 519 (523) (DB).
3. (1907) 30 Mad 423 (425).
4. AIR 1926 Cal 385 (387) : 52 Cal 914 (DB).

buyer has to pay it, the buyer can recover the same from the seller under S 69 of the Contract Act (5) A buyer making a payment which he is himself bound to pay is only performing his own obligation and cannot obviously recover it from the seller under S. 69 of the Contract Act(6).

Similarly, a seller paying charges which he is himself bound to pay before the ownership of the property has passed from him, cannot recover them from the buyer under S 69, Contract Act. But in the case noted below(7), where the buyer had entered into possession before the sale deed was executed, it was held that the seller, paying charges in respect of the property sold in the intervening period could recover the same from the buyer.

18. Property sold subject to incumbrances — Incumbrances found invalid — Who gets the benefit?

In *Izzatunnissa Begum v Kunwar Pertab Singh*,(1) where property was sold subject to certain incumbrances, and it was afterwards found that they were invalid, their Lordships of the Privy Council observed as follows :

> "On the sale of property subject to encumbrances the vendor gets the price of his interest, whatever it may be, whether the price he settled by private bargain or determined by public competition, together with an indemnity against the encumbrances affecting the land The contract of indemnity may be express or implied If the purchaser covenants with the vendor to pay the encumbrances, it is still nothing more than a contract of indemnity The purchaser takes the property subject to the burden attached to it If the encumbrances turn out to be invalid, the vendor has nothing to complain of He has got what he bargained for His indemnity is complete He cannot pick up the burthen of which the land is relieved and seize it as his own property The notion that after the completion of the purchase the purchaser is in some way a trustee for the vendor of the amount by which the existence or supposed existence, of encumbrances has led to a diminution of the price, and liable, therefore, to account to the vendor for anything that remains of that amount after the encumbrances are satisfied or disposed of is without foundation After the purchase is completed, the vendor has no claim to participate in any benefit which the purchaser may derive from his purchase."(2)

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5. AIR 1926 Cal 385 (391) : 52 Cal 914 (DB).

6. AIR 1916 Mad 980 (982) : 39 Mad 795

7. AIR 1927 Mad 1060 (1063).

Section 55 — Note 18

1. (1908) 31 All 583 (589) : 36 Ind App 203 (PC).

2. **See also** the following cases (1967) 2 Andh LT 273 (282, 283) (DB) (Mortgage debt scaled down at instance of agriculturist mortgagor — Non-agriculturist purchasers of equity of redemption can be proceeded against only for the scaled down amount) ** AIR 1957 Ker 98 (99) ILR (1957) Ker 321 (Fidelity bond — Amount charged on property sold — Bond discharged on retirement from service — Buyer is entitled to benefit and not the seller) ** AIR 1954 Mad 508 (512) ILR (1954) Mad 484 (DB) ** AIR 1953 Punj 110 (113) ILR (1952) Punj 219 (DB) (Sale of property — Part of purchase money left with purchaser for payment to previous mortgagee — Extinction of mortgage as a result of operation of Punjab Restitution of Mortgaged Lands Act — Seller has no right to participate in the benefits which purchaser might get by non-payment) ** AIR 1942 Mad 527 (527) (DB), (Immovable property sold subject to mortgage — Mortgage debt scaled down at instance of mortgagor agriculturist, under Madras Agriculturists' Relief Act (1938) — Purchasers although non agriculturists are entitled to benefit of reduction and are liable only to extent of amount scaled down) ** AIR 1937 Oudh 159 (164) . 12 Luck 540 (Auction sale) ** AIR 1916 Mad 980 (982) 39 Mad 795 ** (1909) 33 Bom 311 (316) (DB) (There is nothing to prevent him from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it) ** (1787) 29 ER 87 (88) : 2 Bro CC 151, Tweddel v Tweddel

The buyer, is in fact, entitled to contest the validity of the incumbrances(3)

On the sale of property *free of incumbrances* on the other hand, where the buyer retains a portion of the purchase-money to pay off the prior incumbrances, it cannot be said that the seller gets the price of his interest until the prior incumbrances, free of which the property is sold, are paid off Until then the money retained by the buyer retains the character of unpaid purchase money If under such circumstances, the incumbrances turn out to be invalid, or for some other reason a lesser amount than that retained, is to be paid, the amount not paid, or the balance of the amount remaining unpaid, as the case may be, must be paid to the seller as *unpaid purchase money In the undermentioned case*(4) *A* sold to *B* property *x* for Rs 3,000 out of which Rs 928-8-0 were to be retained by the buyer to discharge a prior mortgage That mortgage comprised only property *x* and no other By reason of the subsequent passing of the U P Agriculturists Relief Act, 27 of 1934, the amount payable under the mortgage was reduced to Rs 732-13-0, and the vendee discharged the mortgage by paying only Rs. 732-13-0 *A* thereupon sued *B* for the balance of Rs 195-11-0 It was held that he was entitled to recover. See also the undermentioned cases(5) to a similar effect As to the test to see whether a sale is free of incumbrances or is one subject to incumbrances, see Note 14

19. Buyer entitled to rents and profits, etc. — Paragraph 6, clause (a).

Where, under the sale, the buyer is entitled to get possession of the property at once, he will by entitled to damages for the period he is kept out of possession for no fault of his(1)

Where land is sold in execution of money decree vendee would be entitled to the rents and profits of the same as a legal incident of the property in respect of crops raised after the date of sale(2).

Where the agreement of sale of house was terminated by vendor on failure of vendee to pay purchase price but subsequently vendee agreed to take over the house, the vendee would be entitled to rents collected by vendor from the tenants of the house after the date of sale until the date of transfer(3).

Where the property occupied by tenant was transferred during pendency of proceedings for eviction against the landlord, and there was default committed by tenant long prior to date of transfer, and in the sale deed such arrear of rent was not specifically assigned to transferee he could not claim such arrears of rent(4).

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3. (1913) 21 Ind Cas 79 (80) (Cal).

4. AIR 1940 All 351 (352) : ILR (1940) All 340 (DB)

5. AIR 1955 Pat 254 (256) (DB) (The purchaser must be held to be in position of trustee for unpaid purchase money and was liable to refund the excess amount in his hands) ** AIR 1953 Mad 370 (371) (DB) (Debt reduced under Madras Act 4 of 1938 — Vendor held was not entitled to claim any money as balance of unpaid purchase money when vendee had paid more than the amounts left with him) ** AIR 1949 All 340 (341) (DB) (Where a vendee under a sale for a fixed sum fails to pay the vendor s creditor part of the consideration left in his hands for such payment, the vendor is entitled to it under S 55(4)(b) of the T.P Act as it is really unpaid purchase money) ** AIR 1943 Mad 482 (487) ILR (1943) Mad 885 (DB). (Sale free from incumbrance Sum left in hands of vendee to discharge prior mortgage — Due to passing of Madras Agriculurists Relief Act, 1938 amount payable to mortgagee reduced — Seller is entitled to recover balance as unpaid purchase money.)

Section 55 — Note 19

1. (1947) 52 Mys HCR 69 (72) (DB) ** AIR 1935 Oudh 142 (142)

2. AIR 1973 Andh Pra 94 (95).

3. (1978) 1 Malayan LJ 23 (29).

4. AIR 1989 Pat 13 (17) : 1988 Pat LJR (HC) 950.

Where a person has purchased land from a private person and not Municipality. The purchaser would be entitled to all rights under Ss. 8, 55(6)(a) of the T.P. Act. Thus on the purchaser making construction on the land or some alteration, the Municipality could not demand any conversion charges by invoking S. 173-A of the Rajasthan Municipalities Act(5).

20. Buyer's charge — Paragraph 6, clause (b).

This clause enacts that, if before the title passes to the buyer, the latter has paid purchase money or earnest money, he has a charge on the seller's interest in the property for the amount of the purchase money, etc., provided he has not improperly declined to accept delivery of the property.(1) Section 55(6)(b) creates a statutory charge and not a charge or interest which can be said to have been created by act of parties. Such charge depends upon certain contingencies. It does not create an absolute charge as such but the charge arises provided it is shown that the buyer has not improperly declined to accept delivery of the property.(2) under S. 55(6)(b) the buyer has got a charge for the price pre-paid This charge attaches from the moment the buyer pays any part of the purchase money and is only lost in case of his own subsequent default This charge on the property is enforceable not only against of the seller but all persons claiming under him. A transferee for value with notice or without notice would be liable to under S. 55(6)(b). The buyer's charge under this section is a statutory charge and he is entitled to enforce it against property and the plea of the want of notice by third party purchaser is of no avail (3) The charge in favour of buyer as converse to the seller's charge under S. 55(4)(b). The buyer's charge under the section is a statutory charge and differs from a contractual charge which a buyer may be entitled to claim under a separate contract. No charge is available unless the agreement to genuiene. When the property upon which the charge is created gets converted into another form, the buyer will be entitled to proceed against the substituted security.(4) It follows the English law, that a purchaser has got a lien for the money

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5. AIR 2001 Raj 9 (13) : 2000 (2) Rajasthan LR 644.

Section 55 — Note 20

1. AIR 1941 Lah 407 (411, 412) : ILR (1942) Lah 79 (FB) ** 1999 (3) Cal LT 177 (185) ** (1973) 86 Mad LW 738 (If the vendor wrongfully declined to complete the transaction the buyer is entitled to the charge for the prepaid purchase price.) ** AIR 1968 Mad 142 (151) : ILR (1966) 2 Mad 78. (C, a Hindu coparcener, executing agreement of sale in favour of P in respect of certain property asserting that it was his self acquired property and receiving some purchase price — Suit for partition by other coparceners against C claiming that property was joint family property — **Held**, that P was entitled to charge for pre-paid purchase price on share of C either in property agreed to be sold or any other property that might be allotted to him at partition) ** AIR 1965 Pat 404 (406) (Fact proved by vendee showing that vendors were willing to fulfil their part of contract of sale by executing sale deed at any time — Sale deed not executed — **Held**, that it must have been due to some laches on part of vendee and it could be said that there was improper refusal by vendee to accept delivery so as to disentitle him to a charge on property) ** AIR 1959 Ker 389 (390) (DB) ** AIR 1953 Bom 145 (149) : ILR (1953) Bom 253 (DB) (The creation of a charge under S. 55(6) is not at all dependent upon the buyer not coming into possession of the property intended to be sold) ** AIR 1938 Rang 367 (368) (DB) ** AIR 1937 Bom 142 (143) : ILR (1937) Bom 140 ** AIR 1937 Mad 714 (716) (DB) ** AIR 1931 Mad 592 (593, 594) : 54 Mad 708 (DB). (Purchaser paying earnest money and then refusing to complete the purchase has no charge on property ** (1906) 9 Oudh Cas 259 (266) (DB) ** (1900) 24 Bom 440 (402) (DB) ** (1899) 23 Bom 56 (63) ** (1897) 7 Mad LJ 234 (236) (DB). (Seller includes his subsequent transferee.)

   [See also AIR 1941 PC 47 (48). (Question whether charge exists depends upon the question whether buyer has improperly declined to accept delivery.)]

2. AIR 1970 Guj 12 (DB).

3. (1989) 1 Ker LT 581 (582).

4. AIR 2000 SC 573 (578) : 2000 AIR SCW 113 : 1999 (10) JT 223.

paid by him on the vendor's interest when the contract goes off (5) The principles underlying this rule were stated by Vice-Chancellor Kindersley, in *Wythes v. Lee*(6) as follows :

> "Suppose a person, absolute beneficial owner in fee of an estate contracts to sell it, and the purchaser pays the deposit in part payment of the purchase-money, and by reason of the vendor being *unable to make a title* or from any other reason, not being misconduct on either side the contract goes off and cannot be completed, has the purchaser a lien on the estate for his deposit? . . . . . Now the question I have looked at in three different points of view
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> (1) With reference to natural justice, irrespectively of any specific rule of law, and it does appear to me that it is consistent with natural justice that if a purchaser on the faith of the contract being completed, and the same becoming his, has advanced money in payment or part payment for the purchase, he has advanced it under circumstances which entitle him to say "if you cannot complete, not only are you bound to give me back my money, but I have a right to lien on the estate"
>
> (2) With reference to the general law of this Court I do not mean with reference to decided cases, but to the general law and principles of this Court : This is clear, that the *vendor* if he has parted with the estate to the purchaser before he has got his money, has a lien for it on the estate, that is unquestionable Now, does the right of the *purchaser* if the contract goes off, stand in principle on the same footing as that of the vendor? The only distinction that occurs to me is this the vendor when he contracts to sell his estate is owner, he has the estate in his own possession at least under his own control, and when he contracts to sell his right is to say "I will convey the estate when the purchase-money is paid, but till that is done I will not convey it, that creates a lien of itself, very analogous to the common law lien, and that lien which exists before conveyance, still continues; it is not a new, but the same lien But with regard to the purchaser he has not the estate in his possession, and his lien is not in its origin the same sort of lien as that of the vendor. But when a contract is made, and then goes off, it appears to me that, in principle and justice, the equity of the purchaser to a lien on the estate ought to stand on as good a footing as the lien of the vendor after conveyance . . . . . ."

This clause applies to a stage *before* the buyer has accepted delivery of the property and therefore does not apply where the delivery *has been accepted* (7) The words "accept delivery of the property" must be understood as meaning "accept the *completion* of the contract by the execution of the conveyance or delivery of the property as the case may be." It does not mean acceptance of mere possession without the execution of a conveyance in cases where a conveyance is necessary. Thus, where under a contract for sale *A*, the seller, puts *B*, the buyer, in possession and receives the purchase-money, and the contract is not completed for no fault of the buyer, it cannot be said that by reason of the fact that *B* was placed in possession, he has "accepted delivery" within the meaning of this clause, and that he has no charge on the property (8) But where the *contract has*

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5. Halsbury, Laws of England, Volume XIX pages 16 and 17 ** (1898) 67 LJ Ch 313 (317) · (1898) 1 Ch 478 (485) · 78 LT 185 Levy v Stogdon. (Contract not completed by seller not being able to discharge incumbrances) ** (1864) 33 LJ Ch 385 (389, 390) 10 HL 672, Rose v. Watson.

6. (1855) 61 ER 954 (957) : 3 Drew 396.

7. AIR 1966 Mad 330 (330) ** AIR 1952 Kutch 10 (12)

   [**See also** (1947) 52 Mys HCR 69 (71) (DB) (It is only when possession is not with the buyer, either because he has declined to take delivery for proper reasons or because possession was not delivered to him that charge is created in favour of purchaser for the amount he might have paid.)]

8. AIR 1957 Bom 79 (81) ILR (1956) Bom 844 (DB) ** AIR 1953 Bom 145 (152) ILR (1953) Bom 253 (DB) ** (1947) 52 Mys HCR 69 (71) (DB) ** AIR 1916 Low Bur 67 (67) ** AIR 1916 Low Bur 38 (39) ** AIR 1914 Low Bur 53 (54) · 7 Low Bur Rul 262 (Property merely delivered to buyer without a proper conveyance as required by S 54 — Buyer has got a charge — The case is dissented from in AIR 1922 Low Bur 25 (26), but the reasons for the dissent are not given and the facts are quite different)

been duly completed in the manner prescribed by S 54, this clause does not apply **(9)** Nor will it apply if the sale is otherwise invalid,**(10)** or if subsequently the sale is avoided at the instance of a third party. The remedy of the buyer would in the latter case be merely a personal one against the seller to recover the purchase money paid by him as on a failure of consideration.**(11)**

When the property upon which the charge is created gets converted into another form, the buyer will be entitled to proceed against the substituted security This is a general principle of law and S 73 is only an example of it the same principle which is applicable to mortgages applies to cases of statutory charge under S 55(6)(b) If immovable property is charged and is converted into another property or money, then the charge will fasten on the property or money into which the subject-matter of the agreement is converted, S. 55(6)(b) also makes it clear that the buyer is entitled to interest on the amount of purchase money paid, interest is payable from the date of payment of purchase money to the seller till date of delivery of property to the purchaser or till the execution of sale deed whichever is earlier.**(12)**

The clause presupposes that the seller has some existing interest in the property contracted to be sold Where the thing contracted to be sold no existence at all, obviously the buyer cannot have a charge under this clause on any property of the seller He will only be entitled to recover the purchase-money personally from the seller on the ground that the money had been paid to him wholly without consideration **(13)** In *Sudha Mukhi Debi v Chairman of Commissioner of the Tollygunge Municipality*,**(14)** the contract for sale was not completed and possession was not delivered owning to the fact that the property agreed to be sold became non-existence. It was held that the buyer was entitled to claim a refund of the purchase-money which had been paid by him, personally from the seller as on a failure of a consideration.

Where the contract depends for performance upon the vendor recovering possession of the property from a protected tenant and the purchaser can well be said to be aware of this contingency unless and until vendor secures possession the statutory lien under Sec. 55(6)(b) would not be created in favour of the purchaser in respect of the money that he might have paid**(15)**.

If the agreement itself is void or becomes void by reason of statute prohibiting a contract of sale the Section would not become applicable and would create no charge**(16)**

[**See also** ILR (1959) Bom 35 (37), (AIR 1953 Bom 145, **Foll.**) ** AIR 1944 Mad 556 (556, 557). (Buyer put in possession under written contract of sale but S 53A not applicable as transaction was prior to its enactment and that section is not retrospective In suit for possession by vendor, vendee cannot rely on S 53A but will be entitled under S 55(6)(b) to refund of the purchase money before he is dispossessed.) ** (1904) 28 Bom 466 (471) (DB). (Execution of conveyance without registration — Vendor receiving purchase money and delivering possession to vendee — Suit by vendor to recover possession was decreed subject to vendee's charge) ** **AIR 1926 PC 94 (95, 96) : 53 Ind App 214.** (In such cases vendor is a bare trustee and has no attachable interest)]

9. AIR 1966 Mad 330 (330) ** AIR 1937 Bom 142 (143) ILR (1937) Bom 140 ** AIR 1928 Bom 328 (332) (DB).

10. AIR 1973 SC 1368 ** ILR (1967) Guj 323 (329) (Contract for sale void under S 23, Contract Act — Buyer not entitled to charge under S 55(6)(b)) ** (1910) 8 Ind Cas 1089 (1089, 1090) (DB) (Mad).

11. See (1892) 19 Cal 123 (126) : 18 Ind App 158 (PC).

12. AIR 2000 PC 573 (578) : 2000 AIR SCW 113 (119) : 1999 (10) JT 223.

13. (1852) 86 RR 619 (629) : 7 Ex 208, Strick Land v. Turner.

14. AIR 1934 Cal 148 (149) (DB) ** AIR 1964 Orissa 269 (273) (Vendee is entitled to ask for refund of earnest money.)

15. AIR 1974 Bom 155 (161, 162)

16. 1980 Law Summary 30 (32) (AP) ** 1996 (1) Guj LH 893 (900)

In case of sale of land in favour of a non-agriculturist being in violation of Bombay Act 7 of 1948 and the land and the price is ordered to be forfeited the purchaser would be entitled to refund of consideration. Because in such cases the contract of sale would imply a condition of permission from the Collector being obtained for validating the sale(**17**).

Even where a buyer wanted to take delivery of agricultural land agreed to be purchased by him, but for no fault of his the sale could not be effected and the land was acquired the buyer would be entitled to have a charge on the land for the amounts of purchase price paid by him(**18**)

The first part of the clause deals with the buyer's charge for *purchase money* The second part of the clause death with the buyer's charge for the *earnest money* (if any) that he might have paid and the last part deals with the buyer's charge for the costs if any awarded to him of a suit to compel specific performance of the contract(**19**) or to obtain a decree for its rescission

The buyer will be entitled to earnest money when he properly declines to accept delivery It follows, therefore, that under S 55(6)(b) unless the buyer properly declines to accept delivery the charge for the earnest money will remain from the time of payment This Section, however, begins with the words "in the absence of the contract to the contrary " So if the parties expressly stipulate that earnest money would be forfeited under certain circumstances the provisions of sub-section (6) will not be attracted. But mere fact that money is described as earnest does not make the contract to the contrary within the meaning of this sub-section Mere use of the word earnest would not be sufficient to exclude the operation of S 55(6)(**20**).

In the absence of express stipulation in the agreement to that effect, the amount of earnest money could not be forfeited on ground that the sale transaction did not materialise (**21**)

Earnest money can be forfeited if the party who paid the same was in default(**22**).

The buyer is, under paragraph 5, clause (b) above, bound to pay the purchase-money only at the time of conveyance and if he pays it before that time the seller is really a trustee for the buyer in respect of that amount until the conveyance is executed(**23**) and, therefore, in the first class of cases a charge arises from the moment the purchase-money in whole or in part is paid by the buyer in pursuance of the contract of sale(**24**).

Where the purchaser has committed default he is not entitled to claim a charge under S 55(6)(b).(**25**) In a suit by vendor for recovery of possession of the land agreed to be sold and for mesne profits, the counter-claim of the buyer was only for specific performance and alternatively for

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17. (1972) 13 Guj LR 343 (353)

18. (1969) 10 Guj LR 635 (638) (DB).

19. AIR 1956 Bom 443 (447) (DB)

20. AIR 1978 Cal 285 (295) (DB)

21. 1997 AIHC 975 (977) : 1997 (1) Kant LJ 605

22. AIR 1972 Mys 28 (29)

23. (1864) 12 WR (Eng) 585 (586) 10 HL 672, Rose v Watson (Per Lord Cranworth)

24. AIR 1978 Andh Pra 334 (A purchaser of J D's property under an agreement of sale has sufficient interest to entitle him to file an application under O 21 R 90 C P C) ** 1978) 2 An WR 312 (316) ** (1978) 80 Pun L R 195 (198) 1978 Pun LJ 14 ** AIR 1968 Andh Pra 334 (336) ** AIR 1952 Bom 145 (149) ILR (1953) Bom 253 (DB) ** AIR 1952 Bom 67 (68, 69) ** AIR 1916 Nag 78 (79 80) 13 Nag LR 19 ** AIR 1916 Low Bur 38 (39) ** (1897) 23 Bom 56 (61) (DB)

[**But see** (1910) 8 Ind Cas 144 (145) (DB) (Mad) (Purchaser not entitled to get back purchase-money until contract goes off by vendor s default and therefore charge does not arise on payment — Submitted not correct on principle) ** AIR 1922 Nag 81 (81, 82) (Charge does not arise until decree declaring charge — Submitted not correct)]

25. 1983 TLNJ 339 (342) (Mad).

refund of advance paid. There was no plea based on charge. Therefore, he could not raise the plea of charge as contemplated under S 55(6)(b) as a mere point of law in the absence of pleadings and proof to that effect.(26) *Earnest money, on the* other hand, when paid, cannot be said to belong to the buyer in the same way as purchase money paid before the execution of the conveyance As will be seen below it is paid as a guarantee for the due performance of the contract and is not returnable to the buyer until he properly declines to accept delivery Consequently, it is at that time that the charge will arise. It has, however, been held in the undermentioned cases(27) that the charge for the earnest money comes into existence at the time the earnest money is paid. As regards cost it is obvious that until it is *actually awarded* the buyer cannot have a charge for it.

A buyer who had to give up his right of sale of the property under an agreement executed in his favour because official assignee in whom the property vested on the seller's insolvency insisted on bringing the property to sell in the interest of creditors on the approval of the insolvency Court the buyer can insist upon a charge on the property being created for the amount of purchase money(28)

If the vendor sells the property to another person vendee under earlier contract who has paid the purchase price is entitled to recover the sum from the new vendee(29).

In anticipation of delivery.

In order that the first part of the clause may apply, the purchase money must have been paid *in anticipation of delivery* Where, at a sale in Government auction, the buyer is to deposit the price within a certain time, but the confirmation is to take place only later on, it cannot be said that the auction purchaser pays the purchase money "in anticipation of delivery", and he is, therefore, not entitled to any interest on the purchase money by reason of the delay in the confirmation of the sale.(30)

Declining to accept delivery.

The buyer does not lose his charge under this clause unless he has *improperly* declined to accept delivery. In the undermentioned case(31) it was held that this clause applied where there was a failure of the contract for sale, it having fallen through owing to some default on the part of *one or other* of two parties It is submitted that this view is not correct; the clause specifically enacts "unless the *buyer* has improperly declined to accept the delivery."

A buyer cannot be said to improperly decline to accept the delivery by the fact of his rejecting the contract for a valid reason caused by the seller's default.(32) In *Rose v. Watson*(33) where the buyer had rejected the contract owing to default of the seller and it was argued that the buyer had no lien. Lord Westbury, L.C., observed as follows :

> "But, my Lords, it has been contended at the Bar in words, that the contract has been rejected by the purchaser, and that therefore the purchaser ought not to have the benefit of lien, that is, of that

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26. 1998 (2) Mah LR 738 (752) (Bom).

27. AIR 1953 Bom 67 (68) ** AIR 1942 Sind 120 (120) ILR (1942) Kant 200 (If the property is thereafter attached and sold in execution such attachment and sale cannot affect the buyer's charge and can take effect only after the payment to the buyer of his earnest money out of the sale proceeds : 23 Bom 56, Foll.)

28. AIR 1978 Mad 186 (190)

29. 1981 All LJ 62 (64).

30. AIR 1928 Bom 328 (329) (DB).

31. AIR 1928 Bom 328 (332) (DB).

32. AIR 1929 Mad 189 (191) (DB). (Using option under S 15, Specific Relief Act in rejecting offer, is not declining delivery under this section.)

33. (1864) 11 ER 1187 (1191) . 12 WR (Eng) 585 . 10 HL 672 33 LJ Ch 385 3 NR 673 10 Jur (NS) 297 10 LT 106

partial ownership, that interest in the estate which is due to the purchase-money which he has paid. It is quite a mistake and a misapplication of the word to say that the purchaser has rejected the contract, or put an end to the contract. The purchaser would have been willing to perform the contract if the vendor had performed those things which, in good faith, he was bound to do. And it is impossible to say with any truth or accuracy of expression, that the purchaser has repudiated the contract because the vendor has failed to redeem his own promises to which he had pledged his faith, and in dependence upon which the purchaser entered into the contract. It only gives, in point of fact, an additional ground of complaint to the purchaser, that he cannot obtain the estate that he contracted for, and that being unable to obtain it by reason of the failure of the vendor, the loss to him is attempted to be aggravated by its being sought to deprive him of the only means of acquiring the repayment of his money (the vendor having become bankrupt), namely, by following the interest which in respect of that payment of money he had acquired in the estate."

It follows that where the seller fails to make out a marketable title at the time fixed for completion of the contract for sale and the buyer consequently puts an end to the contract(**34**) he cannot be said to have improperly declined to accept the delivery and cannot therefore be deprived of the charge under this clause.

It is, however, not necessary that the contract should have gone off by reason of the *default of the seller*. The charge will exist in every case in which a right to recover the money has not been lost by reason of the misconduct of the buyer. In other words, where the contract goes off either by reason of the default of the seller or without any default on the part of the buyer the charge becomes operative(**35**). Thus, where the buyer rescinds the contract by virtue of a power of rescission reserved to him under the contract for sale, he does not lose his charge(**36**).

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34. AIR 1973 Mad 353 (Where the vendor having only life interest purported to convey absolute title to the vendee and vendee was entitled to return of purchase money even if he was aware of the defect in the title.) ** AIR 1964 Orissa 269 (273) ** AIR 1958 Madh Pra 239 (241, 242) (DB) (Land transferable only on sanction by Revenue Officer — Seller failing to obtain sanction — Buyer declining to complete sale — Not improper.) ** AIR 1952 Madh-B 145 (145) (Pr 4) (AIR 1943 Sind 92, Rel on.) ** AIR 1943 Sind 92 (93) ILR (1942) Kant 543 (DB) (Seller's title would be doubtful where there is reasonable probability of litigation in respect of the property agreed to be purchased — Fact that after subsequent judicial investigation the seller's title was found to be clear will not deprive the buyer of his charge if at the time of the completion of the contract the seller was not able to give a title free from reasonable doubt.) ** AIR 1937 Pesh 8 (9) (DB) ** AIR 1924 Bom 282 (285) (DB) (Vendor's difficulties in making out a marketable title and complete the same should not be allowed to affect the vendee prejudicially.) ** AIR 1924 Lah 476 (477, 478) (DB) (Knowledge of vendee of the defective title does not disentitle him from getting a clear title for only a refund.) ** AIR 1915 Lah 237 (237) ** (1909) 5 Nag LR 70 (75) ** (1912) 14 Ind Cas 811 (811, 812) (Low Bur) ** (1912) 81 LJ Ch 386 (390) (1912) 1 Ch 601 (610), In re Lloyds Bank and Lillington (1862-63) 1 Bom HCR 77 (80) ** (1873) 42 LJ Ex 108 (112) 8 Ex 174, Want v. Stallibras ** (1867) 15 WR (Eng) 420 (421) 3 Eq 744 Turner v. Marriott.

[**See also** AIR 1960 Punj 275 (278) ILR (1959) Punj 1463 (DB) (Seller's title doubtful and reasonable probability of litigation in respect of property — Buyer would be justified in declining to carry through transaction.) ** **(1897) 21 Bom 827 (865) (FB).**]

[**See however** AIR 1950 Lah 106 (115) Pak LR (1950) Lah 1 (DB) (Agreement of sale of property at Lahore by A to B — Subsequent notice under S 36 Punjab Town Improvement Act, 1922 for acquisition of property in question — A's title is not rendered defective — B held not entitled to repudiate contract and recover earnest money.)]

35. AIR 1952 Bom 67 (68) (In this case there was no default on the part of buyer so that the buyer had a charge and the buyer's charge continued and was never lost.) ** (1902) 71 LJ Ch 424 (426) (1902) 1 Ch 835 (840, 841) (Whitbread v. Watt (Per Cozens Hardy, LJ.)

36. (1902) 71 LJ 424 (426) (1902) 1 Ch 835 (840) Whitbread v. Watt

[**See also** 1908 All WN 5 (5) (Rescission of contract inferred from conduct of parties.)]

But though, if the default is that of the buyer he cannot have a charge under this clause, he will, in respect of any *purchase money* that had been paid by him, be entitled to a return thereof, which can be enforced *independent of any charge*(37) The reason is that, unless the conveyance is executed, the seller is not entitled to any purchase money and cannot retain it as against the buyer The position is different where *earnest money* has been paid by the buyer and the contract goes off by his default In this case he cannot recover, as will be seen below, the earnest-money at all, much less will he have a charge for it(38).

Extent of charge.

The buyer's charge under this clause extends not only to the purchase money but also to the interest on such amount(39) This clause does not, however, provide for any interest on the earnest money in cases where the buyer has a charge in respect thereof(40). In England where a contract for sale goes off on account of the seller's default the buyer is entitled to a refund of the deposit (earnest money) with interest(41) In this country also it has been held that in similar circumstances he is entitled to interest(42) It is doubtful, however, whether he will have a charge for such interest in view of the wording of the section.

Where in a contract for sale a certain amount was provided as liquidated damages in the event of default on either side and the seller did not carry out his part of the contract, it was held that the charge which the buyer had under this clause did not extend to the amount of damages awarded(43).

Buyer has got charge on the property for price pre-paid and it is enforceable not only against seller but also against all persons claiming under him, including transferee for value without notice(44).

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37. 1983 TLNJ 339 (342) (Mad) ** AIR 1955 Orissa 20 (23) (DB) ** AIR 1955 Orissa 11 (13) . ILR (1954) Cut 526 (DB) (Part payment of purchase money) ** AIR 1942 Sind 37 (39) : ILR (1941) Kant 495 (DB) ** AIR 1927 Mad 204 (206)

38. ILR (1950) Nag 625 (631) (DB) ** AIR 1936 Cal 51 (52) 63 Cal 804 (In the absence of contract to contrary or if inferred from terms of contract.)

[See also (1924) 93 LJPC 237 (239, 240) 1924 App Cas 980 131 LT 645 40 TLR 678. Mayson v. Clouet]

39. AIR 1956 Bom 443 (447) (DB) (Contract falling through due to seller's default in making out good title — Buyer is entitled to purchase money paid by him and also interest thereon) ** AIR 1929 Mad 189 (191) (DB) ** (1909) 31 All 68 (71) : 36 Ind App 44 (PC) ** (1864) 33 LJ Ch 385 (389) 12 WR (Eng) 585 10 HL 672 : 11 ER 1187 10 LT 106 10 Jur (NS) 297 · 3 NR 673, Rose v. Watson

[See also AIR 1927 Bom 195 (208, 209) 51 Bom 247 (DB)]

40. AIR 1956 Bom 443 (447) (DB).

41. Halsbury, Laws of England, Vol XXV, p 401 ** (1822) 58 ER 322 (322) 5 Sim 227 · 35 RR 153, Lord Anson v. Hodges.

42. AIR 1937 Pesh 8 (9) (DB) (Provision of the Act taken as a guide though the Act is not applicable in the province.)

[See also AIR 1958 Madh Pra 239 (242) (DB) (Suit for refund of purchase money — Interest can be claimed from date of suit and not from date of payment of money) ** AIR 1958 Punj 111 (115) ILR (1958) Punj 294 (Unreasonable delay on part of vendor in fulfilling condition requisite for sale to be effected — Vendee held entitled to get back earnest money with interest.)]

43. AIR 1929 Mad 189 (191) (DB) (Purchaser's lien in this country created by statute and the Court cannot go beyond the words of the section itself.)

[See also 1962 Ker LT 728 (730) (Or on costs in respect of damages awarded)]

44. AIR 1990 Ker 169 (170) : (1989) 1 Ker LT 245.

In spite of agreement to sell the vendor gifted the property to grandson, the vendee filed a suit for specific performance and in the alternative for return of the advance paid, the vendor died during pendency of the suit. Held that S 55(6)(b) would apply and the donee would be liable to refund the advance, though no prayer for refund was made against him(**45**).

The charge under this clause attaches only to the *seller's interest* in the property(**46**) So far as claim for interest on the purchase money is concerned it can be enforced only against the defaulting vendor and not against subsequent purchaser(**47**) The word "interest" means *personal* interest and not the interest which a person may have in property as a trustee Where, therefore, a trustee sells trust property and receives the earnest money but refuses to complete the sale the buyer cannot under this clause, have any charge on the trust property(**48**) But where a *guardian* of a minor agrees to sell property of the minor for a purpose binding on the minor and receives purchase money but refuses to complete the contract, it has been held by the High Court of Nagpur that the buyer has a charge under this clause on the minor's property(**49**) So also where there is a charge under this clause in favour of a non-evacuee on the property belonging to an evacuee the interest of the evacuee is only the property subject to the charge The charge does not vest in the custodian, nor has he any power under the Administration of Evacuee Property Act, 1950 to determine the charge in favour of a non-evacuee(**50**) In *Aberaman Iron Works Co v Wickness*(**51**), where *A* contracted to purchase certain property from *B* and then contracted to sell the same to *C* who paid the purchase money to *A* but *A* could not perform the contract with *C* it was held that *C* had a lien on *A's* equitable interest in the property This would not be so in this country where *A's* contract for purchase from *B* will not give him any equitable interest See also the undermentioned case(**52**)

Earnest money.

"Earnest" is the sum of money paid by the buyer of property under a contract for sale in order to bind the seller to the terms of the agreement for sale(**53**) In other words it is a *guarantee* for the performance of a contract(**54**) The test for vendee's right to recover the deposit is whether the action for specific performance at the instance of the vendor could be successfully resisted by the vendee

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45. AIR 1987 Raj 11 (14) : 1985 Rajasthan LR 802 (805)

46. AIR 1962 Cal 12 (16) ILR (1961) 2 Cal 558 (DB) (If therefore the seller has no interest in the property then there can be no statutory charge for the earnest money paid to him)

47. AIR 1971 All 189 (191) : 1970 All LJ 969

48. AIR 1932 Cal 356 (366) : 59 Cal 586 (DB)

49. AIR 1939 Nag 209 (210)

50. AIR 1964 Raj 48 (49) : ILR (1963) 13 Raj 1111

51. (1869) 17 WR (Eng) 211 (215) : 4 Ch 101.

52. **AIR 1981 SC 519 : 1980 UJ (SC) 739.** (A contract of purchase of property by a minor through his guardian is enforceable as there is no personal liability on the minor regard for payment of purchase price) ** AIR 1972 Bom 217 (Where the contract of sale is frustrated due to the acquisition of land by the Government the buyer would be entitled to a limited interest to the extent of definite amount in respect of what was acquired) ** AIR 1962 Bom 169 (173 174) (Effect of S 11 (1) of Evacuee Interest (Separation) Act 1951 on sale of composite property subject to charge under S 55 (6)(b) — Charge not lost by sale — Charge attaches to sale proceeds.)

53. Wharton Law, Lexicon, Edn 14 1938 p 357, *Sub voce* 'Earnest ** AIR 1960 Punj 51 (54) (Forfeitures are not as a rule favoured unless right claimed is clearly established) ** AIR 1956 Vind Pra 42 (43) ** AIR 1952 Cal 93 (96).

54. AIR 1963 Andh Pra 304 (305) (Mere fact that earnest money is mentioned in the contract as 'advance' or 'consideration for sale' does not take away the seller's right) ** AIR 1961 Punj 378 (383) ILR (1961) 2 Punj 293 (DB) ** AIR 1960 Punj 51 (54) ** AIR 1956 Vind Pra 42 (43) ** AIR 1955 Orissa 20 (23) (DB) ** AIR 1955 Orissa 11 (13) ILR (1954) Cut

on the ground that vendor's title was defective(**55**) The essential characteristic of earnest money is that it is held as an amount by way of security for due performance of the contract. A clause provided for forfeiting of the earnest for default of purchaser is one of the circumstances to ascertain the real character of the amount paid If the amount is paid on the date of the agreement there is presumption that it was a security for performance i.e earnest(**56**) Where a purchaser paid earnest money in respect of a sale advertised by the official receiver of the High Court but failed to pay the balance he could not claim the refund(**57**). When the transaction goes forward the earnest, or as it is called in England "deposit", becomes part of the purchase money(**58**) It is forfeited if the transaction falls through by reason of the fault or failure on the part of the buyer(**59**) and the buyer cannot get it

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526 (DB) ** AIR 1952 Cal 93 ** AIR 1938 Mad 246 (247) ** AIR 1937 Mad 681 (683) ** AIR 1936 Cal 51 (52) 63 Cal 804 ** AIR 1930 Bom 213 (214) (DB) ** AIR 1926 Cal 339 (343) (DB) ** AIR 1916 Nag 104 (111) · 12 Nag LR 177 (DB) ** (1911) 81 LJ Ch 46 (47) : (1911) 2 Ch 551, Hall v. Burnell.

55. ILR (1966) 1 Mad 114

56. AIR 1972 Mys 28 (29).

57. (1972) 42 Com Cas 415 (418) (Delhi).

58. AIR 1967 Delhi 91 (94) (DB) ** AIR 1960 Punj 51 (54) ** 1957 Ker LT 950 (952) ** AIR 1956 Vind Pra 42 (43) ** AIR 1955 Orissa 20 (23) (DB) ** AIR 1955 Orissa 11 (13) ILR (1954) Cut 526 (DB) ** AIR 1952 Cal 93 ** AIR 1930 Bom 213 (214) (DB) * (1910) 33 Mad 375 (379) (DB).

59. **AIR 1926 PC 1 (2) ** AIR 1915 Mad 896 (898) : 38 Mad 178 (FB) ** AIR 1929 Nag 30 (32) : 24 Nag LR 189 (FB) ** (1897) 21 Bom 827 (853) (FB)** AIR 1963 Andh Pra 304 (305) ** AIR 1961 Punj 378 (383) ILR (1961) 2 Punj 293 (DB) (Part payment of purchase price cannot, however, be forfeited as it is not guarantee for performance of contract) ** AIR 1960 Andh Pra 515 (516) ** AIR 1960 Punj 51 (54) ** AIR 1959 Pat 176 (180) (Seller need not prove special damage under S 73, Contract Act in order to retain the amount) ** 1957 Ker LT 950 (952) ** AIR 1956 Vindh Pra 42 (43) ** AIR 1955 Orissa 20 (23) (DB) ** AIR 1955 Orissa 11 (13) ILR (1954) Cut 526 (DB) ** 1953 AMLJ 136 (137) (Breach of contract for sale by vendee — Vendor is entitled to forfeit the earnest money even though the agreement does not contain a clause for forfeiture but on the other hand has a condition that on the vendor's failure to get the sale deed executed within the stipulated period, he would refund the earnest money with interest) ** AIR 1952 Cal 93 (This liability exists notwithstanding Ss 64, 65 and 74 of the Contract Act and is not affected by any of the said provisions) ** AIR 1952 Punj 380 (381) (Contract for sale — Part of property destroyed by fire In view of S 13, Specific Relief Act (1877), contract cannot be said to be wholly impossible of performance — Vendee not prepared to take sale is not entitled to return of earnest money) ** AIR 1952 Sau 88 (99) ** ILR (1950) Nag 625 (631) (DB) (Bidder being aware of all the defects in property put up to sale successfully bidding and depositing percentage required of him — Deposit can be validly forfeited if sale falls through by his default - That resale resulted in bid for larger sum is not a plea open to him nor is it necessary that there should have been forfeiture clause) ** AIR 1945 All 70 (75, 76) ILR (1944) All 204 (DB) (The rule of forfeiture of earnest money does not depend on proportion of earnest money to total price) ** (1915) 27 MLJ 482 (483) (DB) (Failure of vendee to tender expenses of sale and registration — Vendee held could forfeit earnest money) ** AIR 1948 Cal 208 (209) ** AIR 1942 Sind 37 (39) ILR (1941) Kar 495 (DB) ** AIR 1938 Mad 246 (247) (The mere fact that deposit is demanded proves that it will be forfeited if defaulted by vendee unless an agreement to the contrary is proved.) ** AIR 1937 Mad 681 (683) (This is also the principle of English law and applies in India) ** AIR 1936 Cal 51 (52) 63 Cal 804 ** AIR 1930 Bom 213 (214) (DB) ** AIR 1929 Oudh 254 (255) 5 Luck 49 (DB) ** AIR 1926 Cal 339 (343) (DB) ** AIR 1920 Cal 931 (932) (DB) ** AIR 1920 Cal 679 (680) (DB) ** AIR 1919 Sind 68 (69) 12 Sind LR 144 (DB) ** AIR 1916 Cal 974 (975) (DB) ** AIR 1916 Sind 71 (72) 9 Sind LR 137 ** (99) 23 Bom 56 (61) (DB) ** (1897) 19 All 489 (492) (DB) ** (1926) 98 Ind Cas 890 (892) (DB) (Lah)

back(60) As observed by Bowen, L.J., in *Howe v. Smith*(61).

> "It is quite certain that the purchaser cannot insist on abandoning his contract and yet recover his deposit, because that would be to enable him to take advantage of his own wrong

The test to see whether an amount paid is earnest money is to find whether the parties intended that the amount paid was to be treated, not merely as part payment, but as a guarantee for the due performance of the contract(62). See also undermentioned case(63)

The principle of forfeiture of the earnest money will not apply when the buyer not repudiate the contract(64), or where the seller is responsible for the breach of contract(65)

Whether the payment is earnest or not is a mixed question of law and fact and one of the factors is the proportion the amount bears to the sale price the need to take deposit intended to act as

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** (1911) 33 All 166 (167 168) (DB) ** (1910) 33 Mad 375 (378) (DB) ** (1862) 33 LJ Ch 134 (136) 12 WR (Eng) 191, Depree v Bedborough ** (1893) 62 LJ QB 232 (235) 1893-1 QB 350, Ellis v Gulton (Earnest money paid to agent of vendor) ** 19.1 81 LJ Ch 46 (47) (1911) 2 Ch 551 (556) Hall v Burnell ** (1854) 23 LJ Ex 94 (96) 9 Ex 309 Devan v M'Donnell ** (1875) 23 WR (Eng) 846 (846) 10 Ch 512 (514) Ex parte Burrell In re Parnell ** (1884) 53 LJ Ch 1055 (1058) 27 Ch D 89 (1(2) Howe v Smith ** (1958 27 LJ QB 361 (363) : EL Bl & EL 485, Ockenden v. Henly

(See also (1887) 56 LJ Ch 456 (459) . 37 Ch D 96 (103), Soper v. Arnold)

60. AIR 1961 Raj 196 (203) ILR (1960) 10 Raj 1153 1957 Ker LT 950 952 ** AIR 1956 Vind Pra 42 (43) ** AIR 1955 Orissa 20 (23) (DB) ** AIR 1952 Cal 93 ** AIR 1952 Sau 88 (99) ** AIR 1929 Oudh 254 (255) 5 Luck 49 (DB) ** AIR 1915 Mad 546 (547) (DB)

61. (1884) 53LJ Ch 1055 (1059) · 27 Ch D 89 (98)

62. AIR 1963 Ker 247 (247) (No clause in deed for forfeiture of advance — Amount can only be part of sale consideration) ** AIR (1960) Andh Pra 515 (516) ** AIR 1964 Bom 224 (225) ILR (1960) Bom 36 (Contract for sale drawn up by lawyer referring to particular amount paid as earnest money — Recital that this amount was liable to be forfeited in event of other party not carrying out its part of contract — Amount held was intended to be earnest money and not part payment of price) ** AIR 1958 Madh Pra 239 (242) (DB) (Question whether amount paid is part payment or earnest — Depends on intention of parties and surrounding circumstances) ** AIR 1958 Mys 10 (14) ILR (1957) Mys 72 (DB) ** 1957 Ker LT 950 (52) ** AIR 1955 Orissa 11 (13) ILR (1954) Cut 526 (DB) (It depends on the parties as to whether the sum paid was intended to be the one or the other or a combination of both) ** AIR 1920 Cal 679 (680) (DB) The intention may be express or implied and is to be collected from the whole instrument)

63. AIR 1959 Pat 176 (179) (When money is paid at the time of the agreement whether it is called earnest money or not it is presumed to be earnest or security and liable to forfeiture)

64. AIR 1968 Assam 26 (27) ILR (1964) 16 Assam 513 (DB) (Contract of sale coming to an end by frustration — Vendees entitled to refund of earnest money — Principle for refund of earnest money is independent of considerations laid down in Ss 64 65 and 74 Contract Act — The earnest money is liable to be forfeited when the contract goes off for default on the part of the purchaser ** AIR 1952 Cal 93 ** AIR 1959 Pat 176 Full 21 Bom 827 FB) Relied on ** AIR 1953 Orissa 105 (106) (DB) (Forfeiture of earnest money is in nature of penalty — Purchaser's failure to secure relief of specific performance of contract of which time was of essence — Purchaser can be relieved from forfeiture of earnest money by Court in exercise of its equity jurisdiction) ** AIR 1919 Sind 68 (69) 12 Sind LR 144 (DB) ** (1858) 140 ER 986 (1001) 4 CB (NS) 20 Ropleton v Buchanan ** (1910) 33 Mad 375 (385) (DB) ** (1911) 10 Ind Cas 525 (526) (DB) (Cal)

65. ILR (1966) 1 Mad 114 (120) (Test of vendee's right to recover back deposit is whether action for specific performance at instance of vendor could be successfully resisted by vendee on ground that vendor's title was defective) ** AIR 1958 MP 239 (242) (DB) (Breach of contract for sale committed by vendor — Vendor bound to return amount paid whether as purchase money or earnest money) ** AIR 1958 Punj 111 (115) ILR (1958)

in terrorem, the nature of the contract and other circumstances(**66**)

In order that the principle of the forefeiture of earnest money, where the contract falls through owing to the default of the buyer, may apply, it must be unmistakably clear from the contract that the sum was paid or deposited *as earnest* There may be cases where the Court may find that the amount of the deposit is so great in comparison with the amount payable under the contract, that the parties cannot have intended it as a mere guarantee for performance, but rather as a punishment or penalty for non-performance of the contract. in such cases the Court may refuse to allow the retention of the whole of deposit But where there is no disproportion and nothing unreasonable in regarding the deposit as a guarantee, then the defaulter will not be allowed to recover back what he has paid on an express stipulation that it shall be forfeited in the event of default(**67**)

The plaintiff's claim as a vendee for refund of earnest money forfeited by the vendor without pleading and raising an issue to that effect or any evidence about it, is not tenable(**68**).

What is called advance may be deposit or earnest money and what is termed as deposit may ultimately be proved to be an advance, mere description by parties does not conclude the matter. Intention is to be looked at(**69**)

The mere fact that specific performance of the contract is refused to the buyer by the Court does not show that he has repudiated the contract In *Howe v Smith*(**70**) Cotton, L J. , observed :

> "I do not say in all cases where this Court refuse specific performance, the vendor ought to be entitled to retain the deposit It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion, there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to repudiation on his part of the contract "

Where the seller, in a suit for specific performance by the buyer, totally denied the contract for sale but specific performance was refused by the Court not on the ground that there was no contract, but on the ground that the buyer failed to pay the purchase money within the time specified, it was held by the Calcutta High Court that the buyer could not be said to have repudiated the contract and that he was entitled to a return of the earnest money(**71**).

Where a contract falls through bv reason of the default of the buyer and the seller claims damages from the buyer, the earnest money must be taken into account in assessing damages(**72**).

Punj 294 (DB) (Unreasonable delay on part of vendor in fulfilling condition requisite for sale to be effected — Vendee held entitled to get back earnest money with interest) ** AIR 1955 Nag 38 (40) ILR (1955) Nag 538 (DB) ** AIR 1955 Orissa 11 (13) ILR (1954) Cut 526 (DB). (Vendor is bound to return the sum so paid.)

66. ILR (1966) 1 Mad 114.

67. ILR (1966) 1 Mad 114 (117) ** AIR 1960 Andh Pra 515 (516) (Whether in a given case a stipulation to forfeit the amount deposited is so unreasonable as to amount to a punishment for the non-performance of the contract is a question of fact) ** AIR 1956 Vind Pra 42 (43) (Earnest money amounting to 10 p c , of the consideration held was not disproportionate and the whole of it was forfeited) ** AIR 1937 Mad 681 (683, 684)

68. AIR 1978 Cal 559 (565).

69. AIR 1973 Mad 353.

70. (1884) 27 Ch D 89 (95) 53 LJ Ch 1055 50 LT 573 , 32 WR (Eng) 802 · 48 JP 773

71. (1897) 24 Cal 897 (899) (DB)

72. AIR 1960 Punj 51 (54) ** 1957 Ker LT 950 (952) ** AIR 1955 Orissa 11 (13) · ILR (1954) Cut 526 (DB) (If the vendor resells the property and claims to recover the loss arising on such resale the deposits is to be taken into account in diminishing the deficiency) ** AIR

Where, however, a part payment is made and the buyer commits default in performance he can recover the purchase price that he has paid subject to the right of the seller to set off a certain sum for damages against the purchaser(73).

Where the contract of sale became void because of the acquisition of the property, sought to be sold, the buyer is entitled to refund of earnest money with interest(74).

Though a deed of assignment of the benefit under a contract of sale simpliciter will not come under S 17(1) of the Registration Act, it would not be so in a case where such a contract further acknowledges payment of earnest money and/or purchase money because such acknowledgment creates a statutory charge under the provisions of S 55(6)(b) Where a charge is purported to be created by a document in writing and so also in assignment of such charge, both would require registration(75).

Charge is non-possessory.

Where in pursuance of the contract for sale the buyer has paid purchase money and obtained possession, but the contract falls through for no default of the buyer, the charge which he may have on the property for the purchase money will not entitle the buyer to retain possession as against the seller. In other words, the fact that the buyer has a charge on the property is not a defence to a suit for possession by the seller(76).

The vendor's right to get possession of the property is founded in his title and only so long as the title subsists he is entiteld to get back possession of the property from the buyer and not thereafter(77). When an owner purports by an oral sale to transfer his property and delivers possession to the vendee the possession of the transferee must be deemed to be adverse to the owner and a suit for recovery of possession must be filed within 12 years from the date on which possession was delivered. If the right is not so exercised, by the combined operation of Art 144 and S 28 Limitation Act of 1908 (now Art. 65 and S 27 of the Limitation Act 1963) the vendor s title must be deemed to be extinguished(78).

Against whom charge is enforceable.

The words "with notice of the payment" which occurred in the section after the words "persons claiming under him" before the amending Act of 1929 were omitted by that Act The buyer's charge could not, before the amendment be enforced against transferees without notice(79) Under

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1952 Cal 93 (96, 97, 99) ** (1910) 79 LJ Ch 121 (122) (1910) 1 Ch 176 (178) Shattleworth v. Clews.

73. 1957 Ker LT 950 (952) ** AIR 1955 Orissa 11 (13) ILR (1954) Cut 526 (DB)

74. 1992 Bom CJ 320 (331)

75. (1985) 1 Cal HN 95.

76. (1947) 52 Mys HCR 69 (72) (DB) ** (1910) 8 Ind Cas 1089 (1089) (DB) (Mad)

[See also AIR 28 Bom 466 (471) (DB).]

77. AIR 1957 Bom 79 (81, 82) : ILR (1956) Bom 844 (DB)

78. AIR 1957 Bom 79 (81, 82) : ILR (1956) Bom 844 (DB)

[See also AIR 1957 Bom 18 (19) ILR 19 Bom 427 (Position with regard to oral sales is that the buyer becomes a charge holder and it would be open to the debtor to offer the amount in question to the intending buyer and require him to release his property from the burden of the charge But after a lapse of 12 years the alleged purchaser would be able to set up adverse title.)]

79. AIR 1952 Bom 67 (69, 70) (The circumstance that the transfer in favour of the subsequent purchaser has taken place before the date of the suit by the buyer praying for a declaration of the charge makes no difference and the purchaser is bound by the decree declaring the charge.) ** (1897) 7 Mad LJ 234 (236).

[See AIR 1929 Mad 189 (191) (DB) (*A* agreeing to sell property to *B* — *B* paying Rs 200

the present section it is clear that the charge can be enforced not only against the seller but against all persons claiming under him irrespective of notice notwithstanding the provisions of S. 100(**80**). The reason for the amendment has been stated by the Special Committee(**81**) as follows :

> "Sub-clause (b) of clause (6) of the same section relates to the buyer's lien and provides that it can be enforced against the seller and other persons claiming under him with notice of the payment. It also provides that the buyer s lien can only be enforced against a person claiming under the seller, if such person has notice of the payment of the purchase-money The transferees and legal representatives of a seller are thus enabled to escape any liability for the amount received by the seller by pleading that they had no notice of the payment of the purchase money The reasons for limiting the seller's lien against third persons who have notice of the sale do not hold good in the case of the buyer's lien against persons claiming under the original seller The words 'with notice of the payment' in sub-clause (b) of clause (6) should, therefore, be omitted."

Where the seller in breach of the contract transferred the property to a third person and delivered possession the buyer who failed to get delivery is entitled to refund and to a charge on the property against the seller unless he has improperly declined delivery(**82**).

The charge can be enforced not only against the seller but all persons claiming through him irrespective of notice of the prior agreement of sale notwithstanding the subsequent sale of the property(**83**).

If the property is transferred by the vendor subsequent to the agreement for sale before filing of the suit by the first vendee to enforce his charge for prepaid purchase money the subsequent transferee is a necessary party(**84**).

Buyer's charge not an interest in immovable property.

It has been held in the undermentioned cases that the buyer's charge under this section for the earnest money paid under an agreement for sale is an interest in immovable property(**85**). This view is no longer good law in view of the last paragraph of S. 54, T.P. Act and of the Explanation added to S 17(2) of the Registration Act, 1908 See Note 23 under S 54 and Note 53 under S. 17 of the AIR Commentary on the Registration Act, 1908 See also the undermentioned cases(**86**).

Modification or waiver of charge by agreement.

As the provisions of this section are expressly made subject to a contract to the contrary, it is open to the parties to dispense with the statutory charge under this clause by means of a contractual arrangement between them. But an arrangement between the parties which is consistent with the lien under this clause cannot be regarded as intended to waive or modify the statutory charge An agreement by the seller to pay the purchase money by instalments is not inconsistent with the statutory

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as part payment — *A* failing to perform his part of contract and selling property to *C* — *C* having notice of the prior contract for sale — **Held**, *C* being a person claiming under *A* "with notice of the payment" charge could be enforced against them)]

80. 1962 Ker LT 728 (729) ** AIR 1959 Ker 389 (390) (DB) ** AIR 1952 Madh B 145 (145) ** AIR 1937 Bom 142 (144) : ILR (1937) Bom 140

81. See Report of the Special Comittee on S. 55

82. 1979 All LJ 1309 (1311) : (1979) 5 All LR 498.

83. AIR 1973 Mad 353 (356)

84. (1969) 71 Bom LR 769.

85. **AIR 1926 PC 94 (96) : 53 Ind App 214** ** AIR 1956 Cal 462 (563, 464) : ILR (1957) 3 Cal 99 (Such a purchaser can apply under O. 21, R 89, Civil P.C., for setting aside execution sale.)

86. 1962 Ker LT 728 (730) (Section 17 (2) Explanation of Registration Act — Explanation supersedes effect of decision in AIR 1926 PC 94) ** AIR 1916 Low Bur 67 (67) (Charge is not interest in immovable property.)

charge under this clause. A provision that the money should be realisable by the buyer by bringing to sale the seller's interest in the property is only a statement of the right conferred by this clause and does not amount to its waiver or modification. Hence, a consent decree between the parties making the earnest money payable by instalments and providing that the seller's interest in the property should remain mortgaged and should be liable to be brought to sale in execution for recovering the money is entirely consistent, with the charge declared by this section and is in no way a waiver or modification of the charge(87).

Limitation for enforcing charge.

A suit on a charge under this clause is governed by Art. 62 of the Limitation Act, 1963 corresponding to Art. 132 of the Limitation Act, 1908(88).

Other remedy of the buyer.

Where the buyer has paid purchase money and the contract goes off without any default on his part, he can, independently of this clause, sue for the recovery of the purchase money personally from the seller(89). The remedy by way of enforcement of the charge under this clause is only an additional remedy.

Punjab

Principles enunciated under S. 55(6)(b) was applicable to Punjab, though T.P. Act did not apply(90).

21. Omission to make disclosures referred to in paragraph 1, clause (a) and paragraph 5, clause (a).

The omission by the seller to make a disclosure under para 1, cl. (a)(1) and by the buyer under para. 5, cl. (a) is declared to be fraudulent by the last paragraph of the section. This was the law even before the Act was passed(2). As has been seen already in Note 2, a seller is not bound under para. 1, cl. (a) to make a disclosure of a fact where either he himself has no knowledge of that fact or where the buyer himself could, with ordinary care, have discovered it. In such cases the seller cannot be considered to be guilty of fraud in not disclosing the fact(3). It has also been seen in the said Note

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87. AIR 1943 Sind 236 (236, 237) : ILR (1943) Kar 342 (DB) (The decree and the adjustment did no more than repeat or emphasise what existed before and there was no necessity for registration either of the decree or of the adjustment and they could be used in evidence.)

88. (1899) 21 All 454 (458).

89. AIR 1963 Ker 247 (247) ** AIR 1924 Mad 903 (903).

90. AIR 1989 SC 1426 (1430).

Section 55 — Note 21

1. 1965 All LJ 786 (789) (Vendor entering into previous agreement for sale with another — Not a material defect in property or its title — Non-disclosure does not amount to fraud.) ** AIR 1964 Orissa 269 (273) (Onus of proving that non disclosure was fraudulent lies on purchaser.) ** AIR 1963 Raj 38 (41) : ILR (1962) 12 Raj 744 ** AIR 1952 Madh B 23 (26) (Such an omission will entitle the buyer to avoid the contract.) ** AIR 1950 Lah 106 (111) : Pak LR (1950) Lah 1 (DB) (Reasoning under S. 20 Contract Act cannot be used in support of a reasoning under S. 55 T.P. Act.) ** AIR 1929 All 199 (200) (DB) (Sale deed including various mortgage-bonds as sold — Rate of interest thereon not mentioned — Omission held not fraudulent concealment.) ** AIR 1925 Bom 85 (87) : 49 Bom 325 (Such an omission may also be a fraud as defined by S. 17, Contract Act.) ** AIR 1925 Rang 372 (373).

2. (1886) 9 Mad 89 (91) ** (1867) 7 Suth WR 258 (259) (The gratuitous representation by third party would not affect the position of contracting parties.)

3. AIR 1928 Bom 427 (429, 430) : 52 Bom 883 (DB) (Buyer himself could with ordinary care discover.) ** AIR 1923 Cal 641 (643) : 50 Cal 615 (DB) (Seller himself having no

that the buyer can set aside even a completed sale on the ground of fraud by reason of a non-disclosure of a defect under para. 1, cl. (a). The non-disclosure by the buyer under para. 5, cl. (a) would similarly entitle the seller to set aside a completed sale on the ground of fraud(4).

22. "In the absence of a contract to the contrary".

The rights and duties under this section arise only "in the absence of a contract to the contrary" A contract to the contrary may be express or implied But in order to exclude the statutory liabilities referred to in this section, the contract must be so clearly inconsistent with them as to lead to the inference that it has been made to qualify the generality of the rule(1). In *Web v. Macpherson*(2), where the question was whether the statutory charge under para. 4, cl. (b) was excluded by a contract to the contrary, it was held by their Lordships of the Privy Council that it was not excluded "by any contract, covenant, or agreement with respect to the purchase-money which is *not inconsistent* with the continuance of the charge" When reliance is placed upon an express contract to exclude the operation of the statute, the contract, to be binding, must be expressed in plain and unambiguous terms(3)

See also Notes under respective paragraphs and clauses

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^[56. MARSHALLING BY SUBSEQUENT PURCHASER.—If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.]

[A] *Substituted* for the original section, by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 18.

Synopsis

1. **Doctrine of marshalling.**
2. **Marshalling, an exception to the rule of contribution.**
3. **Marshalling distinguished from equitable rule of apportionment.** See Note 3 on S. 81.
4. **Conditions to be satisfied for application of section.**
5. **"Two or more properties".**
6. **"Mortgages them to one person".**
7. **"Then sells one or more of the properties".**

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knowledge) ** AIR 1925 Mad 968 (969) (Do) ** (1899) 47 WR (Eng) 479 (479) (1899) 1 Ch 879 68 LJ Ch 359 · 80 LT 355, Hope v Walter (Do) ** AIR 1915 Sind 21 (22) 9 Sind LR 97.

4. (1866) 55 ER 804 (806) : 35 Beav 27, Sumners v. Griffiths.

Section 55 — Note 22

1. AIR 1961 Pat 11 (14) ** AIR 1950 Nag 229 (231) · ILR (1950) Nag 467 (Express covenant not superseding implied covenant in clear and unambiguous terms — Plaintiff can rest his claim on implied covenant of title) ** AIR 1936 Cal 12 (14) (Liability under S 55, Cl. 1 (f) ** AIR 1933 All 203 (205).

   [See also AIR 1921 Mad 277 (277) (DB).]

   [See however AIR 1944 Mad 572 (573). (Provisions can be excluded only by an express contract that is by clear and unambiguous language contained in the sale deed itself A contract to the contrary cannot be implied.)]

2. **(1903) 31 Cal 57 (72) ; 30 Ind App 238 (PC).**

3. AIR 1952 Punj 298 (299) (DB) ** AIR 1950 Nag 229 (231) ILR (1950) Nag 467 ** AIR 1920 Mad 634 (635) (DB) ** (1910) 8 Ind Cas 91 (95) (DB) (Cal)

8. **"In the absence of a contract to the contrary".**
9. **"So far as the same will extend".** See Note 10 on Section 81.
10. **"But not so as to prejudice the rights of the mortgagee".**
11. **"Or of any other person who has for consideration.... properties".** See Note 14 on this section and Note 2 on Section 81.
12. **Executing Court when can give effect to right of marshalling.**
13. **Purchaser's knowledge of prior mortgage — Effect of.**
14. **Against whom right under this section available.**

1. Doctrine of marshalling.

This section and S 81 enact what is known as the doctrine of marshalling which has been stated in Story's *Equity Jurisprudence*(1) as follows :

> "The general principle is that one party has a lien on interest in *two funds* for a debt and another party has a lien or an interest in *one only* of the funds for another debt the latter has a *right in equity to compel the former* to resort to the other fund in the first instance for satisfaction if that course is necessary for the satisfaction of the claims of both parties whenever it does not trench upon the rights" or operate to the prejudice of the party entitled to the double fund (2)

The equitable principle underlying the doctrine is that a person having two funds out of which to satisfy his demands, shall not, by his election, prejudice a person who has only one such fund (3) And this principle itself is bottomed on the great ethical maxim *sic utere tuo ut alienum non laedas* (so exercise your right as not unnecessarily to prejudice that of your neighbour) (4)

Marshalling implies the existence of two sets of properties one of which is subject to both the mortgages and the other in subject only to the earlier mortgage (5)

Under S 56 mortgage debt is a charge on the property and therefore the charge remains subsisting on the property so long as it has not been only discharged (6)

The doctrine of marshalling was applied to cases arising in this country before this Act was passed not only as between prior and subsequent incumbrances (7) but also between a mortgagee of two properties and a subsequent *purchaser* of one of such properties(8) on the ground that such

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Section 56 — Note 1

1. Story, *Equity Jurisprudence*, (cited in (1867) 7 Suth WR 483 (484))
2. **See also the following cases :**

   (1835) 46 RR 218 (220) Lt and Gt Sugden 252 Averall v Wade ** (1803) 32 ER 402 (405) 7 RR 86, Aldrich v Cooper ** (1893) 2 Ch 54 (72) 62 LJ Ch 804 (813) Finch v Howard ** (1893) 2 Ch 461 (475) 62 LJ Ch 996 (1000) In re Jones Farrington v Forrester ** (1893) 62 LR 944 (948) 1 Y and CCC 401 (411) Barnes v Racksler ** (1842) 6 RR 39 (41) 3 Dr and War 173 Baldwin v Belcher (The right of marshalling is not lost even if mortgagor becomes bankrupt) ** (1742) 26 ER 668 (669) 2 Atk 444 Lanoy v Duke of Athol ** (1857) 108 RR 953 (958) 3 Jur (NS) 24 Lawrence v Gaisworthy ** (1867) 36 LJ CH Ch 442 (46) 3 Eq 668 (679 680), In re Professional Life Assurance Company ** (1863) 55 ER 46 (47) 32 Beav 118 Hales v Cox (Doctrine applied in favour of donee under voluntary settlement) ** (1903) 72 LJ Ch 664 (669) (1905) 2 Ch 494 (505) Mallott v Wilson (Do) ** (1840) 9 LJ (NS) Ch 37 (38) 4 Jur 20 52 RR 243 Aldridge v Forbes (Do).
3. Wharton, Law Lexicon, 14th Edn 1938 *sub voce marshalling* ** AIR 1962 Punj 477 (478)
4. Story, Equity Jurisprudence, Section 633.
5. (1990) 2 Mad LJ 347 : (1991) 1 Mad LW 726 (727)
6. AIR 1995 SC 973 (974).
7. (1867) 7 Suth WR 483 (484) (DB).
8. (1867) 7 Suth WR 483 (484) (DB)

purchaser had as great an equity as a subsequent incumbrancer.(9)

Section 81 of the Act substantially gave legislative effect to the doctrine as applied to prior and subsequent incumbrances except that it disallowed the benefit of the doctrine to subsequent mortgagees with *notice* of the prior lien, but the Act did not provide for a right of marshalling by a subsequent *purchaser* against the prior mortgagee It will be noticed that a right of marshalling is a right enforceable *against the prior incumbrancer* but the old S 56 gave the subsequent purchaser merely a right *as against the seller* to have the prior charge satisfied out of the other property so far as the same extended. The right was not enforceable *against the prior charge holder*(10) and was thus not a right of marshalling at all It merely had the effect of creating in favour of the purchaser a *statutory charge* on the other property for the amount which the purchaser might be compelled to pay to the prior charge holder (11) In practice this section did not really give any relief to the purchaser(12) and in cases arising before the Act was extended to Bombay, the Bombay High Court followed the law as it was applied before the Act was passed and held that a subsequent purchaser had a right of marshalling against the prior chargeholder (13) The present section which has been substituted for the old section by S 18 of the Transfer of Property (Amendment) Act, 1929 has given statutory recognition to this view The right which the prior mortgagee had under the old S 56, of realising the entire amount due to him from any part of the mortgaged property, however, remained unaffected notwithstanding the amended section which came into force by the time of the institution of the suit by the prior mortgagee.(14)

The distinction between this section and S 81 is thus merely that this section deals with the right of marshalling of a *purchaser* of one of the items of the mortgaged properties, while S 81 deals with the right of a *subsequent mortgagee* of one of the mortgaged properties The rule of law enacted by these two sections is that if the owner of two or more properties mortgages them to one person and then *sells or mortgages* one or more of them to another person, the buyer or the subsequent mortgagee, as the case may be, is, in the absence of a contract to the contrary, entitled to have the mortgage debt satisfied out of the property or properties not sold or mortgaged to him so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or persons claiming under him or of any person who has, for consideration, acquired an interest in any of the proper-

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[**See** (1864) 1 Suth WR 353 (355) (DB) (Mouzah hypothecated as security — Subsequent mortgage of mouzah with other property — Security deed registered later than mortgage deed — Mouzah sold on account of sum due under security deed — **Held,** purchaser of mouzah was entitled to require that other property should first be applied in satisfaction of mortgage debt.)]

9. (1867) 7 Suth WR 483 (484) (DB) ** (1885) 7 All 711 (715) (DB) ** **(1898) 22 Bom 304 (314) (FB).**

10. AIR 1955 Mad 439 (441) (DB) ** AIR 1914 Sind 170 (171) · 8 Sind LR 257 (DB) ** (1905) 29 Mad 217 (221) (DB) (**Impliedly overruled** on another point by AIR 1942 PC 50) (1904) 31 Cal 95 (102) (DB) ** **(1908) 31 Mad 419 (421) (FB)** ** (1905) 2 All LJ 698 (700) (DB) ** (1911) 35 Bom 395 (400) (DB) ** AIR 1931 Nag 91 (94) ** (1895) 17 All 434 (435) (DB) ** AIR 1920 All 253 (256) 42 All 336 (DB) ** AIR 1925 Pat 484 (486, 487) (DB) (Though the Court could, under the discretionary power, order the sale of the properties in a particular order for adjusting equities, where a person purchased only the equity of redemption in one of the properties there was no equity in his favour as against the mortgagee) ** (1897) 24 Cal 746 (749) (DB) ** AIR 1928 Mad 500 (502) 51 Mad 648 (DB)

11. AIR 1926 All 415 (416) (DB) (Note —The marginal note to the old section did not use the word "marshalling" as the present section does.)

12. **See** the Report of the Special Committee on S. 56 in Vol. I.

13. **(1898) 22 Bom 304 (314) (FB)** ** 1896 Bom PJ 629 (630) (DB)

14. AIR 1955 Mad 439 (441) (DB)

ties.(15) The section is intended for the benefit of the buyer and not the owner himself (16)

The Act and, therefore, this section was not in force in the Punjab but the principle of the section has been held applicable as being in consonance with justice, equity and good conscience (17) Now this Act is extended to Punjab.

2. Marshalling, an exception to the rule of contribution.

Suppose, *A* mortgages property *X* worth Rs 2,000 and property *Y* worth Rs 3,000 to *B* for Rs 500 and sells property *Y* to C Under S 82, *X* and *Y* would be *contribute* towards the payment of the mortgage debt in the proportion of 2 3 That is to say, property *X* would be liable for the debt to the extent of Rs 200 and property *Y* to the extent of Rs 300 The effect of this section is, however, to make property *X* liable for the mortgage debt to the extent of its full value namely Rs 2,000 In this respect, the right of marshalling is an exception to the rule of contribution enacted in S 82 (1) It may be observed that the last paragraph of S 82 expressly provides that nothing in that section applies to a property liable under S. 81 to the claim of the subsequent mortgagee Contribution under S 82 is applicable where the property has been sold subject to the mortgage while marshalling arises under this section where the property has been sold free from incumbrances (2)

3. Marshalling distinguished from equitable rule of apportionment.

See Note 3 on S 81.

4. Conditions to be satisfied for application of section.

In order that a right of marsalling under this section may arise it is essential that—

(1) the owner of two or more properties must have *mortgaged* them to one person

(2) he must have subsequently *sold one or more of such items to another person,*

(3) the exercise of the right must not prejudice the rights of the mortgagee or of persons claiming under him or of any other person who has for consideration, acquired an interest in any of the properties, and

(4) there must be no contract to the contrary

The principle of marshalling applies only to cases where there is a common debtor but not to cases of more than one debtor mortgaging their separate properties jointly for contracting debt (1)

The section will not apply where A and B owning separate properties jointly mortgage them to one mortgagee and then A or B sells his property (2)

5. "Two or more properties."

The old section begin with the words "where *two* properties are subject to a common, *charge* "and consequently did not apply to cases where more than two properties were subject to a common

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15. AIR 1960 Pat 378 (379 380) (DB) ** AIR 1939 All 314 (315) ILR (1939) All 150 (DB)

16. AIR 1947 Lah 230 (232)

17. AIR 1962 Punj 477 (478) ** AIR 1940 Lah 291 (292) ** AIR 1941 Pesh 49 (51) (DB, (Case from N W F Province)

Section 56 — Note 2

1. AIR 1936 Mad 106 (111) 59 Mad 121 (DB) **Overruled** on another point in AIR 1943 Mad 429 (FB)) ** AIR 1924 Mad 749 (753) (DB, (Section 82 is subject to the exception that the mortgagor is not entitled to contribution when he has assigned the property with an express covenant as against encumbrances)

   Also see S. 82, Note 10

2. AIR 1962 Pat 236 (238) (DB).

Section 56 — Note 4

1. AIR 1973 Andh Pra 46 (47) : (1972) 2 Andh WR 14

2. 1967 All WR (HC) 450 (453)

charge and one of them was subsequently sold to a third person.(1) This defect has now been removed by the new section The Special Committee in their report(2) on the amending bill, observed

> "The section. . . does not provide for the case when there are more properties which are subject to a common charge and some or one of them is afterwards sold To provide for such cases we propose to amend this section and bring it into line with S 81 which deals with the marshalling of securities."

In order to apply this section it is necessary that the property mortgaged must be recognised and described as consisting of two or more properties; where a single survey number is mortgaged first and later on a portion of it is sold or mortgaged this does not make the property "two or more properties" at the time of the first mortgage (3) This section does not apply where one of the properties is movable.(4)

6. "Mortgages them to one person."

The old section used the word "charge," but obviously included mortgages also. This was inconsistent with S 100 where a charge was defined as not including a mortgage The amendment of the section by omitting the word "charge" and inserting the word "mortgage" has now removed this inconsistency.

The use of the word "mortgage" instead of the word "charge" does not, however, mean that the section has no application to cases where a person creates a charge on two or more properties and then sells one or more of such properties to a third person Section 100 provides that all the provisions which apply to a simple mortgage shall, so far as may be, apply to a charge also. This section would, therefore, by virtue of S. 100, apply to charges also In the undermentioned case(1) the Chief Court of Oudh applied S 56 to case of a charge, though S 100 was not specifically referred to In the undermentioned case(2) of the Nagpur High Court the view has been expressed that though the section is inapplicable in terms of a charge, the principle underlying it can be applied by virtue of the provisions of S. 100 and O. 34, R. 15, Civil Procedure Code.

A charge created by decree of Court cannot come within scope of S 100 of the Act and, therefore, all incidents of simple mortgage cannot come into play, so as to attract the relevant provisions which apply to such a simple mortgage, consequently S 56 will not apply to such case.(3)

The section has no application to hypothecation of movable property See Note 5 on S 81

7. "Ten sells one or more of the properties."

The Act does not, save as provided by S 57 and Chap IV, apply to transfers by operation of law or by or in execution of a decree (1) This section does not, therefore, in terms apply to cases

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Section 56 — Note 5

1. AIR 1935 Cal 666 (670) (DB).
2. See Report of the Special Comittee on S 56 in Vol. I.
3. 1979 Nag LJ 235 (236)
4. 1967 All WR (HC) 450 (453)

Section 56 — Note 6

1. AIR 1937 Oudh 301 (311) (DB).
2. AIR 1944 Nag 25 (27) ILR (1944) Nag 230 (DB) (The omission of the word 'charge' in S 56 of the T P Act as amended in 1929 clearly indicates that this section is intended for cases of mortgages only.)
3. 1980 TLNJ 402 (404) (Mad).

Section 56 — Note 7

1. AIR 1983 NOC 141 : (1983) 2 Mad LJ 139.

See Section 2, Clause (d)

where subsequent to a mortgage of several items one or more of such items is sold in execution of a decree against the mortgagor.(2) It has been held by the High Court of Allahabad that even the principle of this section is not applicable to such cases (3) According to the Lahore High Court it is applicable (4) The Punjab(5) and the Patna High Courts(6) are also of the same view In any view the Court can, in the exercise of its discretion under O 34, R 4, Civil Procedure Code, order that the mortgaged properties other than the properties sold in execution may be sold first for the purpose of adjusting the equities between the parties (7) If there are no equities in favour of any party the mortgagee is of course entitled to sell the properties in any order he chooses It was observed in the undermentioned case(8) that if the execution purchase was a collusive one or if the purchaser had paid only for the equity of redemption, no equity would arise in his favour and the Court should not make the sale in an order different from that fixed by the mortgagee

The subsequent purchaser referred to this section does not exclude a purchaser who holds mortgage rights over some other property of the seller (9)

Neither this section nor the principle underlying it applies to a *lessee* from the mortgagor(10) or to creditors who have merely obtained money decrees against the mortgagor and have attached his properties.(11) See also S. 81, Note 6

Where X held a mortgage over items a, b and c under one mortgage document and another mortgage over item d, and he sued only on the former one impleading Y who was a subsequent purchaser of item a, it was held that Y was not doubt entitled to claim that X should first sell items b and c by virtue of the doctrine of marshalling laid down in this section, but that he had no right either in equity or in law to claim that X should exhaust his remedy against item d also the subject of the second mortgage, before proceeding against item a It was observed that such a claim cannot be allowed even by resorting to the provisions of O 34, R 4, Civil Procedure Code, inasmuch as the power under that rule must be exercised only in conformity with some principle of law or equity and that there was no such principle of law or equity in favour of Y (12)

Where three items of property were mortgaged to R and two of the items were sold to 'P' and the third item was settled by the mortgagor on her daughter in execution a decree obtained by the mortgagee 'P' was entitled to have postponed sale of his properties till the sale of the property settled in favour of mortgagor's daughter.(13)

8. "In the absence of contract to the contrary."

The right of marshalling given by this section only exists where there is no *contract to the*

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2. 1967 All WR (HC) 450 (453) ** AIR 1953 Pat 193 (193) ** 1953 BLJR 682 (683) ** AIR 1921 All 323 (324) 43 All 589 (DB) ** AIR 1929 All 309 (311) 51 All 606 (DB) ** AIR 1930 All 634 (636) (DB)
3. AIR 1929 All 309 (311) : 51 All 606 (DB)
4. AIR 1947 Lah 230 (232) : ** AIR 1940 Lah 291 (292)
5. AIR 1962 Punj 477 (478)
6. AIR 1953 Pat 193 (193) (DB) ** 1953 BLJR 682 (683) ** AIR 1962 Pat 236 (238) (DB)
7. AIR 1932 All 85 (87) : 53 All 391 (DB)
   Also see Notes 10 and 12.
8. AIR 1927 Cal 522 (526) (DB)
9. AIR 1963 SC 1607 (1611, 1616).
10. AIR 1926 Cal 525 (527) (DB) (Mining lease of some of the mortgaged properties — Lessee taking with notice of incumbrances.)
11. (1881) 6 Cal 142 (148) (DB).
12. AIR 1940 Mad 776 (776) (DB).
13. (1969) 82 Mad LW 201 (202).

contrary (1) The contract to the contrary need not necessarily be as between the mortgagor and the mortgagee, it may be as between the mortgagor and the purchaser.(2) The contract to the contrary need not be express but can be implied from the facts and the surrounding circumstances (3) It cannot be implied from a bare promise by the purchaser to pay off the mortgage debt.(4) Thus where the three vendees under three different sale deeds promise to pay a certain sum of money to the mortgagee in part discharge of the mortgage debt and it was contemplated that the whole mortgage debt would be discharged if all the three vendees paid as promised but no provision was made as to what was to happen in case the money was not paid promptly it was held that since the parties did not contemplate the possibility of the property, being brought to sale and a question arising as to the priority of the sale of the various items no contract to the contrary could be spelt out of the three sale deeds themselves (5) So also where there was no contract express or implied, that the object of the sale was to discharge the burden of the mortgage and the mortgagor vendor never placed sufficient funds in the hands of the vendee to extinguish the mortgage, it was held that the vendee's right of marshalling under this section was not lost.(6) Where, however, the vendee of one of the mortgaged properties undertook, as part of the consideration for the sale, to discharge the mortgage to a certain extent and it was further agreed between the vendor and the vendee that the balance of the mortgage amount should be paid by the vendor himself on failure of which he was to be *personally* liable for the amount, it was held in the undermentioned case(7) that there was a "contract to the contrary" between the vendor and the vendee and that the vendee's right *as against the vendor* under the old S 56 was excluded by such contract Even under the present section, such a contract would exclude the right of marshalling (8) But where there was an indemnity clause in the sale deed to the effect that if any part of the property should go out of the vendee's possession due to the claim of any one, the vendee should be entitled to recover the loss from the vendor personally and from his other properties it was held that this did not amount to a "contract to the contrary" (9)

9. "So far as the same will extend."

See Note 10 on S. 81.

10. "But not so as to prejudice the rights of the mortgagee."

As has been seen in Note 4, in order that a right of marshalling under that section may arise it is essential that the exercise of the right must not prejudice the rights of the mortgagee or of persons, claiming under him or of any other person who has, for consideration, acquired an interest in any of the properties The question of prejudice is purely one of fact which has to be pleaded and the necessary facts and circumstances established.(1) It is well settled that *every item* of the mortgaged

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Section 56 — Note 8

1. AIR 1983 NOC 141 · (1983) 2 Mad LJ 139 (145) ** ILR (1961) Mad 794 (797) ** AIR 1955 Pat 108 (110).
2. AIR 1950 Mad 224 (225, 226) (DB).
3. AIR 1950 Mad 224 (225 226) (DB) ** AIR 1946 Mad 59 (60) (Undertaking by purchaser of one of several items of mortgaged property to discharge mortgage out of consideration held implied contract to the contrary.)
4. AIR 1950 Mad 224 (225, 226) (DB).
5. AIR 1950 Mad 224 (225, 226) (DB).
6. AIR 1952 All 163 (167) (DB). (AIR 1926 All 415 and AIR 1946 Mad 59, Distinguished)
7. AIR 1926 All 415 (415, 417, 418) (DB).
8. AIR 1983 NOC 141 (1983) 2 Mad LJ 139 ** AIR 1946 Mad 59 (60)
9. AIR 1952 All 163 (166) (DB).

Section 56 — Note 10

1. AIR 1962 Punj 477 (478) ** AIR 1963 SC 1607 (1612) ** AIR 1960 Pat 378 (380) (DB)

property is a security for the *entire* mortgage debt and the mortgagee, as such, has a right to realise the whole of the mortgage debt from any item of the mortgaged property.(2) In other words, a mortgagee has an absolute right to give up or release any portion of the mortgaged property from the mortgage and sue to enforce his claim against the other properties (3) A right of marshalling does not exist if it prejudices this right (4) Where, therefore, a mortgagee of items x, y and z, for example releases x and y from the mortgage and sues to enforce his mortgage against z, a subsequent purchaser or subsequent mortgagee of z cannot claim under this section or under S. 81 that the mortgagee should satisfy his debt first out of properties x and y, inasmuch as such a claim would *prejudice the rights* of the mortgagee (5) But though a mortgagee has an absolute right to *give up* any portion of the mortgaged properties and to *limit his claim to the other portion* he has no such absolute right, where such other portion consists of several items to determine in *what order such items* should be sold for the satisfaction of his debt (6) The subsequent purchaser or mortgagee of some of the items is entitled to have the other items sold first In such a case the right of marshalling under this section and S. 81 cannot be defeated by merely saying that the prior mortgagee will be prejudiced if he is deprived of his right to proceed against any part of the mortgaged property Such an argument would nullify the provisions of these sections The prior mortgagee cannot be said to be prejudiced in any legal sense if he is deprived only of a choice depending on mere caprice In each case it will have to be considered as a matter of fact whether marshalling would cause any *substantial* prejudice to the prior mortgagee.(7) So also where a person claiming under the original mortgagor, i e a subsequent

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2. **AIR 1918 Mad 1030 (1031) : 40 Mad 968 (FB)**, (Per Napier J in the order of Reference) ** AIR 1959 Punj 490 (496) ** ILR 1961 Mad 794 (798) ** AIR 1959 All 3, 4 (5 14) ILR (1939) All 150 (DB) ** AIR 1932 All 85 (87) 53 All 391 (DB) ** AIR 1928 Mad 500 (501) 51 Mad 648 (DB) ** (1882) 5 Mad 385 (386) (DB) ** (1882) 5 Mad 387 (388) **(DB) ** (1966) 6 Suth WR 253 (254) (DB)**

3. **AIR 1918 Mad 1030 (1031) , 40 Mad 968 (FB) ** ILR (1961) Mad 794 , 798**

4. AIR 1964 All 381 (383) (DB) ** ILR (1961) Mad 794 (798) ** AIR 1955 Pat 108 (108) ** AIR 1936 Nag 125 (127) ILR (1936) Nag 22 (DB) ** **(1908) 31 Mad 419 (422) (FB) (29 Mad 217, Referred to.)**

   [See also AIR 1932 All 85 (87) 53 All 391 (DB) (So long as rights under mortgage sought to be enforced by decree are not prejudiced Court executing decree has full power to regulate the order in which and condition subject to which mortgaged properties should be sold in order to do justice between two subsequent transferees) ** (1885) 11 Cal 258 **(260) (DB).]**

5. AIR 1962 Andh Pra 425 (429 430) (DB) ** AIR 1938 Mad 503 (503 504) (Right of contribution of the person claiming marshalling is not however lost and it can be worked out in a separate suit) ** AIR 1928 Mad 500 (501) 51 Mad 648 (DB) ** AIR 1936 Rang 266 (267) 14 Rang 198 (DB) (In this case the mortgagee held a mortgage of immovable property and hypothecation of moveables **Reversing** AIR 1935 Rang 139) ** AIR 1930 **Lah 731 (732) : 11 Lah 694 (DB)**

   [But see AIR 1941 Pesh 49 (51) (DB) (The Court applied the principles of the section but held that the mortgagee cannot release one item and throw the whole burden on the other)]

6. AIR 1932 All 85 (88) 53 All 391 (DB) ** AIR 1927 Cal 522 (526) (DB) ** (1936) 40 Cal WN 1173 (1175).

7. AIR 1943 All 156 (158) ILR (1943) All 444 (DB) (**Dissenting** from the general observations made in AIR 1928 Mad 500 51 Mad 648 to the effect that the rights of a mortgagee would always be prejudiced if he was deprived of his right to proceed against any part of the mortgaged property — It is submitted that the decision in AIR 1928 Mad 500 is correct on facts as in that case the mortgagee had actually released some portion of the mortgaged property from his security.)

mortgagee claims that he will be prejudiced if the prior mortgagee proceeds in the first instance against the property mortgaged to him, i.e. the subsequent mortgagee, he must establish such a plea.**(8)** If even after paying off the prior mortgage from such property there is enough left for payment to the subsequent mortgagee there would be no question of prejudice **(9)** Further, the Court has, at the time of passing the decree under O. 34, R 4 of the Civil Procedure Code a *discretion* to regulate the order of sale so as to adjust the equities between the parties and the right of the mortgagee is only subject to this discretion of the Court.**(10)** Thus, the mortgagee of properties *a*, *b*, *c* and *d* may release property *a* from the mortgage and may sue to enforce his mortgage against *b*, *c* and *d* only But he has no absolute right to claim that *b*, *c* and *d* should be sold in *any particular order*. The Court may regulate the order of sale in the exercise of its discretion The exercise of this discretion cannot legally prejudice the mortgagee's right, for his right is only subject to such discretion **(11)** The discretion must, however, be exercised on judicial principles Thus, where, as between the properties *b*, *c* and *d* to which the mortgagee has limited his claim, there is a right of marshalling under S 56 or S 81, in one of the defendants who has purchased or taken a subsequent mortgage of *d*, and he claims such right, the Court is bound to give effect to this substantive right,**(12)** and the giving effect thereto cannot, as seen above, be said to "prejudice the mortgagee" Where there is no right of marshalling in any party, the Court may still, for the purpose of adjusting the equities between the parties, regulate the order of sale, though it may different from that fixed by the mortgagee **(13)** In the absence of any equities in favour of any party, the mortgagee is, of course, entitled to sell the properties in any order he chooses, and it is not open either to the Court or to the defendants to compel him to proceed against any particular property first **(14)**

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8. AIR 1963 SC 1607 (1612).

9. AIR 1963 SC 1607 (1612) ** (1965) 1 Mad LJ 137 (140).

10. AIR 1960 Pat 378 (380) (DB) (This power can be exercised not arbitrarily but only judicially to square up the equities between the parties and to prevent prejudice to the mortgagee) ** AIR 1955 Mad 208 (209) ** AIR 1932 All 85 (88) 53 All 391 (DB) (Court should frustrate any attempt on the part of mortgagee to throw most of the burden on one only of the mortgaged properties) ** AIR 1924 Pat 459 (464) 3 Pat 522 (DB) ** (1910) 7 Ind Cas 4 (5) (DB) (Cal) (This power of the Court cannot be taken away by the mortgagee bringing to sale in execution only one of the items reserving his claim against other items for another execution petition.) ** AIR 1939 All 314 (315, 316) ILR (1939) All 150 (DB) (Order under this order is in spite of the doctrine) **** (1908) 31 Mad 419 (423) (FB).**

[See also (1870) 11 Suth WR 202 (203) (DB) (Sale by a mortgagee of one of the items of mortgaged property in his money decree does not cause automatic release of such property **and the purchaser can claim marshalling.)]**

11. AIR 1924 Mad 509 (510) (DB).

12. 1864 Suth WR 374 (374) (DB) (Purchase) ** AIR 1914 Cal 828 (830) 41 Cal 418 (DB) (Mortgage.) ** AIR 1927 Cal 522 (526) (DB).

13. AIR 1932 All 85 (87) 53 All 391 (DB) ** AIR 1931 All 657 (658, 659) (DB) ** AIR 1939 All 314 (316) ILR (1939) All 150 (DB) ** AIR 1924 Mad 509 (510) (DB) (May be done **even at execution stage.)**

Also see Notes 7 and 12.

14. AIR 1962 Andh Pra 425 (430) (DB) (Puisne mortgagee of some of the properties agreeing to pay off prior mortgagee — Condition not fulfilled — Suit by prior mortgagee to recover mortgage money by sale of items covered by puisne mortgage — Puisne mortgagee who has not fulfilled condition is not entitled to benefit of S. 81 — His claim to direct prior mortgagee to sell items not covered by puisne mortgage cannot be allowed as that would prejudice prior mortgagee's right to proceed against any item) ** AIR 1932 All 85 (87) 53 All 391 (DB) ** AIR 1925 Mad 332 (333) (DB) ** 1887 All WN 183 (184) (DB). (No equities in defendant — Mortgagee's right to sell properties in any order he chooses not to be curtailed by Court.) ** AIR 1927 Cal 522 (526) (DB).

It has been observed in the undermentioned case(15) that the right of the mortgagee to realise his mortgage debt from *any* portion of the mortgaged property is subject to two exceptions namely, the doctrine of marshalling provided for by Ss 56 and 81, and the Court's power under O. 34, R 4 to direct the mortgaged properties to be sold in a particular order If the right of the mortgagee referred to in the decision is the right to determine in what order the mortgaged properties which he wishes to proceed against are to be sold, then the decision is unexceptionable for, as has been seen already, such right is not an absolute one, but is subject to the discretion of the Court under O 34, R 4 of the Code of Civil Procedure, which discretion must be exercised in favour of a person who has a right of marshalling. If the right of the mortgagee referred to is, on the other hand, the absolute right in the mortgagee to give up any item of the mortgaged property and to proceed against the other items for the whole of the debt, the decision, it is submitted, is not correct Such right cannot, under this section, be prejudiced by the right of marshalling It is not correct to say in such a case that the right of marshalling is an *exception* to the right of the mortgagee Nor can O 34, R 4 of the Civil Procedure Code which enables the Court to regulate the sale of the properties, *the subject matter of the suit before it*, be construed as authorising the Court to take away in its discretion, a right given to the mortgagee by the substantive law, to limit his suit to such portions of the mortgaged property as he chooses

In *Sarju Lal v Baijnath Prashad*(16) the mortgagee having purchased himself some of the mortgaged properties after his decree on the mortgage, claimed to execute the decree against the other properties which had been subsequently purchased by third persons It was held that the purchasers cannot insist that the mortgagee should sell also the property purchased by him, and that any equity which they might have must be worked out only in a separate suit

11. "Or of any other person who has for consideration. . . . . properties."

See Note 14 on this section and Note 2 on Section 81

12. Executing Court when can give effect to right of marshalling.

It has been seen already that the Court has a discretion *at the time of passing the decree* under O 34, Rr. 4 and 5 of the Code of Civil Procedure to determine the order in which the mortgaged properties should be sold Where a question as to the order in which the mortgaged properties should be sold has been raised and determined by the decree, the Court cannot, at the time of the execution, go behind the order so made (1) Where, however, the decree merely states that the properties mentioned therein should be sold without any determination as to the order in which such properties are to be sold, the executing Court has a discretion to regulate the order of sale of the various items (2) This does not mean that some of the items decreed against can be *excluded* from being brought to sale at all All the properties decreed against must be advertised for sale and when they are actually

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[See however AIR 1925 Mad 1214 (1214) (DB)]

Also see Note 12

15. AIR 1939 All 314 (314, 315) : ILR (1939) All 150 (DB)

16. AIR 1923 Pat 44 (44) (DB)

Section 56 — Note 12

1. AIR 1960 Pat 378 (380) (DB) ** AIR 1926 Mad 1144 (1144) ** AIR 1943 Mad 705 (706) (DB)

2. AIR 1975 Pat 223 (224) 1976 BLJR 74 ** AIR 1964 Mad 547 (549) (Decree on mortgage Court has discretion to fix order in which property is to brought for sale ** AIR 1960 Pat 378 (380) (DB) ** AIR 1939 All 314 (315) ILR (1939) All 150 (DB) ** AIR 1934 Pat 329 (329) (DB) ** AIR 1926 Mad 1031 (1032) (DB)

[See however AIR 1925 Pat 484 (486) (DB).]

[But see AIR 1916 Oudh 288 (288) (DB) (Submitted not correct)]

brought into execution and become subject to sale, it would be then for the Court to decide on just and equitable grounds which property ought to be sold first (3) If a right of marshalling is claimed at that time, and has not already been determined at the time of the decree, the executing Court is bound to give effect to it Even in the absence of any right of marshalling existing in any of the parties the executing Court can regulate the order of sale for the purpose of adjusting the equities between the parties (4) Where there are no equities in favour of any party the mortgagee is entitled to choose the order in which the properties decreed against should be sold(5) and the judgment-debtor has no legal right to demand that the decree-holder should proceed against a particular item first (6) In the undermentioned case(7) properties *a* and *b* were mortgaged to *X* and subsequently *a* was sold to *R* *X* obtained a decree against *R* and the mortgagor for sale of both *a* and *b* He then applied for execution by sale of both the properties The Court ordered in the exercise of its discretion that property *b* should be sold first *X* thereupon did not press the petition which was consequently dismissed Within a week thereof *X* applied again for execution of his decree but for sale of property *a* alone It was held by the Calcutta High Court that *X* could not be allowed to fetter the exercise of the Court's discretion by thus applying for the sale of *a* alone *X* was ordered to amend his petition by including both the properties It may be noted that *X did not give up* property *b* from his mortgage, but merely claimed to sell *a* first.

13. Purchaser's knowledge of prior mortgage — Effect of.

Under the old S 81 a right of marshalling could not be claimed by a subsequent mortgagee who has taken his mortgage *with notice* of the prior mortgage. This section did not apply to mortgages not governed by this Act or to mortgages made before the Act In such cases it was held that the English law of marshalling of securities would be applicable, and under that law, the fact that the subsequent mortgagee had notice of the prior mortgage did not affect his right of marshalling (1) This principle was applied even in cases where marshalling was allowed in favour of a subsequent

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3. AIR 1975 Pat 223 (225) 1976 BLJR 74 ** AIR 1960 Pat 378 (380) (DB) ** AIR 1924 Pat 802 (802) : 3 Pat 962 (DB) ** (1910) 7 Ind Cas 4 (5) (DB) (Cal).

4. **(1908) 31 Mad 419 (423) (FB)** ** AIR 1955 Mad 208 (209) ** AIR 1944 Nag 25 (27) ILR (1944) Nag 230 (DB) (Charge decree — S 56 does not apply as it is restricted to mortgages only — Principle of S 56 can however be applied — Even apart from S 56 executing Court can order that property purchased by stranger should be sold after other properties if decree-holder is not prejudiced thereby) ** AIR 1932 All 85 (87) 53 All 391 (DB) ** AIR 1931 All 657 (658 659) (DB) (When the question as to which of the properties has to be sold first comes up before the executing Court, the solution of the question will depend upon a determination of the equities between the holders of the properties)

   Also see Notes 7 and 10

5. AIR 1960 Pat 378 (380) (DB) (Where there is no equity in favour of any party, it will be an illegal exercise of discretion if the executing Court prescribes the order in which the properties should be sold) ** AIR 1925 Pat 484 (487) (DB) ** AIR 1924 Mad 366 (367) 47 Mad 688 (DB).

   [**See also** AIR 1955 Pat 108 (110) (Equities should be left to be decided in properly constituted suit.)]

6. (1957) 2 Andh WR 385 (388, 389) ** AIR 1924 Mad 366 (367) 47 Mad 688 (DB)

   Also see Note 10

7. (1910) 7 Ind Cas 4 (5) (DB) (Cal)

Section 56 — Note 13

1. (1893) 18 Bom 160 (170, 171) (DB).

purchaser on general principles.(2) though in some cases(3) the view was expressed that a subsequent purchaser with notice should not, on general principles, be allowed the right of marshalling

Section 81 has now been amended by omitting the provision as to notice A right of marshalling whether under this section or S 81 is now independent of any question of notice (4)

As seen in Note 7 this section does not, in terms, apply to cases where subsequent to a mortgage of several items, one or more of such items is sold in execution of a decree against the mortgagor, but according to some High Courts the principle of the section is applicable to such cases provided the auction purchaser shows that he is a *bona fide* purchaser for value without notice of the prior mortgage.(5)

14. Against whom right under this section available.

As has been seen in Note 1 the old section gave a right to the subsequent purchaser *as against the seller* to have the prior mortgage satisfied out of the property not sold to him The right was thus not available against the mortgagee, or against any person who had *purchased the other property from the mortgagor* (1) The omission of the words "as against the seller" in the present section now makes the right of the subsequent purchaser enforceable against the mortgagee also (2) But the addition of the words "but not so as to prejudice the rights of a person who has for consideration acquired an interest in any of the properties" has the effect of negativing any right of marshalling in the purchaser of one of the mortgaged properties as *against the purchaser of any item of the mortgaged properties*, inasmuch as the exercise of any such right will clearly prejudice the latter (3) Where, however, the other item is mortgaged and not sold by the mortgagor the right of the purchaser of marshalling is not lost in every case and can be claimed if after paying off the prior mortgage from such item there is enough left for payment to the subsequent mortgagee because there would be no question of prejudice in such a case (4)

The principle of marshalling as provided in S 56 can be applied to a bona fide purchaser for value without notice of a prior mortgage.(5)

But if A purchases one of the mortgaged properties with an express condition that it is not to be liable for the debt and *B* purchases another of the mortgaged properties with the condition that the entire debt is to be satisfied by B out of the consideration in his hands A can claim that the property in the hands of B should be sold first.(6)

See also Note 2 on Section 81.

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2. **(1896) 22 Bom 304 (314) (FB).** (The principle applies to auction-purchaser as well as purchaser at private sale.)
3. (1885) 7 All 711 (715) (DB).
4. AIR 1962 Punj 477 (478) ** AIR 1947 Lah 230 (232)
5. 1980 TL NJ 402 (406) (Mad) ** 1953 BLJR 682 (683) ** (1965) 1 Mad LJ 137 (140) (AIR 1953 Pat 193 Applied) ** AIR 1953 Pat 193 (193) (DB) ** AIR 1962 Pat 236 (238) (DB)

Section 56 — Note 14

1. AIR 1955 Mad 439 (441) (DB) ** (1905) 2 All LJ 698 (701) (DB) ** AIR 1931 Nag 91 (94) ** (1903) 31 Cal 95 (102) (DB) ** AIR 1920 All 253 (256) 42 All 336 (DB)
2. AIR 1955 Mad 439 (441)
3. AIR 1947 Lah 230 (232)

   [See AIR 1930 All 634 (636) (DB) (Right of auction-purchaser of one of the mortgaged properties against the auction-purchaser of another)]

   [See also AIR 1955 Pat 108 (110).]
4. **AIR 1963 SC 1607 (1612).**
5. (1991) 1 Mad LW 726 (727) : (1990) 2 Mad LJ 347.
6. AIR 1929 Pat 664 (671) : 8 Pat 585 (DB).

Discharge of Incumbrances on Sale

57. PROVISION BY COURT FOR INCUMBRANCES AND SALE FREED THEREFROM.— (a) Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court,—

(1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property — of such amount as, when invested in securities of the [A][Central Government], the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and

(2) in any other case of a capital sum charged on the property — of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a large additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(c) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the [B][State Government] may, from time to time, by notification in the Official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

[A] *Substituted* for the words 'Government of India' by A.O., 1937.

[B] *Substituted* for the words 'Provincial Government' (which was a substitution for Local Government) by A.L.O. 1950.

Synopsis

1. **Analogous law.**
2. **Scope of the section.**
3. **Section compared with Section 83 and Order 34, Rule 12 of the Code of Civil Procedure.**

4. Incumbrance.
5. "Whether immediately payable or not."
6. "May, if it thinks fit."
7. "Direct or allow payment into Court."
8. "On the application."
9. "Any party to the sale."
10. Procedure.
11. "In any other case of a capital sum," etc. — Clause (a), sub-clause (2).
12. "Not exceeding one-tenth part of the original amount."
13. Notice to incumbrancer — Clause (b).
14. Service of notice — Clause (c).
15. "Appeal" — Clause (d).
16. "Court" — Clause (e).

1. Analogous law.

Section 5 of the Conveyancing and Law of Property Act, 1881 (44 and 45 Vict. C 41) provided as follows :(1)

"5 (1) Where land subject to any incumbrance, whether immediately payable or not, is sold *by the Court, or out of Court*, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an *annual sum* charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon, but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for *special reasons thinks fit* to require a larger additional amount.

(2) Thereupon, the Court may, if it thinks fit, *and either after or without any notice to the incumbrancer as the Court thinks fit*, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(3) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4) *This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.*"

The section has been now replaced in England by S. 50 of the Law of Property Act, 1925 (15 Geo. V. Ch. 20) which runs as follows : (2)

"50 (1) Where land subject to any incumbrance, whether immediately realisable or payble or not, is sold or exchanged by the Court, or out of Court, the Court may, if it thinks fit, on the application of any party to the *sale or exchange*, direct or allow payment into Court of such sum as is hereinafter mentioned, that is to say—

(a) in the case of an *annual sum* charged on the land, or of a capital sum charged on a determinable interest in the land, the sum to be paid into Court shall be of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge: and

(b) in any other case of capital money charged on the land, the sum to be paid into Court shall be of an amount sufficient to meet the incumbrance and any interest due thereon

but in either case there shall also be paid into Court such additional amount as the Court considers

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Section 57 — Note 1

1. The italics are intended to show where the section differs from Section 57 of the Indian Transfer of Property Act.
2. The italics are intended to show where the section differs from Section 57 of the Indian Transfer of Property Act.

will be sufficient to meet the contingency, of further costs, expenses and interest and any other contingency, except depreciation of investments not exceeding one-tenth part of the original amount to be paid in, unless the Court for *special reasons thinks fit* to require a larger additional amount

(2) Thereupon, the Court may if it thinks fit *and either after or without any notice to the incumbrancer, as the Court thinks fit*, declare the land to be freed from the incumbrance and make any order for conveyance or vesting order, proper for giving effect to the *sale or exchange* and give directions for the retention and investment of the money in Court and for the payment or application of the income thereof.

(3) The Court may declare all other land if any, affected by the incumbrance (besides the land sold or exchanged) to be from the incumbrance, and this power may be exercised either after or without notice to the encumbrancer, and notwithstanding that on a previous occasion an order, relating to the same incumbrance has been made by the Court which was confined to the land then sold or exchanged.

(4) On any application under this section the Court may if it thinks fit, as respects any vendor or purchaser dispense with the service of any notice which would otherwise be required to be served on the vendor or purchaser.

(5) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same and generally may give directions respecting the application or distribution of the capital or income thereof

(6) This section applies to sales or exchanges whether made before or after the commencement of this Act, and to incumbrances whether created by statute or otherwise."

2. Scope of the section.

This section has been borrowed from S 5 of the Conveyancing and Law of Property Act, 1881, now replaced by S 50 of the Law of Property Act, 1925 (1) The English cases bearing on these sections will be thus a useful guide in the construction and the application of this section

Where the subject-matter of a sale is property subject to an incumbrance, this section empowers the Court to provide for the discharge of the incumbrances, and then to declare the property free from such incumbrances (2) It is a remedial enactment for facilitating the sale of land (3) The object of S 5 of the Conveyancing and Law of Property Act, 1881, was stated by Sargant, J, in the following terms :

> "*Prima facie* the object of the whole of S 5 is not to disturb any vested or other rights more than is necessary but to enable a sale to be effected and the property to be transferred to the purchaser notwithstanding there may be on the land a liability for payment of a future sum which would, but for the provisions of the section, clearly have prevented the sale of the land free from incumbrance Of course, a purchaser might think fit to take the land subject to the incumbrance, but the purchase of land subject to an incumbrance is not usually a desirable investment, and the object of the section was to enable the land to be conveyed to the purchaser so that he might get a full and complete title to it (4)

The section presupposes the *existence* of an incumbrance The question *whether there is an incumbrance or not* cannot be determined under this section (5)

The section has no application where the incumbrance has merged into a decree and a question

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Section 57 — Note 2

1. See Note 1 for the text of these sections.
2. AIR 1916 Pat 113 (114) : 2 Pat LJ 118 (DB).

   [See also AIR 1937 Nag 36 (36) ILR (1938) Nag 183 (If appropriate procedure is taken under S. 57 the charge may be wiped out.)]
3. (1915) 1 Ch 94 (101) 84 LJ Ch 252 (256) In re Wilberforce, Wilberforce v Wilberforce
4. (1915) 1 Ch 94 (102) 84 LJ Ch 252 In re Wilberforce Wilberforce v Wilberforce
5. (1895) 43 WR (Eng) 473 (474) (1895) 2 Ch 256 In re Freme's Contract

of the *adjustment of the decree* out of Court is involved. In the undermentioned case(6) *A* had mortgaged his property to *B* who obtained a decree for sale thereon. *C* then negotiated with *A* for the sale of the property and *B* consented to the proposed purchase and agreed to accept from *C* a sum of money in full satisfaction of his decree. *C* thereafter completed the sale, but *B* refused to accept the sum tendered by C, whereupon *C* applied under this section and prayed for a declaration that the property was free from the incumbrance. It was held that the section had no application to the case as it involved a question of the adjustment of a decree out of Court which was governed by other provisions of law.

The Transfer of Property Act has no application to the Punjab but the principles on which it is based will apply as being in consonance with justice, equity and good conscience. The principle of this section may therefore be applied to cases arising in the Punjab (7).

Section 2(d) excepts this section from the operation of that provision. Thus this section will apply to transfers by operation of law or by, or in execution of a decree or order (8) (See also S. 2 Note 6).

3. Section compared with Section 83 and Order 34, Rule 12 of the Code of Civil Procedure.

Section 83 provides for the *discharge of a mortgage* on property after it has *become due*. This section provides for declaring an incumbered property free of the incumbrance (which is not confined to mortgages), where such property is the subject-matter of sale. Under S. 83 the Court cannot *compel* the mortgagee to accept the deposit in discharge of the mortgage, while under this section the Court can declare the property free of incumbrance even against the will of the incumbrancer.

Order 34, Rule 12 of the Code of Civil Procedure provides that where any property *the sale of which is directed by that order* is subject to a prior mortgage, the Court may with the consent of the prior mortgagee direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold. This section is wider than the said rule and applies to sales by the Court or in *execution of a decree or out of Court* and not merely to a sale directed by O. 34 of the Code.

4. Incumbrance.

An "incumbrance" is defined in Wharton's Law Lexicon as "a claim, lien or liability attached to property." Bouvier in his *Law Dictionary* defines an "incumbrance" as "any right to, or any interest in, land which may subsist in a third person to the diminution of the value of the land not inconsistent with the passing of the fee in it by a deed of conveyance." The word has also been defined in S. 2 of the Conveyancing and Law of Property Act, 1881 (now replaced by S. 205 of the Law of Property Act, 1925), as follows :

> "Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity or other capital or annual sum, and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof."

This section having, as has been seen already, been borrowed from S. 5 of the Conveyancing and Law of Property Act, 1881, the word "incumbrance" may also, appropriately, be taken to have the same meaning as it has under the said Act. Thus, it will include a *charge* on property (1).

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6. (1901) 24 Mad 412 (413) (DB) (**Overruled** on another point in 28 Mad 473 (FB)).
7. 1907 Pun Re No. 148, p. 687 (691) (DB).
8. AIR 1965 SC 834 (838). (AIR 1940 Mad 701 and AIR 1937 Cal 129 **Overruled**.)

Section 57 — Note 4

1. See Section 101 of the Act as it stood before the amendment of 1929.

   [See also AIR 1937 Nag 36 (36), ILR (1938) Nag 183 (Section 57 may be applicable to maintenance allowance charged on property.)]

5. "Whether immediately payable or not."

These words contemplate that the Court can, under this section, make provision for a charge that is not immediately payable, i.e., for charges payable *in futuro*, though ordinarily this should not be done except where it is necessary.(1)

6. "May, if it thinks fit."

These words show that the Court has a *discretion* to act or not, as it thinks fit, under this section. In *In re Great Northern Railway Co and Sanderson* (1) a Railway Company contracted to sell certain lands free from incumbrances for £ 868. It turned out that the land was subject to a perpetual rent charge for £ 63 which was unknown to the Company at the time of the contract. The purchaser applied under S. 5 of the Conveyancing and Law of Property Act, 1881 (corresponding to this section) asking the Court to declare the property free of incumbrances, after calling upon the company to deposit into Court a sum sufficient, out of the dividends, to pay the rent charge with a further sum to meet the contingencies. This sum amounted to £ 2,300. Pearson, J., observed:

> "Section 5 is only permissive in its language. It says that "the Court may, if it thinks fit . . . direct or allow payment into Court" of the amount mentioned, and the Court may, if it thinks fit . . . . declare the land to be freed from the incumbrance. In the present case, the amount which would have to be paid into Court would be about £ 2,300."

The amount was three times the amount of the purchase money. The Court refused to exercise the discretion in favour of the applicant.

See the undermentioned cases.(2)

7. "Direct or allow payment into Court."

In *In re Great Northern Railway Co and Sanderson*(1), Mr. Justice Pearson said "I think that, when it is said that the Court may 'direct or allow payment into Court,' the word 'direct' applies to a sale *by the Court*, and the word 'allow' to a sale *out of Court*."

8. "On the application."

The Court can act only on the *application* of a party to the sale. It cannot act *suo motu*.

9. "Any party to the sale."

The parties to a sale are the vendor and the purchaser. The application must be made by one or the other of these two. Where there are more vendors than one or more purchasers than one, it is conceived that any one of them may apply.

10. Procedure.

In an action for partition of certain hereditaments which were the subject of an annuity in favour of one X, the plaintiffs asked that the property might be sold free from the incumbrance of the

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Section 57 — Note 5

1. (1895) 43 WR (Eng) 473 (474, 475); (1895) 2 Ch 256, In re Freme's Contract.

Section 57 — Note 6

1. (1884) 25 Ch D 788 (793) : 32 WR (Eng) 519 (520).
2. (1884) 54 LJ Ch 567 (568); 28 Ch D 402; Milford Havan Ry Co v Mowatt (Section 5 of the Conveyancing and Law of Property Act was applied to the case.) ** (1910) 79 LJ Ch 669 (672); (1910) 2 Ch 438, In Re Evans & Bettells Contract (Existence of liability held an objection to title on the sale of estate — Opportunity was given to vendors to apply for an order under S. 5 of the Conveyancing and Law of Property Act, 1881.) ** AIR 1931 Cal 763 (769); 58 Cal 598 (DB) (In a mortgage suit the Court can pass by consent a combination of several decrees in favour of different mortgagees, determining the order in which they are to be paid and incorporating orders which the Court would be amply justified in making under S. 57, Transfer of Property Act.)

Section 57 — Note 7

1. (1884) 25 Ch D 788 (793) : 32 WR (Eng) 519 (520).

annuity. *X* was not a party to the action It was held by Chitty, J , that the Court could dispense with the consent of X, and the proper order in the case would be that out of the purchase money to be paid into Court, such an amount, as, when invested, in Government securities, the Court shall consider sufficient to provide for the annuity and costs be set aside and invested as a provision for the annuity, and that thereupon any person interested is to be at liberty to apply in Chambers for an order declaring the hereditaments freed from the annuity (1)

11. "In any other case of a capital sum," etc. — Clause (a), sub-clause (2).

The second alternative in Cl. (a) of the section provides that in any other case of a capital sum charged on the property, the Court may direct or allow payment into Court of " the amount sufficient to meet the incumbrance and any interest due thereon " The "amount sufficient" to be paid into Court is the amount which, in the opinion of the Court, is sufficient when invested in *Government securities* to meet the incumbrance and any interest thereon In coming to this conclusion Mr Justice Sargant observed in *In re Wilberforce* (1) as follows

> "Then comes the other alternative — 'In any other case of capital money charged on the land,' when the payment into Court is to be of the amount sufficient to meet the incumbrance and any interest thereon ' Does that merely mean the actual amount of the capital money or does it mean the amount which is considered by the Court sufficient when invested in Government securities to meet the incumbrance and any interest thereon — that is to say are the words in the first alternative reflected in the second alternative, so that by the words 'the amount' I am to understand the Legislature as meaning the sufficient amount as set out in the earlier part of sub-section (1) (e Cl (a)) or am I to take 'the amount' as meaning merely the bare amount of the capital charge ' In my opinion, the former is the truer construction It seems to me that there is no reason why in the second part of the sub-section, the Court should not have the same discretion that it has in the first part of the sub-section or be limited to directing payment into Court of the bare amount of the charge itself It seems to me that the amount which is to be paid into Court is the amount which, in the opinion of the Court, is sufficient when invested in Government securities to meet the incumbrance and any interest thereon."

12. "Not exceeding one-tenth part of the original amount."

The Court is entitled under this section to direct the party to pay an additional amount *not exceeding* one-tenth part of the original amount to be paid in for meeting further contingencies But for *special reasons to be recorded in writing* the Court can order a larger amount to be paid into Court Mortgages to secure *future* advances and mortgages containing agreements that the money shall remain for a fixed period might furnish special reasons for demanding a larger amount (1)

13. Notice to incumbrancer — Clause (b).

Under S 5 of the Conveyancing and Law of Property Act, 1881, and also S 50 of the Law of Property Act, 1925, the Court may, if it thinks fit, act under this section *whether after or without notice* to the incumbrancer Under this section the Court is *bound to* give notice to the incumbrancer unless it thinks for *reasons to be recorded in writing* that notice should be dispensed with But the *consent* of the incumbrancers is not necessary either under the English law or under this section to enable the Court to apply the provisions of this section (1) Nor are the incumbrancers necessary parties to the application.

Section 57 — Note 10

1. (1882) 30 WR (Eng) 887 (887), Dickin v. Dickin

Section 57 — Note 11

1. (1915) 1 Ch 94 (102, 103) 84 LJ Ch 252 (257) 111 LT 797 58 SJ 797

Section 57 — Note 12

1. See Shephard and Brown, Transfer of Property Act, 7th Edition p 219

Section 57 — Note 13

1. (1882) 30 WR (Eng) 887 (887), Dickin v. Dickin

14. Service of notice — Clause (c).

There is no provision in this Act prescribing the mode of service of notice under this section, on the persons interested in or entitled to the money or fund in Court. Section 102 deals with the service of notice under Chapter IV. It is conceived that the service of notice under this section must be made in the manner provided for by O. 5 of the Code of Civil Procedure.

15. "Appeal" — Clause (d).

A right of appeal is given against all directions and orders made under this section, as a safeguard against possible errors in the exercise of a novel jurisdiction. See Note 16.

16. "Court" — Clause (e).

The jurisdiction to act under this section can be exercised only by—

(1) the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction;

(2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate; and

(3) any other Court notified by the State Government in the Official Gazette.

The reasons for limiting the exercise of the powers given by this section to the above Courts is stated in Whitley Stoke's *Anglo-Indian Codes*(1) as follows:

> "The corresponding section in 44 and 45 Vic., c. 41 has been hailed in England as likely to effect one of the greatest reforms every made in the law of real property, and there is reason to believe that it will be equally beneficial in India. But to prevent any chance of error in the exercise of a novel jurisdiction, the Indian Legislature has taken two precautions: first, it has confined the jurisdiction to the High Courts, the District Courts and any other Courts specially empowered by the local Governments, and, secondly, it has declared that an appeal shall lie from all directions and orders given under this section."

CHAPTER IV

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES

58. "MORTGAGE," "MORTGAGOR," "MORTGAGEE," "MORTGAGE-MONEY" AND "MORTGAGE-DEED" DEFINED.— (a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage money, and the instrument (if any) by which the transfer is effected is called a mortgage deed.

Simple mortgage.

(b) Where, without delivering possession of the mortgaged property the mort-

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Section 57 — Note 16

1. Whitley Stokes, The Anglo-Indian Codes, Vol. I, 1892 Edn., Introduction to the Transfer of Property Act, page 731.

gagor binds himself personally to pay the mortgage money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Mortgage by conditional sale.

(c) Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale :

[A][Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.]

Usufructuary mortgage.

(d) Where the mortgagor delivers possession [A][or expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage money and to receive the rents and profits accruing from the property [B][or any part of such rents and profits and to appropriate the same] in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest [C][or] partly in payment of the mortgage money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

English mortgage.

(e) Where the mortgagor binds himself to repay the mortgage money on a certain a date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage money as agreed, the transaction is called an English mortgage.

Mortgage by deposit of title deeds.

[A][(f) Where a person in any of the following towns, namely, the towns of Calcutta, Madras, [D][and Bombay], [E][* * *] and in any other [E]town which the [G][State Government concerned] may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds.

Anomalous mortgage.

(g) A mortgage which is not a simple mortgage, a mortgage by conditional

sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title deeds within the meaning of this section is called an anomalous mortgage.]

[A] Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S 19.

[B] Substituted for the words "and to appropriate them," ibid

[C] Substituted for the words "and," ibid.

[D] Substituted for the words, "Bombay and Karachi" and A C A O., 1948 (23-3-1948).

[E] The words "Rangoon, Maulmein, Bassein and Akyab" were omitted by A O., 1937 [1-4-1937]

[F] For extension of S. 58(f).

To the State of Haryana w e f 10-5 1972 See Hary Govt Gaz , 10-5-1972 Pt III (L S), Ext , P. 561.

To the State of Punjab — See Punj Govt Gaz , 28-8-1975, Pt III (L.S) , Ext , P 545.

and for extension of S 58 to Chandigarh with immediate effect – Chd Admn Gaz , 18-12-1980, Ext., P. 446

For notifications relating to the towns of—

Bandra, Kurla and Ghatkoper-Kirol, See Gaz of Ind., 1924, Pt I, page 1064;

Kanpur, Allahabad and Lucknow, See Gaz. of Ind., 1933, Pt I, p. 158.

Coimbatre, Madura, Cocanada and Cochin, See Gaz. of Ind , 1935, Pt I, p 526,

Ahmedabad, See Gaz of Ind 1935, Pt I, p 936 or Bom. Gaz., 1936, Pt. IV-A, p. 646,

Agra, See U.P. Gaz., 1939, Pt. I, p. 44;

Tuticorin, See Ft. St. Geo Gaz., 1948, Pt. I, page 776.

Guntur, See Ft. St. Geo, Gaz., 1949, Pt. I, p. 1356;

Nellore, Rajahmundry, Eluru, See Ft St Geo Gaz 1950 Pt I, page 1293;

Mangalore, See Ft. St. Geo. Gaz., 1951, Pt. I, page 334;

Bangalore, Mysore and Davangere, See Mys Gaz 1-10-1951, Extra, Pt IV-IC

Vellore, See Ft. St. Geo. Gaz., 1952, Pt I, page 344;

Ballary and Adoni, See Ft St Geo Gaz , 1952, Pt I, page 561

Trivandrum, Nagarcoil, Quilon, Alleppey, Kottayam, Alwaye, Changanacherry, Ernakulam, Mattancherry and Trichur, See T and C Gaz , 1-4-1952, Pt I, p. 356,

Baroda and Surat, See Guj Gaz., dt 3-8-1961, Pt IV-A, p 97,

Ajmer, Alwar, Bhilawara, Bikaner, Ganganagar, Jaipur, Jodhpur, Kota Pali and Udaipur See Raj Gaz., 21-6-1962, Pt. I (Kha), p. 29;

Delhi and New Delhi, w e f 1 11-1962, See Gaz of Ind., 24-11-1962, Pt. II, S 3(1), p 1884;

Delhi Cantonment, w e.f 1-6-1963, Gaz of India, 1-6-1963, Pt II, S 3(1), p 1020,

Hubli-Dharwar, See Mys Gaz., dt 14-5-1964, Pt. IV, S. 2-C(ii), p. 1363.

Anantpur, Chitoor, Cuddappah, Srikakulam, Adilabad, Karimnagar, Khammam, Mehbubnagar, Sangareddy, Nalgonda, Nizamabad, Produttur, Tenali, Kothugudem Vijaypuri, Guntakal, Tirupati, Chirala, Godivada, Nandyal, Anakapalle and Bhimvaram, A P Gaz , 28-8-1969, Pt I, p. 1349

Shillong, Gauhati, Jorhat, Dibrugarh, Tezpur, Silchar and Dubri — Assam Gaz , 10-6-1970, Pt. IIIA p. 2062.

Patna, Muzaffarpur, Bhagalpur, Purnea, Motihari and Arrahi, w.e.f 4-9-1969, Bih. Gaz., 4-9-1969, Ext., No. Patna 290 (S.O. 748).

Gaya, Darbhanga, Champa, Monghyr and Saharsa, w.e f 30-10-1969 — Bih Gaz , 30-10-1969, Ext (No. Patna 450) (S.O. 948, D/- 23-10-1969);

Ahwa, Amreli, Bharuch, Bhuj, Gandhinagar, Godhra, Himatnagar, Kheda, Mehsana, Palanpur, Valsad, Guj. Govt. Gaz., 16-2-1978, Pt. IV-A, p. 142;

Ambala City, Karnal, Gurgaon, Hissar, Rohtak, Narnawl and Jind — Hary Govt. Gaz , 10-5-1972, Pt III (LS), Ext., p 563

Bhiwani, Sonepat and Kurukshetra — Har Govt. Gaz., 27-2-1973 Pt III (LS), Ext., p 217

Tahsil headquarters in the State of Haryana and the towns of Faridabad and Yamunagar — Har Govt Gaz., 22-8-1975, Pt. III, Ext., p. 593,

All the district headquarters in Mysore State specified under this clause — Mys Gaz 24-7-1969 Pt. II, S. 2C(ii), p. 376.

Gokak, Raibag, Hospet, Sengappa, Bilgi, Jamkhindi, Mudhol, Harihar, Gagawathi, Manvi Sindhanoor Bhadravathi, Channagiri and Honnali — Kant Gaz., 14-5-1970, Pt IV-2C(ii), p 1701,

Udipi in the State of Karnataka — Kant Gaz., 21-2-1974, Pt IV-2c(ii), p 498,

Tirur Municipal Town — See Ker Gaz., 31-12-1978, Pt I, S IV, P I, G 91,

Bhopal, Jabalpur, Raipur, Bilaspur, Satna, Bhilai and Dewas — M P Gaz 20-11 1973 Pt I, p 1790

Thana, Alibag, Ratnagiri, Nasik, Dhulia, Jalgaon, Poona, Ahmadnagar, Satara, Sangli Sholapur Kolhapur Parbhani Bhir Usmanabad, Nanded Nagpur Buldhana, Akola, Amravati, Yeotmal, Bhandara, Wardha and Chandrapur — Mah Govt Gaz., 15-3-1973, Pt IV p 133

Rayagada, Sunabeda, Talcher — Orissa Gaz 15-5-1976, Ext., p 1 (No 801),

Mahe and Yanam — See Pondi. Gaz., 6-2-1969, Ext., p 1;

All the block headquarters in the State of Punjab — Punj Govt Gaz., 23-6-1979, Pt III (LS) Ext., p. 403;

Tanjavur, Cuddlore, Salem, Tirunaveli, Virudhanagar, Polluchi — Fort St George Gaz 5-2-1969 S. II, p. 69;

Kanchipuram and Dharmapuri — T N Govt Gaz., 24-4-1970, Pt II S 1, p 678,

Sivakasi, Didigal, Palani, Periakulam, Theni, Bodi and Cambam — T N Govt Gaz 23 9-1970 Pt. II, S. 1, p. 1510;

Tiruppur — T.N. Govt., 20-6-1973, Pt II, S. 1, p 615,

Udhagamandalam in the Nilgiris district — T N Govt Gaz., 17-2-1982, Pt II S 2 p 103,

District Headquarters at Kailashahar and Udaipur of North Tripura District and South Tripura District respectively — Tri. Gaz., 27-7-1977, Pt. I, Ext., p. 2,

Aligarh, Almora, Ballia, Bareilly Basti, Bulandshahr, Dehra Dun Faizabad, Garhwal (Pauri), Gorakhpur, Gaziabad, Jhansi, Meerut, Naini Tal, Rae Bareli, Saharanpur and Varanasi — U P Govt Gaz., 1-2-1975, Pt I, p. 256;

Azamgarh Bahraich Bara Banki, Banda, Badaun, Bijnor, Chamoli, Deoria, Etawah, Etah Farrukhabad, Fatehpur, Gonda, Ghazipur, Hamirpur, Hardoi, Jaunpur Jalaun Kheri Lalitpur Mainpuri Mathura Muzaffarnagar, Moradabad, Mirzapur Pilibhit, Pithoragarh, Pratapgarh, Rampur, Shahajahanpur Sultanpur, Sitapur, Tehri-Garhwal, Unnao and Uttar Kashi.

The above towns are in addition to the cities of Agra, Allahabad, Aligarh Almora, Ballia, Bareilly Basti, Bulandshar, Dehradun, Faizabad, Garhwal (Pauri) Gorakhpur, Gaziabad Jhansi Kanpur, Lucknow, Meerut, Naini Tal, Rae Bareli, Saharanpur and Varanasi which are notified earlier —U P Govt. Gaz., 28-3-1976, Ext., p. 1

Division	District	Town
Meerut	Saharanpur	1. Hardwar Union
		2. Roorkee
		3. Deoband
		4. Manglaur
		5. Gangoh
		6. Behat
		7. Landhaura
		8. Nakur
		9. Ambehta
		10. Rampur
		11. Titron
		12. Sarsawa

Division	District	Town
		13. Nahauta
		14. Jhabrera
		15. Chilkana
	Bulandshahr	1. Sikandrabad
		2. Khurja
		3. Debai
		4. Anupshahr
		5. Jahangirabad
		6. Aurangabad
		7. Bhon Bahadurnagar
		8. Bugrasi
		9. Gulaothi
		10. Siana
		11. Shikarpur
		12. Khanpur
		13. Chhatari
		14. Rabupura
		15. Kakore
		16. Bilaspur
		17. Jawar
		18. Dankaur
		19. Pahasu
	Muzaffarnagar	1. Kandhla
		2. Shamli
		3. Kairana
		4. Khatauli
		5. Charthawal
		6. Thanabhawan
		7. Jhinjhana
		8. Miranpur
		9. Jalalabad
		10. Sisauli
		11. Jansath
		12. Shahpur
		13. Par Qazi
		14. Budhana
		15. Bhaunkerherhi
	Meerut	1. [illegible]
		2. Mawana
		3. Sardhana
		4. Kankerkhera
		5. Agarwal Mandi
		6. Bakser Khera
		7. Abdullapur
		8. Khekra
		9. Chhaprauli
		10. Aminagar Sarai
		11. Parikchatgarh
		12. Phalauda
		13. Lawar
		14. Sewalkhas
		15. Bashuna
		16. Karawal
		17. Kithor
	Ghaziabad	1. Hapur

Division	District	Town
		2 Pilkhuwa
		3. Muradnagar
		4 Kharkhauda
		5 Niwari
		6 Faridnagar
		7 Babugarh
		8 Loni
		9 Patla
		10 Dadri
Agra	Aligarh	1 Hathras
		2 Sikandra Rao
		3 Atrauli
		4 Jalali
		5 Jattari
		6 Harduaganj
		7 Sashi
		8 Mursan
		9 Mendu
		10 Khair
		11 Chharra
		12 Beswan
		13 Brijargarh
		14 Nassain
		15 Kauriaganj
		16 Pilkhana
		17 Purdil Nagar
	Agra	1 Firozabad
		2 Fatehpur-Sikri
		3 Achhnera
		4 Shamshabad
		5 Etmadpur
		6 Dayalbagh
		7 Tundla
		8 Swamibagh
		9 Pinhat
		10 Bah
		11 Fatehabad
		12 Jagner
		13 Kheragarh
	Mathura	1 Vrindaban
		2 Kosi
		3 Gobardhan
		4 Radhakund
		5 Sonkh
		6 Farrah
		7 Gokul
		8 Baldeo
		9 Sadabad
		10 Mahaban
		11 Sahpau
		12 Raya
		13. Chhata
	Mainpuri	1. Shikohabad
		2. Sirsaganj
		3. Karhal
		4. Bhongaon

Division	District	Town
		5. Bewar
		6. Kuraoli
		7. Jasrana
		8. Pharha*
	Etah	1. Kasganj
		2 Soron
		3. Jalesar
		4. Ganj Dundwara
		5. Marhera
		6 Aliganj
		7. Amapur
		8. Sakit
		9. Nidholi-Kalan
		10. Sahawar
		11. Bilram
		12. Raja-ka Rampur
		13. Patiali
		14. Awagarh
		15. Mohanpur
		16. Bhargain
Rohilkhand	Bareilly	1. Aonla
		2. Baheri
		3. Faridpur
		4 Nawabganj
		5. Thiriya Nijawal Khan
		6. Senthal
		7. Rathaura
		8. Richha
		9. Shishgarh
		10. Fatehganj Purbi
		11. Sirauli
		12 Shahi
		13. Dhaura Tanda
		14. Shergarh
		15. Fatehganj-Pashchami
		16. Mirganj
	Budaun	1. Ujhani
		2. Sahaswan
		3. Kakrala
		4 Bilsi
		5. Bisauli
		6. Islamnagar
		7 Mundia
		8. Dataganj
		9. Alapur
		10. Usehat
		11. Gunnaur
		12. Gawan
		13. Saidpur
		14. Babrala
		15. Kunwargaon
	Shahjahanpur	1. Tihar
		2. Jalalabad
		3. Puwayah
		4. Katra
		5 Kant
	Pilibhit	1. Bilaspur

Division	District	Town
		2. Puranpur
		3. Husainpur Neoraj
		4. Bilsanda
Moradabad	Moradabad	1. Chandausi
		2. Amroha
		3. Sambhal
		4. Hasanpur
		5. Bilari
		6. Dhanaura
		7. Behjoi
		8. Thakurdwara
		9. Kanth
		10. Kundarki
		11 Bechhraon
		12. Bhojpur-Dharampur
		13. Naraulı
	Rampur	1 Suar
		2 Bilaspur
		3 Milak
		4 Tanda
		5 Shahabad
		6 Kemri
	Bijnor	1 Dhampur
		2 Najibabad
		3 Nagina
		4 Nehtaur
		5 Chandpur
		6 Afzalgarh
		7 Kiratpur
		8 Seohari
		9 Haidaur
		10 Jhalu
		11 Sahanpur
		12 Bathapur
		13 Mandawar
		14 Sahaspur
Allahabad	Farrukhabad	1 Fatehgarh
		2 Kannauj
		3 Kaimganj
		4 Chhibramau
		5 Shamshabad
		6 Sekanderpur
		7. Kamalganj
		8 Tirwaganj
		9. Talgram
		10 Gurusahaiganj
	Etawah	1 Auraiya
		2 Bharthana
		3. Jaswantnagar
		4. Phaphund
		5 Lakhana
		6 Ekdil
		7. Achhalda
		8. Dibiyapur
		9. Bidhoona
	Fatehpur	1. Bindki

Division	District	Town
		2. Khaga
		3. Kishanpur
		4. Kora Jahanabad
Jhansi	Jhansi	1. Mauranipur
		2. Baruasagar
		3. Samthar
		4. Ranipur
		5. Gursarai
		6. Moth
		7. Chirgaon
		8 Katera
		9. Erich
	Lalitpur	1. Talbehat
		2 Mahroni
		3. [illegible]
	[illegible]	1. Chitrakut Dham
		2. Attarra
		3. Naraini
		4. Bisanda Bujurg
		5. Baberu
		6. Rajapur
		7. Manikpur Sarhat
		8. Mataundh
		9. Oran
	Jalaun	1. Konch
		2. Jalaun
		3. Kalpi
		4. Madhogarh
		5. Kadaura
		6. Kotra
	Hamirpur	1. Mahoba
		2. Rath
		3. Maudaha
		4. Hamirpur
		5. Charkhari
		6. Sumerpur
		7. Khoreela
		8. Sarila
Varanasi	Mirzapur	1. Chunar
		2. Kacchwa
		3. Robertsganj
		4. Ghorawal
	Jaunpur	1 Mongra Badshapur
		2. Machhlishahar
		3. Mariaha
		4. Kerakat
		5 Zafrabad
	Ballia	1. Baragaon
		2. Sahatwar
		3. Bansidih
		4. Bilthara Road
	Ghazipur	1. Dildarnagar — Fatehpur Bazar
		2. Bahadurganj
		3. Zamania
		4. Saidpur
		5. Sadat

Division	District	Town
	Varanasi	1. Bhadohi
		2. Moghalsarai
		3 Ramnagar
		4. Gangapur
		5. Gyanpur
		6 Gopiganj
		7. Chakiya
		8. Khamaria
		9. Saiyed Raja
		10. Chandauli
Gorakhpur	Gorakhpur	1 Nautanwa
		2 Pipraich
		3. Gola
		4. Siswa Bazar
		5 Barhalganj
		6. Mundera Bazar
	Azamgarh	1 Maunath Bhanjan
		2. Mubarakpur
		3. Dohrighat
		4. Atrauli
		5 Kopaganj
		6 Phulpur
		7 Sarai Mir
		8 Nizamabad
		9 Mohammadabad
		10. Amila
		11 Ghosi
		12. Adari
	Basti	1. Mehdawal
		2 [illegible]
		3. Shoharat Garh
	Deoria	1 Padrauna
		2 Gaurabarahaj
		3. Lar
		4. [illegible]
		5. Rampur-Karkhana
		6 Captainganj
		7 Rudrapur
		8 Sewarahi
		9 Kasyan
		10 Bhatpur-Rani
Kumaon	Naini Tal	1. Haldwani-cum-Kathgodam
		2 Kashipur
		3. Ramnagar
		4 Rudrapur
		5 Jaspur
		6 Tanakpur
		7. Khatima
		8. Kala Dhuggee
		9. Bhimtal
		10. Sultanpur
		11. Kichha
		12. Bazpur
		13. Sitarganj
		14. Gadarpur
	Almora	1. Bageshwar

Division	District	Town
	Pithoragarh	1. Dharchula
		2 Dedeehat
		3. Champawat
Garhwal	Garhwal	1. Kotdwara
		2 Pauri
		3. Srinagar
		4. Dogadda
		5 Rudra-Prayag
	Tehri Gurhwal	1. Narendranagar
	Uttar Kashi	1 Bhatwari
		2 Barkot
	Dehra Dun	1. Mussoorie
		2. Vikasnagar
		3. Rishikesh
	Chamoli	1. Cochar
Lucknow	Unnao	1. Bangemau
		2 Purwa
		3. Haidarabad
		4. Maurawan
		5 Beeghapur
		6. Bhagwantnagar
		7. Safipur
		8. Ugoo
		9. Ganj-Moradabad
		10. Fatehpur-Chaurasi
		11. Ganga Ghat
		12. Kursath
		13. Auras
		14. Nawahganj
	Sitapur	1. Biswan
		2. Neemsar Misrikh
		3. Khairabad
		4. Laharpur
		5 Maholi
		6. Mahmudabad
		7. Paitapur
		8. Tambaur-cum-Ahmedabad
	Hardoi	1 Shahabad
		2. Sandila
		3 Sandi
		4 Pihani
		5 Bilgram
		6 Madhoganj
		7. Mallawan
		8. Kachauna Patsain
		9. Pali
		10. Beniganj
		11. Gopamau
	Rai Bareli	1 Dalmau
		2. Lalganj
		3. Mahrajganj
		4. Bachhrawan
		5. Jais
		6. Salon
	Kheri	1. Kheri
		2. Golagokaran Nath

Division	District	Town
		3. Mohammadi
		4 Palia
		5 Dhaurehra
		6 Od Dhakna
		7 Singhai Bhiraura
	Lucknow	1 Malihabad
		2 Kalori
		3 Amethi
		4 Gosainganj
Faizabad	Faizabad	1 Tanda
		2 Akbarpur
		3 Bikapur
		4 Jalalpur
		5 Goshaiganj
		6 Bhadarsa
	Bahraich	1 Ikauna
		2 Jarwal
	Gonda	1 Balrampur
		2 Nawabganj
		3 Colonelganj
		4 Katra
		5 Khargoopur
		6 Mankapur
		7 Pach Perwa
	Sultanpur	1 Amethi
		2 Koeripur
		3 Dostpur
	Pratapgarh	1 Pratapgarh City
		2 Katramedniganj
		3 Manikpur
		4 Kunda
	Bara Banki	1 Nawabganj
		2 Dewa
		3 Fatehpur
		4. Tikait Nagar
		5 Daryabad
		6. Satrikh
		7. Zaidpur
		8. Ramnagar

—U P Govt. Gaz., 30-4-1977, Ext., p. 10 (No. 215-Kha)

Headquarters of New Okhla Industrial Development Authority i e Noida Complex in District Ghaziabad —U.P. Gaz., 24-10-1981, Pt. 4(ख), Ext., p.2

Provisions of S 58 extended to the Union Territory of Chandigarh — Chd Admn Gaz., 18-12 1980 Ext., p. 446.

Cooch-Behar — Cal Ga., 14-8-1969, Pt. I, p. 1434:

(1) Haldia Port — Midnapore
(2) Bolpur — Birbhum
(3) Kalyani — Nadia
(4) Memari — Burdwan
(5) Pandooah — Hooghly
(6) Boinchee — Hooghly
(7) Barupore 24 Pargans
(8) Baduria — 24 Parganas
(9) Kanchrapara — 24 Parganas
(10) Habra — 24 Parganas

(11) Khardah — 24 Parganas
(12) Gosaba — 24 Parganas
(13) Naihati — 24 Parganas
(14) Kakdwip — 24 Parganas
(15) Conning — 24 Parganas
(16) Nimpith — 24 Parganas
(17) Hamiltonganj — Jalpaiguri
(18) Falakata — Jalpaiguri
(19) Dhupguri — Jalpaiguri
(20) Changrabandha — Cooch Behar
(21) Khagrabari — Cooch Behar
(22) Bijanbari — Cooch Behar
(23) Sukiapokhri — Cooch Behar
(24) Raiganj — West Dinajpur
(25) Kaliaganj — West Dinnajpur
(26) Harishchandrapur — Malda
(27) Gazole — Malda
(28) Samsi — Malda
(29) Chachol — Malda
(30) Ajodhya — Howrah
(31) Bauria — Howrah
(32) Donjur — Howrah
(33) Liluah — Howrah
(34) Belur — Howrah

—Cal Gaz., 8-6-1978, Pt. I, p. 1192.

—Panji, Mapusa, Margao and Vasco of Union Territory of Goa, Daman and Diu (Goa in view of State).

—Goa Gaz., 18-4-1974, Series 1, No. 3, P. 22.

—Latur, Jalna, Gadchiroli and Kudal in Maharashtra.

—Mah. Govt. Gaz., 15-10-1987, Pt. III-B, p. 797.

(Note— The list of the names of the towns given above is not exhaustive — Ed.)

[G] The words "Governor General in Council" were successively amended by A.O., 1937 and A.L.O., 1950 to read as above.

Synopsis

1. **Amendments under Act XX of 1929.**
2. **Mortgage — General.**
3. **The Punjab and other States.**
4. **Mortgage is a transfer of an interest in immovable property.**
5. **Sub-mortgages.**
6. **Agreement to grant or accept a mortgage.**
7. **Subsequent mortgage in lieu of earlier mortgage, found invalid — Revival of earlier mortgage.**
8. **Muhammadan widow's possession in lieu of dower.**
9. **Specific immovable property.**
10. **Mortgage and pledge of future property.**
11. **Mortgage of moveables.**
12. **"For the purpose of securing the payment of money."**
13. **"Existing or future debt."**
14. **"Or the performance of an engagement."**
15. **"Mortgagor."**
16. **"Mortgagee."**
17. **Mortgage-money.**
18. **Non-payment of consideration — Effect.**
19. **Mortgage without title — Subsequent acquisition — Principle of making good.**
20. **Mortgage by person having voidable title.**

21. Mortgage by co-owners.
22. Mortgage by pardanashin women.
23. Mortgage by beneficiary under trust.
24. Mortgage by person incompetent to contract.
25. Mortgage by one person when binding on another.
26. Mortgage in favour of minor.
27. Simple mortgage.
28. Possession remains with the mortgagor.
29. Mortgagor binds himself personally to pay.
30. "Mortgagee shall have a right to cause the mortgaged property to be sold."
31. Mortgage by conditional sale.
(A) Legislative history.
(B) Ostensible sales.
(C) Personal liability.
(D) "On default of payment of mortgage-money on a certain date."
32. Distinction between mortgage by conditional sale and a sale with a clause for re-purchase.
33. Sale or mortgage — Tests of distinction.
(A) Effect of the proviso.
(B) Dekkhan Agriculturals' Relief Act.
(C) U.P. Zamindari Abolition and Land Reforms Act (1951).
34. Mortgage by conditional sale or other kinds of mortgage.
35. Usufructuary mortgage.
(A) Delivery of possession.
(B) Appropriation of rents and profits.
(C) Absence of personal liability.
(D) Time limit for redemption.
(E) Distinction between usufructuary mortgage and lease. See S. 105, Note 67).
36. Zuripeshgi lease.
37. Kanom and otti.
37A. Lekha mukhi mortgage.
37B. Chitham mortgage.
37C. Vatantar mortgage.
37D. Pukhta Maurusi Tenant.
38. English morgage.
(A) Personal liability.
(B) Absolute transfer.
(C) Proviso for reconveyance.
(D) Possession of property.
39. Equitable mortgage.
(A) Delivery of documents of title.
(B) Scope of the security is the scope of the title.
(C) Delivery must be made to a creditor or his agent.
(D) The delivery must be with intent to create security.
(E) Registration.
(F) Remedy of the equitabe mortgagee.
(G) Remedy of the mortgagor in equitable mortgage.
(H) Merger.
(I) Interest.
(J) Territory in which equitable mortgage can be made.
(K) Punjab and other areas.
(L) Simla.
(M) Rajasthan.
40. Anomalous mortgages.
41. Simple mortgage usufructuary.
42. Limitation to enforce mortgages
See Arts. 61, 62 and 92 of the A.I.R Commentries on the Limitation Act 7th (1997) Edn
43. Sale in execution of mortgage decrees and money-decrees.
44. Miscellaneous — Construction.

1. Amendments under Act XX of 1929.

(1) The proviso to clause (c) is new See Note 33.

(2) The words "or expressly or by implication binds himself to deliver possession" and the words "or any part of such rents and profits and to appropriate the same" in clause (d) have been newly added. Note 35.

(3) Clauses (f) and (g) have been newly added The Act recognised a mortgage by deposit of title deeds in S. 59, and an anomalous mortgage in S 98, but there was no definition of such mortgages before.

The amendments have been declared by section 63 of amending Act not to be retrospective in their operation(1).

2. Mortgage — General.

A right in another's property was known in Roman law as a *jus in re aliena*. To this class of rights according to Holland(1) belongs a right which is given for the *subsidiary* purpose of enabling the person to whom it is granted to make sure of receiving a certain value to which he is entitled, if not otherwise, then at all events by means of the right in question. This right which is known as pledge merely enables a person who is entitled to receive a definite value from another, in default of so receiving it, to realise it by eventual sale of the thing which is given to him in pledge. This right of sale is one of the component rights of ownership and is a *right in rem*. "The objects aimed at by the law of pledge are obviously, on the one hand, to give the creditor a security on the value of which he can rely, which he can readily turn into money, and which he can follow even in the hands of third parties, on the other hand, to leave the enjoyment of thing in the meantime to its owner and to give him every facility for disencumbering in when the debt, for which it is security, shall have been paid."(2)

These objects were attained in Roman Law by three different methods(3) :

(1) *By fiducia*, involving an actual transfer of ownership in the thing from the debtor to the creditor accompanied by a condition for its retransfer upon due payment of the debt This corresponds to English mortgages and to mortgages by conditional sale

(2) *By pignus*, in which the ownership of the thing remained with the debtor, but its possession was transferred to the creditor This corresponds to a usufructuary mortgage

(3) *By hypotheca*, by which not merely the ownership of the thing but its possession also remained with the debtor This corresponds to a simple mortgage

In England the original form of mortgage in Common law seems to have been in the nature of a *pignus* in Roman law. Subsequently, it seems to have taken the form of a conditional sale, the condition being that on repayment, the sale determined and the land came back to the mortgagor Later still the form became one of absolute sale on condition that the creditor will retransfer the property on payment of the money on the due date, on default of payment on the due date, the creditor became the absolute owner of the property In the Courts of Chancery, however, this rigour of the Common law was mitigated by the rule of equity that the time fixed for repayment was not of the essence of the transaction, and that the debtor had an *equity of redemption which he could exercise even* after the due date had passed After 1925 the mortgage takes the form of a lease which ceases when the money secured by it has been paid.

In this country also mortgages under various forms have been in vogue from very ancient times A mortgage by conditional sale under various names such as *kaikabela or bye-bil-wufa, gahan lahan, muddatakravam*(4) *and perutham*, has been a very common form in use in various

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Section 58 — Note 1

1. **AIR 1952 All 716 (719) : ILR (1952) 2 All 200 (FB).** (Proviso to S 58(c) is not retrospective)

Section 58 — Note 2

1. Holland, *Jurisprudence*, 6th Edn., page 200.
2. Holland, *Jurisprudence* 6th Edn page 201 AIR 1962 Raj 12 (18) · ILR (1961) 11 Raj 76 (Transfer of Property Act not in force in Marwar when transaction took place — No prohibition against making oral mortgage of immovable property 1940 MLR 299 (Civil), Foll.)
3. Holland, *Jurisprudence*, 6th Edn., pages 201, 202, 203.
4. (1906) 29 Mad 531 (533) (DB) (A document described as *"meddatu kravan" which is defined as "land, mortgaged with option to the lender to consider it as his property if the*

parts of India. Usufructuary mortgages were also prevalent under various names such as *bhogvam swadina adamanam, kanom, otti Bhagbandak, khai khalari, rehan*(5) *or bandaknama*. So also were simple mortgages under the names of *adamanam, dhristabandaka, tanaka*(6) *panayam, tarangahan, arh, mushtagraq, or bhandaki Khai*. The English mortgage came to be used, in the Presidency Towns, and by Europeans after the British advent in this Country. In the Bombay Presidency, the general though not an invariable rule among Hindus and Muhammadans was that it was deemed essential in order to complete a transfer by mortgage, to transfer possession to the grantee (7). Certain exceptions were, however, recognised (8). A Kanom in Malabar has got incidents of a usufructuary mortgage and a lean. Even though document is styled as Kanom it has to be considered and treated as a mortgages in some cases and as a lean in other cases. A Kanom and mortgage with possession have many features in common and only way to decide is to find out the object in which transaction was entered viz. whether transfer was of right to enjoy or as security for payment.(9) The essential characteristics of a mortgage under the section are the following:

(1) There is a *transfer of an interest* in specific immovable property; and

(2) the object of the transfer is to *secure the payment* of a loan or debt or the performance of an engagement giving rise to a pecuniary liability(10).

If both these essentials are present, the transaction is a mortgage irrespective of its form (11).

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mortgage is not redeemed within a stipulated period" seems to fall under the first kind of mortgage by conditional sale specified in the section. The mere use of the word "nizadatu krayan" in a document is not, however, conclusive.)

5. AIR 1915 All 142 (142) (DB).

[See also 1962 Mys LJ (Supp) 534 (538) (DB). (Mysore T P Act S. 58(c). Case before addition of explanation. Two documents together constituting single transaction of mortgage by conditional sale — Both the documents must be registered before transaction can be held to be valid and enforceable.)]

6. AIR 1919 Mad 1117 (1121) (DB). (The word 'tanaka' occurring in a document evidencing a loan means a mortgage and not merely an assignment of land revenue.) ** AIR 1914 Mad 306 (306) (DB). (Tanaka is a phrase commonly used and perfectly well understood by the people of the Ganjam District as meaning a mortgage and in no other sense.)

[But see (1913) 19 Ind Cas 221 (224) (DB) (Mad). (The words 'I and my heirs with all my property movable and immovable as tanaka shall be liable' are not enough to create a change or a mortgage.)]

7. (1882) 6 Bom 490 (493) (DB) ** (1877) 2 Bom 299 (3, 1 319) (DB). (Case of a sale but observations are general.)

[See also (1872) 9 Bom HCR 275 (277, 278) (DB) ** (1872) 9 Bom HCR 304 (306) (DB).]

8. **(1882) 6 Bom 193 (200, 201) (FB).** (Delivery of possession is not necessary in the case of a *san* mortgage in Gujarat.) ** **(1882) 6 Bom 538 (540) (FB).** (Do.) ** **(1881) 6 Bom 168 (176, 177, 178) (FB).** (The exceptions are set out in detail.) ** (1896) 20 Bom 158 (163) (DB). (*San* mortgage in Gujarat.) ** (1870) 7 Bom HCR (AC) 24 (26) (DB). (Do.)

[See also (1874) 11 Bom HCR 41 (42) (DB). (Rule of Hindu law that a mortgage with possession takes precedence over a mortgage of a prior date unaccompanied by possession is not applicable in Gujarat.)]

9. **AIR 1970 Ker 16 : 1969 Ker LT 62 (FB).**

10. **AIR 1965 Mys 54 (59) : ILR (1964) Mys 545 (FB).**

[See AIR 1960 SC 1030 (1032) : ILR (1960) 2 Punj 555. (Loan or debt to secure which mortgage is created remains pecuniary liability of the person creating it. Therefore mortgage debt would be covered by definition of 'debt' in S. 2(6), Displaced Persons (Debts Adjustment) Act.)]

11. **AIR 1965 Mys 54 (59) : ILR (1964) Mys 545 (FB).** (Need for document, nature of

If one or the other of the said essentials is lacking the transaction is not a mortgage(**12**).

It has been the consistent view of the Allahabad High Court that usufructrary mortgage of an occupancy holding is not valid as a mortgage with all its incidents and subject to the provision of law relating to usufructuary mortgage but is valid in only qualified sense i.e. in the sense of sub-letting with a covenant that the mortgagor will not be entitled to recover possession without payment of the mortgage money and further that under such a mortgage there is no transfer of the right of occupancy tenant and consequently no suit for redemption was maintainable The view that a usufructuary mortgage by an occupancy tenant was not valid in the eye of law has been accepted by the legislature in Cl. (d) of S. 21(1) of U.P Zamindari Abolition and Land Reforms Act, 1951 Since the matter stands concluded by the doctrine of *stare decisis* the Supreme Court did not find it proper to upset the same.(**13**)

The fact that a transaction which satisfied the requirements of cl (a) of this section has not been effected by a registered instrument as required by S 59 cannot detract from its character of being mortgage. The question as to what is a mortgage is dealt with only by this section and not by S. 59 which deals only with the mode of validity effecting a mortgage Hence while determining whether a transaction is a mortgage or not it is not permissible to combine both these sections and read them as constituting a single definition of a mortgage and hold the transaction to be not a mortgage solely because it has not been effected by a registered instrument(**14**).

The document in instant case recited that the executant had received certain amount and had handed over possession of property to opposite party. The executant was to bear municipal taxes etc The period of mortgage was 5 years before which it could not be redeemed. It was stipulated between the parties to execute registered deed Held, that the document was an unregisterd mortgage deed and not an agreement to execute mortgage deed in future.(**15**) However, where deed was unregistered and it was not clear when mortgage loan was not taken, what was rate of interest, what were the other terms, who was the mortgagor and who was mortgagee, the document would not be sufficient to create any mortgage or charge on suit lands(**16**).

Credit facility was given by a financial institution to a company against its agreeing to mort-

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recitals, stamp registration etc , are matters which bear upon mode of executing mortgage and are not essential ingredients of mortgage.) ** AIR 1942 Cal 55 (57) (DB) ** AIR 1917 Mad 368 (370) (DB).

[**See also** AIR 1915 Mad 382 (383) (DB).]

12. AIR 1981 Bom 335 (337, 338) 1980 Mah LJ 263 (**Held,** transaction in instant case was lease and not mortgage) ** 1979 Mah LJ 438 ILR (1981) Bom 1273 (1290, 1291, 1292). (Document called "Patte-Khat" held was not mortgage as the transfer was not as a security for the debt) ** (1962) 40 Mys LJ 669 (670) ** (1900) 2 Bom LR 215 (217) (DB). (Where there is no transfer of an interest, transaction is not mortgage)

[**See** AIR 1916 Mad 1219 (1219) (DB) (A security bond, after reciting an order of the Court, stated that "we have for a sum not exceding Rs. 300 made over properties mentioned below as security" — **Held,** that the document did not transfer any interest in the property nor was there any existing or future debt or an agreement which might give rise to a pecuniary liability — It merely created a charge.)]

[**See also AIR 1963 SC 1041 (1042).** (On payment of mortgage money by mortgagor mortgage ceases to exist because then no debt can be said to be due from him to mortgagee and hence no security for payment of debt can exist.)]

13. AIR 1987 SC 987 (989) : 1987 All LJ 443 : (1987) 2 SCC 482.

14. AIR 1959 J & K 64 (64) (FB).

15. AIR 1998 Guj 31 (35) : 1998 (1) Guj LR 760.

16. 2002 (1) MPHT 529 (532).

gage immovable property. Resolution was also passed accordingly in the Board's meeting of the company. However, the Company neither mortgaged the property nor register the charge with the Registrar of the Companies though it availed of credit facility The company went into liquidation, Held, that the undertakings given by the company did not amount to mortgage or charge attracting S. 125 of the Companies Act and became void against the Liquidator (17)

It has been held in the undermentioned case(18) that it is possible to create a mortgage merely by operation of law, apart from what is provided for in the Transfer of Property Act Such a legal mortgage is not to be confounded with the conventional mortgages which could arise only out of the voluntary consent of the parties. The law attached to certain obligations in the case of legal mortgages a charge on the debtor's property with the some incidents as a consensual security

A mortgage under the T P Act can be created by a living person Court is not a living person within the meaning of the T P Act. Thus a self-liquidating usufructuary mortgage created by the Collector under Section 17 of the U P Debt Redemption Act is not a mortgage(19).

Mortgage by owners in respect of loan advanced to person having no interest in mortgage property is contemplated by S. 58(20).

"Undertaking affidavit" executed by successful bidder of a Chit Fund for securing repayment of prized chit amount received by the bidder creating charge over a property amounts to transfer of interest in immovable property and is a mortgage(21).

The definition of "transfer of property" in S 5 of "mortgage" in this section makes no reference to the *locus* to which the property belongs Hence, a mortgage deed cannot be challenged on the mere ground that a part of the property embraced by it was outside India(22).

Mortgage being a crature of contract cannot be brought into existence by prescription (23) However, it was held in the instant case by M P High Court(24) that even if the mortgage was illegal at its inception, where the mortgagee remains in possession of the mortgaged property for a period of 12 years, a valid mortgage comes into existence after the expiry of 12 years period of confirming in possession.

Definition under Stamp Act compared :

Section 2(17) of the Stamp Act provides as follows :

> " 'Mortgage deed' includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to, or in favour of another a right over or in respect of specified property."

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17. 2000 CLC 704 (711) (Cal)

18. AIR 1955 Trav-Co 130 (131, 132) (DB) (Where, at a time when the T P Act was not in force in Travancore, the decree in a suit for recovery of property and mesne profits allowed the defendant to retain possession till she got the amount that was declared to be due to her or to surrender possession of the property and to claim the amount with interest and further she was also allowed to appropriate the profits from the property till she was paid her amount or till she surrendered possession of the property and claimed the amount with interest thereafter, it was held that a mortgage was created on which the plaintiff could file a suit for redemption — Ghose on the Law of Mortgage in India, Vol 1, page 14, Ref)

    [But see ILR (1959) Ker 1147 (1182) 1959 KLT 956 (Overruled on another point in ILR (1960) Ker 475.)]

19. 1968 All WR (HC) 696 (DB).

20. (1977) 81 Cal WN 300 (306) ILR (1977) 2 Cal 607 (DB)

21. AIR 1979 Mad 282 : (1979) 2 Mad LJ 170 (SB).

22. AIR 1951 All 462 (463) : ILR (1951) 2 All 703 (DB).

23. AIR 1938 Pat 479 (480) (DB). (Mortgagee rights, therefore, cannot be prescribed)

24. AIR 1999 Madh Pra 86 (88) : 1999 (2) MPLJ 31.

This definition is more extensive than the definition in this section in the following respects :

(1) It includes movable property.

(2) The engagement referred to therein is not limited to one which may give rise to a pecuniary liability.

(3) It is not limited to cases where there is a "transfer" of an interest in immovable property.

Thus, a mortgage deed under the Stamp Act will include an instrument whereby only a *charge* is created and no transfer of an interest in property is effected(**25**).

It is not the name that is given to a document that matters If really a document operates to create rights of the nature contemplated by S 2(17), in favour of persons who advance money, clearly the document is a mortgage(**26**).

Where the plaintiff filed suit for recovery of mortgaged amount by sale of mortgaged property and who prayed for personal decree, but the mortgage was found to be in contravention of statutory provisions, the passing of simple money decree on ground of personal covenant for repayment of debt is valid and legal Primary consideration in such transactions is the way of security in favour of mortgagee (**27**) Under S 8, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and the legal incidents thereof Where a mortgaged property is sold, the mortgagor-vendor is capable of passing in the property only that right of ownership subject to the encumbrance already created, if any fraud has been created by the vendor and the mortgagee has nothing to do with it, it cannot be said that the mortgage created or taken by him is invalid for any purpose The remedy of the purchaser can only be against the vendors, if they had misrepresented the purchaser.(**28**) Where the findings of fact as to interpreting the document to be a mortgage, recorded by the lower appellate Court on the basis of as many as seven surrounding circumstances was neither perverse nor against record, it was not liable to be interfered with under S 100, C.P.C.(**29**) Where a party executed sale deed of immovable property in favour of the creditor for securing loan, an agreement to reconvey was embodied in separate document and simultaneously a rent deed mentioning interest payable as rent payable by borrowers was also executed, held, that these transactions did not amount to creating mortgage but amounted to loan within meaning of the Hyderabad Money Lenders Act (**30**) In a suit for redemption of mortgage the defendant pleaded that he was in possession of the suit shop as a tenant, that the mortgage was a sham transaction and therefore the suit itself was not maintainable However, no cogent evidence to prove the allegation of intention to create tenancy was adduced. The mortgage deed was registered. There was no evidence to create doubt about its genuineness and authenticity Thus the plaintiff was entitled to decree for redemption of suit.(**31**)

3. The Punjab and other States.

Though the Transfer of Property Act is not in force in the Punjab, the definitions of the various kinds of mortgages given in it have always been accepted as correctly describing their

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25. **AIR 1978 All 443 (445) (SB) ** AIR 1968 Andh Pra 213 (216) (FB).** (There is no warrant for the importation of the requirements of either the T P Act or the Registration Act, to construe documents or instruments under the Stamp Act as the latter Act itself specifically defines the terms used therein — The Stamp Act does not require a valid mortgage deed (i.e , a valid transfer in law) as contemplated under S 59, T P Act — Under Stamp Act what is sought to be defined is only a mortgage deed — AIR 1953 Mad 764, **Diss. from**)

26. **AIR 1959 Andh Pra 650 (651) : ILR (1959) Andh Pra 495 (SB).**

27. AIR 1998 Madh Pra 73 (74) : 1998 (2) MPLJ 195.

28. 1996 CTC 653 (656) (Mad)

29. 1996 AIHC 3493 (3497) (All) : 1996 All CJ 42.

30. 1997 AIHC 135 (139) : 1996 (3) Andh LT 257

31. 1999 AIHC 1055 (1057) : 1998 (119) Pun LR 68

essential ingredients and incidents (1) But the definition will not be applied without taking into consideration the particular circumstances of the case Where by S 16 of the Punjab Alienation of Land Act, 1900, the mortgaged property could not be brought to sale by the Civil Court, the definition under cl (b) of the present section was not applied to a simple mortgage so as to give the mortgagee a right of sale through Court(2)

Oral mortgages in villages are not uncommon and the mortgagee is satisfied when entry in revenue record is made in his favour(3)

The proviso to S 58(c) is merely a technical rule as to proof and there is nothing in it in accord with equity, justice and good conscience and that being so, it is not applicable to the Punjab(4)

The Transfer of Property Act had no statutory force in the erstwhile Travancore State Nevertheless the Courts there were freely following many of the principles laid down in that Act The conditions laid down in Section 58(c) of the T P Act which defines a mortgage by conditional sale can be applied to the transaction in dispute to find out whether it was really a mortgage by conditional sale(5).

As the rules pervalent in the erstwhile Seraikella State were not inconsistent with the T P Act the principles of the Act were applied in the matter of redemption of mortgage(6)

Where the text of deed showed that

(i) the deed did not create, expressly or by implication the relationship of debtor and creditor, nor was the amount paid by the transferee to the transferor made a charge on property;

(ii) there was no provision in the deed in regard to interest,

(iii) possession of the land was handed over to the transferee and municipal taxes were made payable by the transferee;

(iv) a period is stipulated within which the transferor may repurchase land after making payment of the amount for which it was originally transferred,

and the statement in the deed that if the amount was not paid within the stipulated period the deed was to be treated as permanent sale deed, Held that such a deed was not a deed of mortgage by

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Section 58 — Note 3

1. **AIR 1940 Lah 401 (403) : ILR (1941) Lah 71 (FB) ** AIR 1932 Lah 465 (466) : 13 Lah 660 (FB)** (Though the Act is not in force in the Punjab, the definition of *mortgage* contained in S 58, is uniformly and unreservedly adopted by the Courts in this province) AIR 1916 Lah 155 (FB) **Rel. on**) **** AIR 1916 Lah 155 (156) 1916 Pun Re No. 53 (FB) **** AIR 1936 Pesh 43 (45) (DB) (N W F P) ** AIR 1933 Lah 151 152) (DB) (Definition of usufructuary mortgage as given in S. 58(d) applied)
2. **AIR 1941 Lah 274 (276) (DB)**
3. **1978 Pun LJ 117 (117) ** 1978 Rev LR 337**
4. AIR 1964 Punj 81 82) (DB) ** AIR 1960 Punj 444 (445) ILR (1960), 2 Punj 741 (DB) ** **(1946) 48 Pun LR 517 (518) (DB).**
5. **AIR 1970 Ker 81 (84, 85) : 1969 Ker LT 338 (DB)**
6. **AIR 1981 Pat 215 (218 219) (DB)** (Under a document executed in 1933 in the erstwhile Seraikella State, a loan was to be re-paid with interest within a stipulated time failing which the lender, the relative of the borrower, was to have the property in question after paying dues and as per procedure prevailing in the State and the lender got his name mutated The document read with mutation order showed that the mutation was for collection of rents alone, and not for creating title in favour of the lender Following the principles of T P Act, it was held that the lender was a mortgagee and the borrower was entitled to redeem the mortgage.)

way of conditional sale, is an outright sale, with a condition of repurchase(7).

4. Mortgage is a transfer of an interest in immovable property.

In England a mortgage debt is a chose in action but the mortgagee is treated as having an interest in the mortgaged property and priorities are governed by the rules applicable to interests in land and not by the rules which apply to interest *in personality*(1). Under the present Act a mortgage debt is not an actionable claim It is the *transfer of an interest in immovable property*(2) The owner of the bundle of rights transfers some of those rights to the mortgagee and the remainder of them still remain with him (3) A mortgage cannot be conceived of without a transfer of property to be mortgaged It is not a mere promise to perform any act but it contemplates transfer of property in praesenti in favour of mortgagee (4) This distinguishes it from a sale which is a transfer of *ownership*, that is, all the interests in the immovable property(5) The interests referred to in this section thus has refer-

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7. AIR 1982 Bom 437 (439) : 1982 Mah LJ 538.

Section 58 — Note 4

1. (1901) 70 LJ Ch 477 (484) (1901) 2 Ch 231, Taylor v London and County Banking Company.

   [**See also** (1804) 32 ER 659 (661) 9 Ves 407 (410), Jones v Gibbons]

2. **AIR 1981 SC 981 (987) : 1981 UJ (SC) 641** ** AIR 1964 Pat 193 (196) (DB) ** AIR 1963 Andh Pra 489 (490) ILR (1964) Andh Pra 832 (DB) (AIR 1963 Andh Pra 239, **Reversed**) ** ILR (1959) Ker 1147 (1152) (**Overruled** on another point in ILR (1960) Ker 475) ** AIR 1960 Pat 196 (198) 37 Pat 1465 (DB) ** **AIR 1959 Pat 153 (155) : 37 Pat 1577 (FB)** ** AIR 1952 Bom 454 (455, 457) ILR (1952) Bom 1090 (DB) ** AIR 1951 Pat 327 (328) (DB) ** AIR 1949 Lah 264 (265) ** AIR 1938 All 564 (566) (DB) ** AIR 1938 Pat 16 (17) (DB) (Mortgage of right to recover rent from tenant) ** AIR 1938 Rang 461 (462) (Hence cannot be transferred for consideration by the endorsement of the pronote together with the making over of title deeds) ** AIR 1936 Rang 152 (155) (DB) ** **AIR 1947 All 27 (29, 30) : ILR (1946) All 883 (FB).** (Mortgage is merely transfer of an interest in specific immovable property and not absolute transfer Mortgaged property cannot be described as property "in the hands" of the mortgagee within the meaning of S 6 of U P Temporary Postponement of Execution of Decrees Act, 1937) ** **(1901) 29 Cal 1 (6) (FB)** ** AIR 1931 Cal 223 (227) 58 Cal 136 (DB) ** AIR 1918 Cal 411 (412, 413) (DB) ** (1909) 36 Cal 665 (668) (DB) (Rents and profits derivable from a hat are immovable property and can be validly mortgaged) ** (1883) 9 Cal 511 (512) (DB) ** **(1912) 34 All 273 (276) (DB) (It is not a mere contract.)**

   [**See also** ILR (1954) 1 All 563 (571) (DB) (A bare licence confers merely a personal right and does not transfer an interest in the property. On the other hand a lease or a mortgage transfers an interest in the property itself) ** AIR 1916 Cal 714 (717) (DB) ** (1897) 2 Cal WN 29 (31) (DB) (Creation of a mortgage gives certain rights to the mortgagee over the mortgaged property but it does not necessarily prevent third parties from dealing with the mortgagor still as the owner of the property nor is the mortgagee entitled in every case to ignore the rights arising out of such dealings in favour of third parties)]

3. AIR 1963 Andh Pra 489 (490) ** ILR (1964) Andh Pra 832 (DB) (AIR 1963 Andh Pra 239, **Reversed.**) ** **AIR 1952 Pat 469 (471) (DB).**

   [**See also** AIR 1939 All 369 (372) **(DB).** (Mortgage is a transfer of the proprietary rights in a case where the mortgagor is the owner of such proprietary rights and makes a mortgage of them.)]

4. (1977) 81 Cal WN 300 (306) ILR (1977) 2 Cal 607 (DB) (In instant case held that the transaction was a simple mortgage as it satisfied the requirements of S 58(a) and (b))

5. AIR 1964 Pat 193 (196) (DB) ** AIR 1960 Punj 444 (447, 448) ILR (1960) 2 Punj 741 (DB).

   [**See also AIR 1959 Pat 153 (155) : 37 Pat 1577 (FB).** (Sale by mortgagor of immovable property usufructuarily mortgaged is sale of tangible immovable property — ILR 24 Mad

ence to interest less than ownership which continues with the mortgagor. The interests transferred in the several classes of mortgages are, however, not identical(6)

Hypothecation of property does not create any bar in execution of agreement of sell of the same property In hypothecation title of the property is not transferred to mortgagee, moreover in the instant case the purchaser had no knowledge of hypothecation(7)

In this connection, the following must be noted The *ownership* of property is a right which is distinct from the *possession* of it Where a *lease* is granted, it is the right to *possession* that is transferred This also amounts to the transfer of an *interest* in the immovable property But the interest transferred in such a case is of a kind different from the interest that is transferred when a property is mortgaged The distinction is this Where a *lease* is granted, the transfer does not affect the *ownership* of the property It is only the right to *possession* that is transferred But where a property is *mortgaged the ownership of* the property is affected Though the ownership continues to be vested in the mortgagor it is subject to the interest created in favour of the mortgagee Even where the mortgagee is entitled to possession as under a usufructuary mortgage, it is not a mere right of *possession* that is transferred to the mortgagee An interest in that aspect of the mortgagor's right which falls under the category of *ownership* is also transferred to the mortgagee (See S 105 Notes 6 and 67).)

This characteristic of a mortgage, namely, that it is the *transfer of an interest* in immovable property distinguishes it from a *charge*, which is a security of property without any transfer of any interest therein (8) But though ther is no transfer of an interest the right is more than a personal

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449 (463) and AIR 1919 Cal 325 Sulaiman A C J in AIR 1928 All 726 (FB) Ram Labhaya J in AIR 1950 Assam 107 **Dissented from**) ** AIR 1954 Pat 326 (329) (DB) (A usufructuary mortgagee therefore is not a proprietor within the meaning of Bihar Tenancy Act, S. 3(2).)}

6. AIR 1936 Rang 290 (291) 14 Rang 292 (DB) (Simple mortgage and mortgage by deposit of title deeds — Neither right to possession nor right to rents and profits are parts of interest transferred in absence of agreement to contrary)

7. AIR 2001 All 224 : 2001 All LJ 1743 · 2001 (1) All CJ 665

8. **AIR 1970 SC 1041 (1055, 1056) · (1970) 1 SCJ 487** (A charge creates only a right of payment out of the specified property but a mortgage effectuates a transfer of interest in the property) ** AIR 1971 Pat 27 (30) 1970 BLJR 481 (DB) ** 1965 All LJ 1104 (1107) ** AIR 1964 Bom 1 (3) ILR (1963) Bom 509 (DB) (Subsequent mortgage of property for consideration and without notice of prior charge created over said property prevails — Such mortgage is transfer of property in hands of mortgagee) ** AIR 1962 Cal 12 (16) ILR 1961 1 2 Cal 558 (DB) ** (1956, 60 Cal WN 988 991 ** AIR 1943 Pesh 24 (26) (DB) ** AIR 1941 Cal 436 (440 441) (A borrowing sum from *B* and mortgaging certain properties — Consent decree creating charge in favour of C on same properties — Further advance by *B* to *A* secured by instrument called further charge — Instrument incorporating provision in first mortgage regarding transfer of property to mortgagee amounts to mortgage) ** AIR 1941 Pat 274 (275) (DB) ** AIR 1936 Nag 125 (127) ILR (1936) Nag 22 (DB) ** AIR 1936 Oudh 196 (200) (DB) ** AIR 1935 All 150 (151) ** AIR 1930 All 375 (376) ** AIR 1929 All 281 (285) 50 All 612 (DB) ** AIR 1922 Pat 529 (532) 1 Pat 387 **(DB) ** AIR 1918 Cal 194 (196) (DB).**

Also see Section 100, Note 13 ** AIR 1915 Cal 478 (480) 42 Cal 625 (DB) ** (1908) 35 Cal 837 (843, 844) DB) (The difficulty that arises in cases of lien created by parties especially for payment of debts must be solved in each case from the terms and expressions used in the instruments creating them and formalities actually observed in execution — If an instrument is expressly stated to be a mortgage and gives the power of realisation of the mortgage money by sale of the mortgaged premises it should be held to be a mortgage — The fact that the necessary formalities of due execution were wanting would not convert the mortgage into a charge — If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realization of money from a

obligation being a right to payment out of a particular fund or property **(9)** Thus a document which gives immovable property as security for the satisfaction of a debt, or for payment in future of a sum, without transferring any interest therein, merely constitutes a charge on the property and is not a mortgage **(10)** Where *A* having already mortgaged his land with possession to the mortgagee took a further advance on the security of the land already mortgaged on the same conditions as the original mortgage, it was held that the transaction did not amount to a fresh mortgage but that it created only a charge.**(11)** But if the new transaction purports to cancel the earlier one, or contains condition substantially different from those contained in the original mortgage, or an additional area of land is included in this security, the transaction may amount to a fresh mortgage as evidencing an intention to transfer *an interest* in property and not merely to create a security **(12)** Where subsequent to the execution of a usufructuary mortgage the mortgagor agreed to allow the mortgagee to remain in possession of the mortgaged property for an additional period in lieu of interest on the new debt incurred subsequent to the mortgage, it was held that the subsequent contract did not amount to a mere charge but amounted to an additional usufructuary mortgage **(13)** The right of substituted security whether on enquitable grounds or under an agreement is a right to a security and would be a charge and cannot be considered to be a mortgage **(14)** In *Hunter v Abdul Ali*(**15**), the distinction between a mortgage and a charge was stated as follows

> "In the case of a charge there is no transfer of any interest in the property in favour of the charge holder as in the case of a mortgage A charge is merely a security for payment of money to be enforced against the property charged Thus, from the very nature of it, as a general rule, a charge cannot be enforced against a transferee for consideration without notice In fact this constitutes an essential distinction between a mortgage and a charge As in the case of a mortgage there is a transfer of interest a transferee of the mortgaged property can acquire only the remaining interest of the mortgagor and is therefore bound by the mortgage But in the case of a charge, there being no transfer of interest, it cannot ordinarily be enforced against a transferee for value without notice "

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particular property without reference to sale, it creates a charge) ** (1906) 33 Cal 985 (992) (DB) (To constitute a mortgage not only should the payment of money be secured on land but some interest in specific immovable property should be transferred — A mortgagee can follow the property in any case, but one who holds a charge can follow the property in the hands of a transferee with notice) ** (1905) 9 Cal WN 1001 (1002) (DB) **(1890) 13 All 28 (44) (DB)

[See however AIR 1941 All 345 (349, 351) : ILR (1941) All 691 FB). (Case under the Electricity Act, 1910, S 9(2).) ** AIR 1914 Nag 32 (34) 10 Nag LR 81.]

9. AIR 1936 Lah 482 (484) (DB) ** AIR 1926 Mad 903 (904) ** AIR 1921 Mad 514 (515) (DB).

[See also AIR 1937 Lah 35 (37) : 17 Lah 659 (DB).]

10. AIR 1919 PC 55 (56) : 42 All 158 (164) ** AIR 1932 Lah 465 (466) : 13 Lah 660 (FB). (AIR 1921 Mad 514, **Foll.**) ** AIR 1921 Mad 514 (515) (DB) ** AIR 1914 All 187 (188) 36 All 201 (DB)

11. AIR 1932 Lah 465 (466) : 13 Lah 660 (FB). (Such a transaction does not amount to a fresh alienation of an interest in the land so as to attract the Punjab Alienation of Land Act - All that was done was that mortgagor took a further advance on the security of the land already mortgaged.) ** AIR 1943 Pesh 24 (26) (DB) (The provisions of the Punjab Alienation of Land Act are therefore not attracted.)

12. AIR 1932 Lah 465 (467) : 13 Lah 660 (FB) ** AIR 1943 Pesh 24 (27) (DB)

13. AIR 1952 Hyd 5 (6) : ILR (1952) Hyd 351.

14. ILR (1957) Punj 79 (84) (DB).

15. AIR 1932 Oudh 336 (340) 8 Luck 168 (DB) (This was approved in AIR 1937 Oudh 35 (FB))

See also the undermentioned cases to the same effect(**16**)

It may also be noted that a charge is not, like a mortgage, subject to redemption or foreclosure.(**17**) See also S. 100, Note 15.

A mere undertaking by the borrower of money that he will not alienate his property until the loan is paid does not transfer any interest in the property to the creditor and a document merely containing such an undertaking is therefore, not a mortgage (**18**) But where a covenant not to alienate is associated with words expressly making property a security for the debt, there may be a transfer of an interest constituting a mortgage(**19**) Whether there is a transfer of an interest depends upon the intention of the parties gathered from the document as a whole (**20**) It is not necessary that there should be a formal transfer of interest in so many words (**21**) Where a bond provided for repayment of a debt and stated "as collateral security I mortgage 23 bighas" etc but there was no express transfer of any interest it was held that it was a mortgage (**22**) Where the true nature of the contract between the parties is one of a charge the erroneous belief of the parties that they had created a simple mortgage would not affect such true nature of the document (**23**) The word "*tarun*" is ordinarily understood to signify a charge rather than a mortgage (**24**) Where *A* and *B* executed a mortgage to *X* and subsequently *A* borrowed a further sum of money from *X* and executed a further deed stating that until the latter sum was paid he was not entitled to redeem the earlier mortgage it was held that the deed was a mortgage, that there was a transfer of an interest by way of security and that explicit and express transfer of an interest was not necessary (**25**) *A* executed a mortgage in favour of *B*, *C* and *D* On a partition between *B* *C* and *D* the mortgage fell to the share of *D* *A* subsequently executed an instrument in favour of *D* recognizing *D* as the sole mortgagee, raising the

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16. (1956) 60 Cal WN 988 (991) ** ILR (1948) 1 Cal 492 (498) ** (1940) 188 Ind Cas 669 (672) (DB) (Mortgage as distinguished from charge is a *jus in rem* and holds good against subsequent transferees even without notice.)

17. AIR 1933 All 934 (938) (DB) ** (1866) 147 RR 129 (132) 35 LJ Ch 253 Earl Poulett v Hood.

18. **AIR 1917 All 4 (5, 6) : 39 All 244 (FB)** ** AIR 1937 Lah 35 (37) 17 Lah 659 (DB) (It is a charge) ** (1879) 2 All 449 (450) (DB) ** (1878) 3 Cal 336 (337, 338) (DB) ** (1869) **1 NWPHCR 159 (160) (DB) ** (1868) 3 Agra 270 (270) (DB)**

[See also (1881) 7 Cal 196 (197) (DB) ** (1881) 8 Cal LR 57 (60) (DB) (The circumstances that the judgment-debtor induced the judgment-creditor from time to time to put off the sale of his property by promising that he would not sell the property to anybody else could not convert such promise into mortgage) * AIR 1934 Pat 495 (496, 498) (1934 Pat 620) (DB) ** (1906) 33 Cal 985 (992) (DB) (Clause against alienation is needless in a deed of mortgage) ** (1871) 3 NWPHCR 205 (206) (DB) (Such a stipulation, though entitling the contractee to sue on breach of it, cannot be enforced by third person an assignee of the bond)]

19. AIR 1916 Pat 11 (13) 1 Pat LJ 563 (DB) ** (1871) 6 Beng LR App 14 (14) (DB)

20. (1906) 29 Mad 531 (533) (DB) ** (1890) 13 All 28 (37) (DB)

21. AIR 1918 Mad 558 (560) (DB) ** AIR 1915 Mad 370 (371) (DB) ** AIR 1914 Mad 333 (333) (DB) ** (1912) 16 Ind Cas 209 (209) (DB) (Mad) ** (1911) 11 Ind Cas 629 (632) (DB) (Mad) (Nor is it necessary that there should be a statement that the mortgagee shall recover his money by sale of the property)

[See also AIR 1937 Mad 148 (149).]

22. (1905) 9 Cal WN 1001 (1002) (DB).

23. AIR 1927 Sind 66 (75) ** AIR 1914 Nag 32 (36) : 10 Nag LR 81

24. AIR 1933 Bom 298 (300) (DB).

25 **AIR 1930 PC 176 (177) : 5 Luck 365 : 57 Ind App 173 ** AIR 1922 All 174 (177, 178) : 44 All 37 (FB) ** (1926) 96 Ind Cas 555 (557) (DB) (All)**

rate of interest and stipulating for an extension of the period of redemption It was held that this was not a fresh mortgage but merely an agreement.(26) Where by a compromise between the mortgagor and the mortgagee the mortgagee released certain items from the mortgage, it was held that this did not effect any fresh transfer of interest to the mortgagee in respect of the non-released portions and was therefore not a mortgage.(27) In a bond the executant admitted the receipt of a certain amount from the obligees and agreed to pay interest regularly Further, it was stipulated that in default of payment of interest the executant would put the obligees in possession of a certain specified property referred to as the "mortgaged property" and that the obligees would be at liberty to enjoy the usufruct and appropriate the profits to the interest There was another mention of the "mortgaged property" and at the end it was agreed that on payment of the entire money due to the obligees, the executant would be entitled to take back the property, and the recitals ended with the following words : "I . . . . . write this Arki mortgage deed so that it may be of use when needed " It was held that although the obligees had no immediate right to take possession, yet the right to take possession upon default in the payment of interest came into existence at the date of the execution of the bond in same way as the right to put the property to sale upon a breach of a contract under a simple mortgage : comes into existence when the bond is executed The deed therefore operated as a mortgage bond from the date of its execution.(28) See also the undermentioned cases (29) Debentures issued by a company are not mortgages, though they bind the estate of the company(30)

Where persons are used to recognise legal terms in a particular form of transaction, it is presumed that they intend that those terms should have their ordinary meaning Where therefore a person states in the document that he had "mortgaged" the property, it will be assumed that he intended to transfer an interest in the property.(31) The *nature* of the interest transferred may also be a matter of implication Thus where in a mortgage there is covenant to pay and a charge on property, it implies that the property may be sold for the debt and the mortgage is a simple mortgage(32)

Since a mortgage is a transfer of an interest in immovable property such interest is capable of

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26. **AIR 1925 All 501 (502) : 47 All 310 (FB).**

27. AIR 1918 Mad 1204 (1206, 1209) (DB).

28. **AIR 1943 All 337 (339) : ILR (1943) All 802 (FB).** (It was contended that the bond was a simple money bond at its inception, but was liable to be converted into a usufructuary mortgage on default in payment of interest.)

29. AIR 1934 All 950 (950, 951) ** (1907) 4 All LJ 253 (256) (DB) ** (1906) 33 Cal 1133 (1153) (DB) ** (1891) Bom PJ 284 (DB) ** (1890) 14 Bom 577 (579) (DB) (A bond contained the following stipulation as regards the liabilities of sureties "In respect of this we have given you in writing as a nazargahan (i e , sight mortgage) the fields belonging to ourselves and which we are enjoying If we do not pay according to contract you may sell the aforesaid number through the Court and recover your amount If any balance remains we will pay it off personally or by means of our other property " - **Held** that the document must be treated as creating a mortgage and not a mere charge) ** (1890) 15 Bom 183 (185, 186) (DB) (Bonds which do not give possession or provide for foreclosure or sale, but merely pledge property as security for a loan are regarded as mortgages in the Bombay Presidency) ** (1889) 14 Bom 377 (380) (DB) (Land given as security for repayment of loan under instalment bond which contained an express power of sale in case of default — Bond held a simple mortgage bond) ** (1887) 14 Cal 687 (690, 691) (DB)

30. AIR 1939 Mad 202 (203) ILR (1939) Mad 199 (DB) (Quaere) ** (1877) 26 WR (Eng) 123 (124) 38 LT 377 Norton v Florence Land and Public Works Co (Ltd)

31. AIR 1941 Lah 274 (275) (DB).

32. AIR 1941 Lah 274 (275) (DB).

transfer by way of assignment, mortgage, etc.(33) and is heritable (34) But the assignee of the mortgage without privity of the mortgagor takes it subject to the state of account between the mortgagor and the mortgagee at the date of the transfer (35) Further a payment by the mortgagor to the mortgagee without notice of the assignment is binding on the mortgagee (36) And the result of the principle that a mortgage is a transfer of an interest in immovable property is that from the time of lending his money, the mortgagee whether he be in or out of possession, acquires the right to have the mortgaged property secured from deterioration in the hands of the mortgagor or of any other person to whose rights those of the mortgagee are superior(37).

An *equitable* mortgagee of a lease in England has no privity of estate with the lessor and is not liable to him on the covenants in the lease even though he may have entered into possession by virtue of his mortgage(38)

Where after the period of grace under Regulation XVII of 1806 the mortgagee sues for possession as owner and the suit is compromised by allowing the mortgagor a further period of redemption it has been held that this compromise does not constitute a fresh mortgage(39)

It has been held in the undermentioned case(40) that as a mortgage creates a transfer of an interest in property for consideration, S 53-A, which is based on equitable considerations applies to a usufructuary mortgage According to this case, a transfer of some of the rights in the property is sufficient to come within the purview of S. 53-A.

When there was no evidence to doubt genuineness of the registered mortgage deed and also no evidence was adduced to prove tenancy, no presumption could be drawn contrary to the contents of the mortgage deed. Thus the mortgage could not be treated as a sham transaction(41)

5. Sub-mortgages.

As has been seen already the right of a mortgagee is itself a right in *rem* and can be transferred by way of a mortgage Such a mortgage by the mortgagee of his right is called a sub-mortgage(1) and all the provisions of law applicable to mortgages will apply to sub-mortgages also such as

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33. AIR 1958 Madh Pra 319 (320) (Usufructuary mortgagee can give a lease of the property either to the mortgagor himself or a third person) ** AIR 1928 All 378 (380) (DB) (Equity of redemption — Sale of apart from corporeal property is permissible) ** (1907) 29 All 385 (399) (FB) ** AIR 1916 Upp Bur 5 (6) 2 Upp Bur Rul 89

    [See also (1910) 8 Ind Cas 256 (256)]

34. (1913) 18 Ind Cas 455 (457) (DB) (Cal)

35. (1798) 31 ER 62 (66) : 4 Ves 118. Mathews v Wallwyn

36. (1799) 31 ER 198 (199) : 4 Ves 389. William v. Sorrell.

37. (1905) 28 Mad 208 (209) (DB)

38. (1848) 41 ER 1120 (1123). Moore v Greg (Lucas v Comerford 3 Bro CC 166 Overruled)

    [See also (1857) 26 LJ Ch 389 (393) 8 De GM & G 8 5 5 WR (Eng) 437, Cox v Bishop]

39. (1873) 20 Suth WR 176 (176, 177) (DB) ** (1868) 10 Suth WR 359 (360) (DB)

    [See also AIR 1924 Lah 696 (697) (DB).]

40. AIR 1963 Andh Pra 489 (490) ILR (1964) Andh Pra 832 (DB (AIR 1963 Andh Pra 239 Reversed)

41. 1999 AIHC 1055 (1057) : 1998 (119) Pun LR 68.

Section 58 — Note 5

1. AIR 1959 Mad 246 (248) ILR (1959) Mad 369 (FB) ** AIR 1916 Upp Bur 5 (6) 2 Upp Bur Rul 89

attestation, registration, etc.(2). A mortgagee can also effect an equitable sub-mortgage of his right by deposit of the mortgage-deed.(3) or where the original mortgage is itself one by deposit of title deeds, by a second deposit of such title deeds (4) Further as a mortgagee right is an interest in immovable property priorities will be governed by the rules applicable to interests in immovable property. Thus, a sub-mortgagee is entitled to be paid the amount due to him under the sub-mortgage in priority to the claim of a subsequent assignee of the mortgage right (5) A sub-mortgage by deposit of title deeds entitles the sub-mortgagee to bring a suit for amounts against original mortgagor or his mortgagee though he may limit his suit to the sub-mortgagor (6) Even in England a mortgage debt, although a chose in action, is regarded as an interest in land and priorities are governed by the rules applicable to such interests and not by the rules which apply to interests in personality(7).

A sub-mortgagee has no privity of estate or contract with the original mortgagor (8) The sub-mortgagee without privity of the mortgagor only takes subject to the state of account between the mortgagor and the mortgagee at the date of the sub-mortgage (9) It is also settled that payment of interest and payments on account of capital made by the mortgagor to the mortgagee after, but without knowledge of, the transfer, must, in the absence of collusion, be allowed to the mortgagor as against the sub-mortgagee (10) The doctrine extends to cases where the whole mortgage-debt is, under similar circumstances, paid off (11) But if the original mortgagor has notice of the sub-

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2. AIR 1935 Rang 483 (483)

3. AIR 1936 Rang 366 (366).

4. AIR 1938 Mad 865 (874) (DB) ** AIR 1937 Rang 69 (69, 70) 14 Rang 522 (DB) ** AIR 1935 Rang 483 (483)

   [See also (1909) 5 Low Bur Rul 93 (94) (DB).]

5. AIR 1943 Mad 100 (103) : ILR (1943) Mad 195 (DB)

6. (1974) 87 Mad LW 89 (DB).

7. (1901) 70 LJ Ch 477 (484) 84 LT 397 49 WR (Eng) 451 17 TLR 413 (1901) 2 Ch 231, Taylor v. London and County Banking Company.

   [See AIR 1917 Mad 928 (930) : 40 Mad 683 (DB)]

8. AIR 1953 Trav-Co 271 (271) (Sub mortgage can be put an end to by redemption or by release only by the original mortgagee.)

9. AIR 1939 All 719 (720) ILR (1939) All 943 (DB) ** AIR 1928 Mad 382 (383) (DB) ** AIR 1928 Nag 223 (224 225) (DB) (No reason to make any differentiation in case of usufructuary mortgage) ** AIR 1919 Mad 1082(1082) (DB) (There is no necessity to give notice of the sub-mortgage to the mortgagor) ** (1899) 68 LJ Ch 572 (575) 81 LT 111, Dixon v Winch (Mathews v Wallwyn (1798) 4 Ves 118, **Followed** Affirmed on appeal in Dixon v Winch (1900) 69 LJ Ch 465) ** (1914) 83 LJ Ch 166 (170) 109 LT 727, De Lisle v. Union Bank of Scotland.

10. **1900 Pun Re No. 31, p. 102 (107) (FB)** ** AIR 1928 Rang 30 (31) · 5 Rang 749 ** (1880) 50 LJ Ch 218 (220) · 43 LT 687, In re Lord Southamptons Estate ** (1899) 68 LJ Ch 572 (575) 81 LT 111, Dixon v Winch, ((1798) 4 Ves 389, (Williams v Sorrell **Rel. on.**)

11. **1900 Pun Re No. 31, p. 102 (111) (FB)** ** AIR 1938 Pesh 73 (76) (DB) ** AIR 1932 Mad 115 (116, 117) 55 Mad 320 (DB) (Payment out of Court) ** AIR 1924 Oudh 209 (216) (DB) ** AIR 1921 Mad 374 (376) (DB) ** AIR 1917 Mad 11 (11) (DB) ** (1905) 29 Bom 199 (202) (DB) ** (1905) 8 Oudh Cas 140 (141) ** (1895) Pun Re No 12, p 46 (48) (DB) ** (1913) 18 Ind Cas 389 (390) (Oudh) ** (1901) 70 LJ Ch 144 (147) (1901) 1 Ch 213 , 83 LT 704 · 49 WR (Eng) 186 17 TLR 143, Turner v Smith

    [See also AIR 1940 Pesh 25 (26).]

mortgage he cannot make any payment to the mortgagee so as to bind the sub mortgagee(12) and cannot dispossess the sub-mortgagee (where the mortgage is with possession without redeeming him(13)

The transfer by way of sub-mortgage cannot affect the rights of the mortgagor in any way. Thus, where the sub-mortgagee brings the mortgagee's interest to sale and purchases it himself, he cannot resist a suit by the mortgagor for redemption of the original mortgage (14) A sub-mortgagee is an assignee of the mortgagee's interest by way of security and the sub-mortgage may be redeemed by the original mortgagor but the sub mortgagee cannot redeem the original mortgage, because sub-mortgagee is not a derevative title holder of the original mortgagor (15) If the mortgage is void(16) the sub-mortgage is also void. There is no merger of the sub mortgage on mortgagor's acquiring the rights under the sub-mortgage. Such merger is possible only if there is no intermediate charge subsisting(17).

There is a difference between an assignment of mortgage and the creation of a sub mortgage. A mortgagee's right to realise the amount secured by the mortgage is itself property and he can therefore either assign it, or create a security over it. If he chooses to make an assignment, the transferee gets all his rights, and the assignor's title — the mortgage right as such passes to the transferee. But if he chooses to create only a mortgage over his mortgage right, there is no passing of the title, though a mortgagee is sometimes said to get a derivative title to the mortgage right. In relation to the sub-mortgagee, the mortgagee is the mortgagor and he will therefore have a right to pay off his debts and redeem the property, which will not be the case if an assignment of the mortgage right is made. In the latter case, the mortgagee retains no interest with him, but in the case of a sub-mortgage, some interest still remains. In other words, all the interests of a mortgagee do not pass to the transferee when a sub-mortgage is created, and if that is so, it cannot be said that the interests of the two are identical, so as to hold that the one is predecessor in interest to the other(18)

The position of a mortgagee in relation to the sub mortgagee is closely analogous to that of a surety (19) and he is liable to the sub-mortgagee for the debt even if he is unable to recover the debt from the mortgagor. He cannot, for instance, by taking a fresh mortgage in discharge of his earlier mortgage, prejudice the rights of his sub-mortgagee to proceed to bring the mortgagee's rights under the earlier mortgage to sale.(20)

The fact that the mortgagee has sub mortgaged his rights under the mortgage for a larger amount than the mortgage money secured by the mortgage in his favour does not result in the extinguishment of that mortgage and the cessation of his mortgagee interests under that mortgage(21).

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12. 1900 Pun Re No. 31, p. 102 (111) (FB) ** (1899) 12 Oudh Cas 260 (267) (DB) ** (1913) 18 Ind Cas 389 (390) (Oudh)

13. AIR 1925 Rang 140 (142) 2 Rang 56 (DB) ** (1902) 15 Mad LJ 375 (376) (DB) ** (1908) 18 Mad LJ 462 (463) (DB)

[See also 1900 Pun Re No. 31, pp. 102 (111) (FB) (Sub mortgagee held entitled to retain possession against original mortgagor having notice of sub mortgage until payment of amount due under sub-mortgage.)]

14. (1910) 5 Ind Cas 935 (936) (DB) (Mad).

15. (1966) 2 Mad LJ 308 : (1966) 79 Mad LW 400

16. (1851) 51 ER 475 (483, 484) 15 Beav 103 Cockell v Taylor

17. AIR 1953 Trav-Co 271 (271)

18. 1979 Ker LT 257 (259, 260)

19. AIR 1940 Pesh 25 (26) ** AIR 1918 Lah 310 (312) (1918 Pun Re No. 3 (DB) ** (1913) 18 Ind Cas 389 (390) (Oudh).

20. AIR 1919 Mad 1082 (1083) (DB) ** (1908) 18 Mad LJ 462 (463) (DB)

21. 1958 Ker LJ 182 (183, 184)

As to the procedure for enforcing the rights of the sub-mortgagee, see the commentaries on the Code of Civil Procedure, O 34, R. 1, Note 9 in the Appendix.

In a suit by the mortgagor for redemption against the mortgagee and his sub-mortgagee, the proper form of the decree is that upon the amount due to the mortgagee being paid into Court, the mortgagee and the sub-mortgagee should re-convey the estate to the mortgagor: the mortgagor is not bound to wait until the accounts between the mortgagee and the sub-mortgagee are settled.(22) In the undermentioned cases,(23) it was held that in such a suit the judgment should direct an account of what is due to the original mortgagee and then of what is due to the sub-mortgagee and that upon payment to the latter of the sum due to him not exceeding the sum due to the original mortgagee, and upon payment of the residue, if any, of what is due to the original mortgagee, both shall re-convey the property to the mortgagor.

If the person representing the mortgagor wants to redeem the original mortgage, he can terminate the sub-mortgage by making the sub-mortgagee also a party to that suit But the mortgagor has no right to directly terminate the sub-mortgage independent of the mortgage (24) Where pending a suit for redemption against the mortgagee and the sub mortgagee the mortgagee dies and his representatives are not brought on record, the suit abates as the mortgagor has no cause of action against the sub-mortgagee(25).

As to the sub-mortgagee's right to sue for a decree for sale or foreclosure, see S. 67, Note 21.

6. Agreement to grant or accept a mortgage.

An agreement to give a mortgage merely creates a right in the promisees to get a regular deed of mortgage, and does not, of itself, create any mortgage or charge upon the immovable property dealt with by the agreement(1).

In England it is well settled that an agreement to borrow or to lend a sum of money will not be specifically enforced An agreement to mortgage for a sum of money *to be advanced* cannot, therefore, be specifically enforced(2) though a suit for damages for breach of such a contract will lie (3)

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22. AIR 1927 Mad 703 (704) ** (1906) 28 All 638 (641) (DB) ** (1864) 55 ER 429 (430) 33 Beav 417, Lysaght v. Westmacott.

23. AIR 1956 Madh Bha 118 (119) ** (1891) 15 Bom 692 (693) (DB)

24. AIR 1953 Trav-Co 271 (271)

25. (1896) 20 Bom 549 (552) (DB).

Also see S. 60, Note 19

Section 58 — Note 6

1. **AIR 1930 PC 76 (78)** ** ILR (1963) 2 Ker 60 (64) (DB) ** **AIR 1938 Mad 889 (892) : ILR (1939) Mad 7 (FB)** ** AIR 1938 Bom 357 (358) (DB) ** AIR 1932 Oudh 54 (56) 7 Luck 237 (DB) ** AIR 1923 Bom 287 (287) ** (1905) 28 Mad 54 (55) (DB) ** (1869) 11 Suth WR 520 (521) (DB) (An agreement to deposit deeds and to execute a proper agreement is not actual mortgage and does not come within Cl (2) of S 17 of Act XX of 1866)

Also see S. 100, Note 5

2. **AIR 1925 Rang 291 (293) : 4 Rang 1 (FB)** ** AIR 1938 Bom 357 (358) (DB) ** (1859) 54 ER 68 (69) 27 Beav 175 29 LJ Ch 240 · 7 WR (Eng) 710, Rogers v Challis ** (1892) 61 LJ Ch 244 (246) (1892) 1 Ch 271 66 LT 402 40 WR (Eng) 182, Western Waggon Co v West ** (1898) 67 LJQB 470 (471) 46 WR (Eng) 545 · 1898 AC 309 · 78 LT 426 14 TLR 298, The South African Territories, Ltd v Wallington

[See also (1862) 54 ER 932 (935) 30 Beav 371 31 LJ Ch 386 8 Jur (NS) 275 5 LT 784 10 WR (Eng) 283 Sicher v Mosenthal ** AIR 1927 Oudh 55 (57, 58) · 2 Luck 299 (DB)]

3. (1898) 67 LJQB 470 (471) , 1898 AC 309, The South African Territories, Ltd v. Wallington.

The law is the same in this country also.(4) Similarly a mortgage holds good to the extent of the amount paid. Where any part of the amount agreed to be advanced remains unpaid a suit will not lie for recovering such para (5) (See also Note 18) Where, however, money has *actually been advanced*, and subsequently the borrower agrees to mortgage property to secure such advance, such an agreement can be specifically enforced(6)

The principle that an agreement to lend a sum of money is not specifically enforceable has no application where money has been left with the mortgagee to pay off the mortgagor's creditor and on the failure of the mortgagee to do so, the mortgagor sues to recover the money(7)

So also where the mortgagor allows the loan to remain with the mortgagee on the understanding that it is to be taken by him from time to time a suit for its recovery is not one to enforce a contract of loan but merely one for recovery of a deposit(8)

Where *A* mortgaged to *B* certain property with possession for moneys advanced by *B* but possession could not be given as the property had been seized by the Collector under a decree against *A*, it was held by the Privy Council that *B* was entitled to damages for non-delivery of possession(9).

Where money is lent on the express condition that a mortgage therefor will be executed and a mortgage is subsequently so executed, the debt cannot be said to be independent of the mortgage and cannot be considered an "antecedent debt" binding under the Hindu law on the sons of the borrower But if the agreement is merely to execute a mortgage *as and when* called upon to do so, the fact that a subsequent mortgage is called for and executed will not make the debt and mortgage form part of the same transaction but the will constitute an "antecedent debt" within the meaning of the Hindu law(10).

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4. AIR 1950 Kutch 86 (86) (Unless plaintiff shows that compensation would not afford adequate relief or that he has actually advanced money on the promised mortgage contract to mortgage cannot be specifically enforced) ** AIR 1936 Lah 722 (729) (FB) 17 Lah 270 (DB) ** AIR 1935 Mad 1045 (1045) (Unpaid portion of loan kept with mortgagee for payment to mortgagor is not debt and cannot be sued upon nor enforced specifically) ** AIR 1925 Mad 62 (63) 47 Mad 698 ** AIR 1919 Mad 322 (326) 41 Mad 959 (DB) ** AIR 1918 Mad 364 (365) (DB) ** (1908) 11 Oudh Cas 217 (218) ** (1905) 8 Oudh Cas 5 (9) **(1888) 12 Bom 242 (245 246) ** (1877) 2 Mad 79 (79) (DB)

5. AIR 1942 Lah 234 (236) ILR (1943) Lah 746 (DB) The mortgagee cannot be compelled to lend more If possession has passed the mortgagor might sue to get it back or take steps to relieve himself of some of other conditions of mortgage If he has suffered any loss he may sue for damages But it is clear that unpaid part of the mortgage-money is not a debt nor has the mortgagor an actionable claim for its recovery against the mortgagee)

   [But see AIR 1935 Lah 141 (142).]

6. **AIR 1928 PC 80 (82) : 55 Ind App 107 : 7 Pat 305** ** AIR 1927 Oudh 55 (58) 2 Luck 299 (DB) ** AIR 1919 Mad 322 (326) 41 Mad 959 (DB) ** (1871) 41 LJ (Ch 96 97) LR 13 Eq 76. Ashton v Corrigun ** (1873) 21 WR (Eng) 571 (571) LR 16 Eq 18 Herrman v. Hodges.

   [See also AIR 1935 Mad 560 (563) (DB) (Pressure by creditor on debtor for repayment of debt or for furnishing security by way of mortgage — Debtor handing over title deeds of certain properties and promising to execute a mortgage deed if he fails to repay without delay — Creditor is entitled to decree for specific performance on the failure of debtor to repay.)]

7. AIR 1935 Lah 141 (142) ** AIR 1933 Lah 1 (2, 3).

   [See also AIR 1935 Lah 26 (27).]

8. AIR 1916 Oudh 184 (185).

9. (1890) 17 Cal 432 (436) (PC).

10. AIR 1938 Mad 889 (892) : ILR (1939) Mad 7 (FB).

7. Subsequent mortgage in lieu of earlier mortgage, found invalid — Revival of earlier mortgage.

Where a new security is accepted in lieu of an old one but the former is found to be invalid, the mortgagee can fall back upon the earlier one (1) In the undermentioned case(2) where the mortgagee accepted a new security from certain reversioners of a Hindu for an old one, and in a suit on the later mortgage, it was found, on the objection of the reversioners themselves, not to be binding on them, it was held by the Privy Council that it was not consistent with equity or good conscience that the reversioners should thereafter claim that the invalid mortgage operated as a release of the earlier valid mortgage(3).

8. Muhammadan widow's possession in lieu of dower.

A Muhammadan widow retaining possession of her husband's property in lieu of dower is not a mortgagee of the property (1) "In the case of a mortgage, the mortgagee takes and retains possession, under *an agreement made between him and the mortgagor* Any rights, the mortgagee may get, are conferred upon him by the mortgagor "In the case of a Muhammadan widow in possession in lieu of dower, "neither the possession of the property nor the right to retain that possession when acquired is conferred upon the widow by the agreement or by the bounty of her deceased husband The possession of the property being once peaceably and lawfully acquired, the right of the widow to retain it till her dower-debt is paid is conferred upon her by the Muhammadan law"(2).

On the question whether the right of Muhammadan widow to retain possession of her husband's property in lieu of dower can be transferred by way of mortgage, sale, etc., there is a conflict of decisions. (See S 6, Note 38) In a Patna case,(3) it has been held, relying upon the Privy Council decision in *Maina Bibi v Chaudhri Vakil*,(4) that the widow has no estate or interest in the property, and therefore her right to retain possession is not transferable It was observed that those decisions which take the view that the widow's right is transferable(5) are no longer good law after the pronouncement of their Lordships of the Judicial Committee in the case referred to above

9. Specific immovable property.

In England general words of conveyance such as "all my real and personal estate whatsoever and wheresoever" will create a good charge on all the property belonging to the mortgagor at the

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Section 58 — Note 7

1. AIR 1927 Nag 83 (84)

   Also see Section 101, Note 4.

2. **AIR 1916 PC 68 (70) : 39 All 178 : 44 Ind App 60.**

3. See AIR 1938 All 418 (423) : ILR (1938) All 714 (FB). (AIR 1916 PC 68. **Followed.**)

Section 58 — Note 8

1. (1902) 25 Mad 658 (659) (DB) ** (1901) 23 All 432 (DB)

   [See also (1911) 33 All 421 (428) (DB).]

   [See however (1907) 9 Bom LR 188 (197, 198) (Where widow is in lawful possession, her position is analogous to that of a mortgagee.)]

2. **AIR 1925 PC 63 (65) : 52 Ind App 145** ** AIR 1944 Pat 163 (169) (DB)

   [See also (1871) 6 Beng LR 54 (63 64, 65) 14 Suth WR 239 (243, 244) (DB) ** AIR 1928 Oudh 209 (211) : 2 Luck 553 (DB).]

   [But see (1902) 25 Mad 658 (659) (DB).]

3. AIR 1944 Pat 163 (169, 170, 171) (DB) (Widow cannot mortgage her right of possession.)

4. **AIR 1925 PC 63 (65) : 47 All 250 : 52 Ind App 145.**

5. See the cases in F N. (4), Note 38 on S 6

date of the mortgage (1) But where the deed recites *particular* property as being conveyed and is then followed by *general* words of conveyance sufficient to cover everything belonging to the mortgagor, only the particular property will pass. *A* executed a document in favour of *B* whereby certain messuages, lands, hereditaments and premises at *K* in the county of *M* were mortgaged by a particular description and by reference to schedules. After this came the following words: "and all other lands, tenements, hereditaments in the county of *M* aforesaid whereof the mortgagor is seised." At the date of the mortgage the mortgagor *A* was seised in fee of a manor at *K*. It was held that the manor at *K* was not included in the mortgage (2) Wood, V. C. said:

> "It is true, that the Courts have held, and the authorities are very numerous on this subject, that you cannot control clear words of *conveyance* by the words of *recital*. That is one canon undoubtedly. But then those words, 'clear words of conveyance', are subject to interpretation, and the exception will be found to be always, that large and general words are not within that description of 'clear words of conveyance' which cannot be controlled by the recital. ... Where there are large and general words amply sufficient to cover everything ... it has been long settled that the recitals clearly bind down the effect of those general words.

Under this section, for the creation of a valid mortgage, the property mortgaged must be specified (3) There can be no mortgage of implied immovable property (4) If the hypothecation is sufficiently precise to enable the property to be determined even after a lapse of time, it is specific property.(5) The word "specific" has the same meaning as it has in the phrase "specifically mortgaged" occurring in S. 22 of the Dekkhan Agriculturists' Relief Act, 1879 (since repealed)(6)

Where the mortgagor purported to give, in the earlier part of the deed, the properties described in the scheduled to the document and later on added "all other *mouzas*, *manas* etc. comprised in the *sanad*," it was held by their Lordships of the Privy Council that the properties comprised in the *sanad* were also mortgaged, though not referred to in the schedule (7) Similarly, where in the mortgage deed it was stated that *mauzas* Bansjora and Simitanr were to stand mortgaged but in the same paragraph the mortgagor agreed that, should any case of action arise, the mortgagee shall be competent to realise the full amount by selling *mauzas* Bansjora, Simitanr and Bahaldih, it was held that *mauza* Baghaldih was also mortgaged (8) But where the instrument purported to pledge certain specified properties as well as certain properties not specified but mentioned in general as "I have pledged to you the properties in villages *A*, *B*, *C* etc.", it was held that the mortgage attached only to the specified properties(9)

Section 58 — Note 9

1. (1899) 48 WR (Eng) 59 (60); 81 LT 354; 68 LJ Ch 742; (1899) 2 Ch 530; In re Kelcey; Tyson v. Kelcey
2. (1856) 25 LJ Ch 795 (799); 2 K & J 753; 2 Jur (NS) 755; 4 WR (Eng) 829; Rooke v. Lord Kensington.
3. (1970) 72 Pun LR 312; 1970 Cur LJ 169 (DB) (In absence of specific immovable property the creditor is entitled to money decree.) ** AIR 19[illegible] (C) 557 (566) (DB) (General description not sufficient.) ** (1910) 5 Ind Cas 654 (655) (DB) (Cal)

   [See also (1871) 16 Suth WR 203 (206) (DB)]
4. 1980 Pun LJ 292 (293) : 1980 Rev LR 651
5. AIR 1919 Mad 718 (726) (DB) (A property can be specific so long as it is identifiable, though it may not be in existence on the date of transfer.) ** AIR 1914 Mad 306 (307) (DB)
6. (1902) 26 Bom 33 (39) (DB) (Covenant to pay the produce amounts to specific mortgage of the land.)
7. **(1898) 26 Cal 395 (398) (PC).**
8. **AIR 1964 SC 1295 (1298); 43 Pat 895.** (AIR 1955 Pat 505, **Reversed**.)
9. **AIR 1931 Cal 732 (733) (SB).** (Case under the Stamp Act.)

The following are illustrations of cases where the description of the property was held to be specific :

(1) "Our rights and property in taluk *R*(**10**)."

(2) "Our *zamindari* property(**11**)."

(3) "The entire *zamindari* of village *P* with hills, jungles as well as our entire right and income and *Kattubadis* on enfranchised *inams*(**12**)."

(4) "My *jiroyati* and *inam* lands which I own at the village of my residence(**13**)."

See also the undermentioned cases(**14**).

The following are illustrations of cases where the description was held to be not specific but general :

(1) "Our property" or "my whole property(**15**)."

(2) "Property of myself and of my daughter for which I am about to sue(**16**)."

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10. (1886) 8 All 486 (489) (DB).

11. (1890) 12 All 175 (179) (DB) (Mortgagors entitled to a certain ascertained and definite fractional share in zamindari is of villages 'T' and 'S' — Property described as our 'zamindari property' — Description held specific.)

12. (1902) 25 Mad 42 (50) (DB).

13. AIR 1914 Mad 306 (307) DB).

14. AIR 1959 Ker 294 (296) (Mortgage of land passes by implication to the mortgagee the buildings erected upon the land in view of the provisions of S 8) ** (1957) 70 Mad LW 205 (206) (Where the description of mortgaged property was as follows — "Municipal Survey No 221-B-1 together with the cinema theatre building being built on date of mortgage — **Held** that what was intended to be hypothecated was only building as such — It may be that building was intended to be used for running cinema but it was not a running cinema house as such that was mortgaged — Hence ceiling boards, ceiling fans and exhaust fans would not form integral part of building though they may be required to run cinema in the building) ** AIR 1955 Pat 189 (191) (The parti land attached to the house, used for business carried on in house held should be considered as part of house which was mortgaged) ** **AIR 1953 Mad 764 (765) : ILR (1953) Mad 566 (FB).** (Reference to the premises described in the document as bearing door No 27, Thiruvottiyur High Road as also to the stock in trade held was to "specified" property within the meaning of S 2(17), Stamp Act) ** AIR 1951 Kutch 4 (4) ** AIR 1923 Mad 511 (512, 513) (DB) ** AIR 1919 Mad 1117 (1122) (DB) (Where a deed of mortgage of 100 villages began by stating that 100 villages with hamlets, tanks, rasams, channel, etc , are secured and then recited that 92 out of the 100 villages were secured without possession and that the remaining eight were mortgaged usufructually but the additions of forest and forest produce were not repeated, though it was expressly stated that the mortgagee was to enjoy all the income realisable from the eight villages — **Held**, intention was clear to include forest and forest produce in respect of the 8 villages also) ** AIR 1917 Pat 268 (270, 271) 2 Pat LJ 293 (DB) (Shares in a company) ** (1901) 11 Mad LJ 27 (28) (DB) (General words will suffice without any specification of the boundaries or exact locality of the land) ** (1970) 2 NWPHCR 263 (264) (DB). (My zamindari share.)

15. (1892) 14 All 162 (164) (DB) ** (1881) 3 Mad 35 (37) (DB) (Promise to pay out of my property indefinitely.) ** (1876) 1 All 275 (276) (DB)

[**See also** AIR 1949 Pat 505 (508) 28 Pat 303 (DB) (Conveyance of property to mortgagee in satisfaction of his mortgage Indemnity clause providing that in case mortgagee was put to loss for defect in title he was entitled to realise it from "entire movable and immovable property of me and all my heirs and representatives ' — Stipulation held did not create mortgage.)]

16. (1881) 7 Cal 196 (198) (DB).

See also undermentioned case(17).

A mortgage of the equity of redemption is a mortgage of specific immovable property(18) But a contrary view is taken in the undermentioned case(19)

A mortgage under this Act is confined to *immovable* property A right to specific performance of an agreement to sell is not an interest in immovable property and cannot be the subject of a mortgage.(20) Profits that would accrue from immovable property in the future do not constitute an interest in immovable property and cannot be mortgaged (21) A life insurance policy is neither immovable nor movable property and therefore cannot be the subject of a mortgage(22)

The definition of a mortgage under the Indian Stamp Act is wider and includes the transfer by way of security of specified property, whether *movable or immovable*(23)

10. Mortgage and pledge of future property.

A mortgage of property that may come into existence in the future operates merely as an agreement to mortgage such property when it comes into existence (1) (See S 5 Note 7) There cannot be a *pledge* of future property inasmuch as no actual possession can be given (2) Even in an hypothecation of movable property the property must be existing(3)

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17. (1978) 80 Pun LR 46 (48) 1978 Cur LJ (Civ) 66 (Where the land said to have been mortgaged had neither been specified inasmuch as neither its Killa number nor Rectangle number had been given nor it was mentioned where it was situate and to whom it belonged nor the revenue estate in which the same was situated and the particulars of its owner or owners were missing in the documents alleged to have been executed as mortgage deeds such documents do not fall within the definition of mortgage as defined in S 58(a) of the T P Act, as their bare reading betrayed the intention of the parties to create a mortgage as envisaged by S. 58(a) of the said Act.)

18. (1895) 22 Cal 33 (41) (DB) (Mortgaging the property for second time does not remove the 'specific' nature present at the time of first mortgage)

19. AIR 1961 Guj 129 (130).

20. AIR 1917 Mad 358 (362) (DB)

21. AIR 1939 Lah 15 (16) (DB)

22. (1950) 54 Cal WN 710 (712).

[But see (1905) 7 Bom LR 138 (139) (Policy of insurance can be mortgaged like any other property.)]

23. (1885) 8 Mad 104 (107) (FB). *Reference under Stamp Act S 46* (Growing crops) ** (1888) 11 Mad 39 (40) (FB). *Reference under Stamp Act S 46* (Transfer of promissory notes by way of security.)

Section 58 — Note 10

1. ILR (1960) 10 Raj 978 (980) (Mortgage of future crops) ** AIR 1924 All 833 (834) (Mortgage of future crops is enforceable as an executory agreement and creates valid equitable charge — But it is unavailing against *bona fide* purchaser without notice of prior charge) ** (1886) 13 Cal 262 (264) (DB) (Indigo crops case of moveable property to which T.P. Act does not apply.)

[See also ** (1910) 5 Ind Cas 373 (373) (All) (DB) (Mortgage of future crops operates as an agreement to assign) ** AIR 1927 Nag 216 (216) (In equity a mortgage of future crops only amounts to an agreement to assign them when they come into existence)]

2. (1886) 13 Cal 262 (264) (DB).

3. (1896) 23 Cal 592 (601) *In the matter of Ambrose Summers*

[See however AIR 1920 Lah 178 (179) (A hypothecation of future crops becomes complete when the crop is grown and the produce realised and is enforceable against a transferee of such produce with notice of the obligee's equitable interest but not against a transferee without notice. 10 All 133, Foll.)]

11. Mortgage of movables.

The section has no application to a mortgage of movable property (1) In the absence of specific rules applicable to any matter, the principle recognised in the various Civil Courts Acts is that the Courts should decide according to justice, equity and good conscience(2), which is considered to be equivalent to the English law wherever such law is applicable to Indian conditions.(3) Under these principles, a mortgage of movable property is valid and a decree can be passed in enforcement of the mortgage (4) The mortgagee will be entitled to a right of sale quite as much as the mortgagee of immovable property in execution of the decree (5) Delivery of possession is not necessary for a mortgage of movable property (6) The mortgagee's right is only to enforce the mortgage by suing for sale of movable property or by the appointment of a Receiver to secure possession of it(7) But if possession is delivered, the mortgagee has a right to sell it without the intervention of the Court, if the mortgagor, after a proper notice given to him to repay the money, fails to do so (8) Though actual possession is left with the Company which pledged and mortgaged movables with the Bank its possession is on behalf of the Bank which is a secured creditor Movables cannot be attached and sold by other creditors of the Company (9) A mortgagee of movables without possession is liable to

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Section 58 — Note 11

1. (1946) 50 Cal WN 258 (259) (DB) ** AIR 1941 Mad 805 (805) ** (1911) 7 Nag LR 72 (75)

2. See for instance Madras Civil Courts Act III of 1873, S 16 ** AIR 1964 Andh Pra 201 (203) : ILR (1964) Andh Pra 681.

3. AIR 1930 PC 142 (143) : 57 Ind App 168 ** (1887) 11 Bom 551 (561) : 14 Ind App 89 (96) (PC) ** AIR 1964 Andh Pra 201 (203) ILR (1964) Andh Pra 681 ** AIR 1952 Sau 107 (109)

4. AIR 1964 Andh Pra 201 (203) ILR (1964) Andh Pra 681 ** 1961 Jab LJ 306 (307) ** AIR 1960 Andh Pra 273 (277) (DB) (There can be mortgage or pledge of shares) ** AIR 1955 Trav-Co 162 (163) ILR (1955) Trav-Co 216 (DB) ** (1946) 50 CWN 258 (259) (DB) ** AIR 1940 Mad 929 (930, 931) ILR (1941) Mad 144 (DB) (Mortgage of produce realized from immovable property, e g growing crops) ** AIR 1932 Cal 524 (526) : 59 Cal 667 (DB) (Mortgage of goodwill and stock-in trade) ** AIR 1924 Cal 990 (991) ** AIR 1918 Cal 165 (166) (DB) (Mortgage of moveable property consisting of plant and machinery both fixed and unfixed.) ** (1905) 7 Bom LR 138 (139) (A policy of insurance can be mortgaged just like any other property — It can be made available as security by mere deposit) ** (1905) 9 Cal WN 14 (15) (DB) ** (1896) 23 Cal 592 (601). (Hypothecation of a letter of lien over stock in trade) ** (1869) 2 Beng LR (AC) 230 (233) , 11 Suth WR 149 (149, 150) (DB) (A mortgage of fees in deposit in collectorate)

   [See also AIR 1922 Pat 36 (37) (DB) (Royalty is in reality the price paid for a portion of the soil the payment whereof is distributed over a number of years — If that be so, then the interest in the royalty cannot constitute an interest in immovable property) ** (1911) 39 Cal 227 (230) (DB) (A turn of worship in a temple is not an interest in immovable property and S. 59 of the T.P. Act does not apply to it.)]

5. AIR 1939 Lah 398 (403) (DB) ** AIR 1933 Mad 241 (242) 56 Mad 560 (He has a right to foreclose too.) ** (1902) 4 Bom LR 577 (581) (DB).

6. 1961 Jab LJ 306 (307) ** AIR 1952 Sau 107 (109) ** AIR 1939 Lah 398 (403) (DB) ** AIR 1932 Cal 524 (526) 59 Cal 667 (DB) ** AIR 1924 Cal 990 (991) ** AIR 1918 Cal 165 (166) (DB) ** AIR 1916 Bom 77 (80) ** (1906) 8 Bom LR 344 (345) (DB) ** (1905) 7 Bom LR 138 (139) ** (1905) 9 Cal WN 14 (16) (DB) ** (1903) 6 Oudh Cas 230 (231) ** (1871) 3 NWPHCR 71 (72) (DB) ** (1871) 3 NWPHCR 54 (58) (DB)

7. AIR 1940 Mad 929 (930, 931) : ILR (1941) Mad 144 (DB).

8. AIR 1932 Bom 613 (614).

9. AIR 1977 Madh Pra 188 : 1977 MPLJ 797 (DB)

be defeated by the mortgagor selling the property to a *bona fide* transferee without notice **(10)** A transferee taking it with notice will, however, be bound by the mortgage **(11)** The mortgagor of movables will be entitled to sue for redemption**(12)**

A mortgage of movable property must be distinguished from a *pledge* of movables dealt with by S. 172 of the Contract Act In the case of a mortgage the *ownership* of the goods passes, whereas in the case of a pledge the pledgee gets possession, but no rights to the goods beyond what is necessary to secure the debt.**(13)** Mortgage of movables without possession is hypothecation**(14)**. In absence of a contract to the contrary the pawnee has no right to accretion to the goods pledged **(15)** While there can be a hypothecation of immovables without delivery of possession, there can be no pledge of movable property without an actual delivery of the movables **(16)** Mortgage of movables without possession is only hypothecation**(17)**.

A subsequent pledge without notice of the prior hypothecation will, however, *have priority over a previous hypothecation* **(18)** The remedy of foreclosure is not confined to mortgages of land. It extends also to mortgage of chattels **(19)** On the other hand a pledgee's remedy is only a sale of

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10. AIR 1955 Trav-Co 162 (163) ILR (1955) Trav-Co 216 (DB) ** AIR 1952 Sau 107 (109) ** AIR 1940 Mad 929 (932) ILR (1941) Mad 144 (DB) ** AIR 1939 Lah 15 (16) (DB) ** AIR 1928 Rang 28 (28 29) 5 Rang 633 (DB) (Mortgage of stock in-trade) ** AIR 1923 Rang 60 (61) **AIR 1919 Mad 779 (779) 42 Mad 59 (DB) ** AIR 1914 Low Bur 265 (265) 7 Low Bur Rul 336 (DB) ** (1909) 5 Low Bur 8 (10) (DB) ** (1889) 2 C PLR 109n (109n) ** (1911) 7 Nag LR 72 (79).

11. AIR 1940 Mad 929 (931) ILR (1941) Mad 144 (DB) (Mortgage of produce of land — Land subsequently leased — Standing crop on land claimed by mortgagee before its removal — Mortgagee's title must prevail over lessee with notice of mortgage) ** AIR 1987 Cal 143 (145) : (1987) 91 Cal WN 821.

12. AIR 1949 Nag 368 (370) · ILR (1949) Nag 243

13. AIR 1964 Andh Pra 201 (203) ILR (1964) Andh Pra 681 (Shares of limited company transferred without transfer of ownership and loan secured – Transaction is pledge) ** AIR 1960 Andh Pra 273 (277) (DB) (There can be mortgage or pledge of shares) **AIR 1959 J & K 67 (69) ** AIR 1954 Madh B 6 (7) ** AIR 1952 Madh Bha 196 (198) ILR (1952) Madh Bha 136 (DB) ** AIR 1949 Nag 368 (370) ILR (1949) Nag 243 ** AIR 1943 Mad 73 (74) (DB) (Citing Welles J in Halliday v Holgate (1868) 3 Ex 299 – Case relating to mortgage of promissory notes — But a transaction may amount to both a mortgage and a pledge.)

[See also AIR 1956 Pat 32 (37) 34 Pat 8 (DB) (Mortgage and pledge of shares — Whether it is one or the other will depend on the intention of the parties and the circumstances of each case.)]

14. (1968) 38 Com Cas 884 (Mad)

15. AIR 1969 Delhi 313 : 72 Pun LR (D) 42 (DB)

16. AIR 1960 Punj 42 (43) ILR (1959) Punj 1969 (DB) ** AIR 1958 All 864 (865) (DB) ** AIR 1952 Madh Bha 196 (198) ILR (1952) Madh Bha 136 (DB) ** AIR 1952 Sau 107 (109). (Mortgage of machinery — Mortgagor remaining in possession paying interest equal to rent — Transaction is hypothecation and not pledge) ** AIR 1949 Nag 368 (370) ** (1894) 21 Cal 241 (244) (SB) ** AIR 1939 Lah 15 (16) (DB) ** (1935) 62 Cal 1046 (1051).

[See also AIR 1918 Cal 165 (166) (DB).]

17. (1968) 38 Com Cas 884 (Mad)

18. AIR 1932 Cal 524 (530 531) 59 Cal 667 (DB) * (1935) 62 Cal 1046 (1051) ** (1889) 2 CPLR 108 (109) (Subsequent hypothecation with possession with notice not postponed to a prior hypothecation without possession) **1874 Pun Re No 70 p 223 224 (DB)

19. AIR 1915 Cal 161 (168) : 42 Cal 455 (DB)

the property. He cannot obtain a foreclosure(20).

A mortgage or a pledge of movable must also be distinguished from a simple lien In the case of a lien there is no transfer of any interest; the person exercising a lien has only a right to retain the subject-matter of the lien until he is paid A pledge is something between a simple lien and a mortgage(21).

In England a mortgage of personal property may be made without deed (22) In this country also, no particular formality is necessary to create a mortgage of movable property(23).

As to applicability of rules relating to redemption to mortgages of movables, see S 60, Note 2.

12. "For the purpose of securing the payment of money."

A transfer of an interest in immovable property must, in order to constitute a mortgage, be for the purpose of *securing the payment of money* advanced by way of a loan or a debt or the performance of an engagement giving the rise to a pecuniary liability.(1) In the English Law of Property Act, 1925, (S 205) a mortgage is defined as including any charge or lien on any property for *securing money or money's worth* A transfer, not for *securing* the repayment of the loan but as an *acquittance* of it is not a mortgage. The test, therefore, for seeing whether a transaction is a mortgage or not is to see whether the property comprised in it is *made security* for a loan or a debt or the performance of an engagement.(2) The established principles do not, however, warrant an interpretation that the transfer was *solely* to secure the amount advanced before it can be inferred that there was a mortgage.(2A) mortgage is essentially a form of security for a debt Debt must subsist Any document by which debt or liability is discharged cannot therefore be a mortgage. Where in a document there is neither a personal convenant to pay nor any provision for redemption nor for sale of property if debt is not paid, and transferee was to remain in possession for a specified limit

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20. AIR 1964 Andh Pra 201 (203) ILR (1964) Andh Pra 681 ** AIR 1960 Andh Pra 273 (277) (DB) ** AIR 1954 Madh B 6 (7) ** AIR 1915 Cal 161 (168) · 42 Cal 455 (DB) **(1877) 4 Ch D 605 (606) : 46 LJ Ch841 (841), Carter v. Wake.

21. AIR 1959 J & K 67 (69).

22. (1852) 86 RR 746 (750) · 7 Ex 481 21 LJ Ex 223, Flory v Denny

23. (1946) 50 Cal WN 258 (259) (DB) (No particular form need be employed and writing is not necessary) **AIR 1916 Bom 77 (80) (A mortgage of movables can be as validly effected by parole as by a writing)

Section 58 — Note 12

1. **AIR 1960 SC 1030 (1032) : ILR (1960) 2 Punj 555.** (Loan or debt to secure which mortgage is created remains pecuniary liability of the person creating it. Therefore, mortgage debt would be covered by definition of "debt" in S 2(6), Displaced Persons (Debts Adjustment Act) ** ILR (1978) 1 Ker 137 (144) (Possession given by way of security, creditor debtor relationship created. It is mortgage even if there is an element of lease in the transfer) ** AIR 1967 Ker 70 (DB) ** (1962) 40 Mys LJ 669 (670) ** AIR 1960 Pat 196 (198) 37 Pat 1465 (DB) ** 1959 Andh LT 457 (461) ** ILR (1956) Cut 650 (664) 24 Cut LT 52 (DB) (It is the assurance in its payment or ready recoverability that constitutes a particular thing a security for a debt) **AIR 1954 Trav-Co 7 (9) · ILR (1952) Trav-Co 438 (DB) ** AIR 1951 Pat 327 (328) (DB) (Debt subsists in mortgage — Transaction by which debt is extinguished is a sale) ** AIR 1923 All 586 (587) · 45 All 581 (DB).

2. **(1902) 26 Bom 252 (256) (FB)** ** AIR 1915 Mad 382 (383) (DB) ** (1864) 2 Mad HCR 51 (54) (DB) ** (1864) 2 Mad HCR 108 (109) (DB) * (1913) 19 Ind Cas 221 (221) (DB) (Mad) (A simple bond under which the obligee bound himself and his heirs "with all my property movable and immovable as thanaka" is not a mortgage or charge) ** (1913) 20 Ind Cas 544 (545) (Oudh)

   [See also (1869) 4 Mad HCR 434 (441) (DB).]

2A. 1975 Ker LT 1 (10, 18) (FB). (AIR 1968 Ker 38 (FB). **Overruled.**)

irrespective of whether amount was satisfied or not only because consideration is not cash, but a past liability, the transaction cannot be termed as mortgage (3) It is not the *name* given to a contract, but its *contents or the relation constituted by it* that determines its nature (4) If it appears from the deed that it was the intention of the parties to create a security on the land, it is sufficient to create a mortgage (5) A 'security', speaking generally, is anything that makes the money more assured in its payment or more readily recoverable, as distinguished from e g , a mere I.O.U. which is only evidence of a debt Therefore, it is the assurance in its payment or ready recoverability that constitutes a particular thing a security for debt (6) For transfer of an interest to secure repayment, there need not be a present advance at the date of the execution of the deed Even an arrangement to advance money in future will support a mortgage (7)

Illustrations

(1) *A* executed in favour of B what purported to be a mortgage with possession for 14 years the deed providing that "on the expiration of the term the mortgagor shall come into possession of the mortgaged villages without settlement of accounts that on the expiration of the term the mortgagee shall have no power whatever in respect of the said estate which, after the expiration of the term, shall be returned to the mortgagor without his paying the mortgage-money secured under this document" It was held by their Lordships of the Privy Council that the transaction was not a mortgage in the proper sense of the word that it was not a security for the payment of any money or the performance of any engagement but that it was simply a grant of land for a fixed term free of rent in consideration of a sum made up of past and future advances(8)

(2) *A* transferred property by a lease for a certain advance by *B not as a security for* repayment but as an *acquittance* of it An agreement was also executed for retransfer of the property when the grantor or his heirs paid back the money without interest It was held that the transaction was not a mortgage(9).

(3) A deed gave the creditor the right to take possession of the property described in it for the purpose of receiving from the profits thereof the amount of the debt with interest if the debt was not paid off within the period fixed It was held that where such a right is given for such a purpose there is "a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced" within S 58 of the Transfer of Property Act (10)

See also the undermentioned cases (11) See also S 105, Note 67

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3. AIR 1981 Bom 335 : 1980 Mah LJ 263.

4. **(1902) 26 Bom 252 (257) (FB) ** (1870) 13 Suth WR 82 (85) (FB) **** AIR 1955 Bom 419 (425, 427) ** AIR 1954 Pat 562 (566) 33 Pat 638 (DB) ** AIR 1940 Bom 225 (227) ILR (1940) Bom 453 (DB) (Per Wassoodew J) ** AIR 1934 Pat 624 (625) ** AIR 1925 Rang 102 (103) ** AIR 1924 Pat 580 (582) 3 Pat 465 (DB) ** AIR 1921 Pat 43 (43) 6 Pat LJ 37 (DB).

   Also see S. 8, Note 20 and S. 105, Note 14.

5. AIR 1955 Bom 419 (425 427) **** (1870) 13 Suth WR 82 (85) (FB).** (If the intention can be collected from the instrument the form of expression is not material)

6. (1969) 35 Cut LT 821 : ILR (1970) Cut 396

7. AIR 1959 Bom 482 (485) : ILR (1959) Bom 1112 (DB)

8. **(1903) 25 All 115 (119) : 30 Ind App 54 (PC).**

9. **(1884) 10 Cal 30 (35) : 10 Ind App 129 (PC).**

10. **(1889) 13 Bom 90 (98) (FB).**

11. (1969) 35 Cut LT 821 ILR (1970) Cut 396 (403) (Delivery of house to mortgagee — Stipulation that on failure to pay within stipulated time mortgagee entitled to sel etc — Repayment of mortgage money secured) ** (1962) 40 Mys LJ 669 (670) (A mortgaging land to B and later on executing agreement in favour of B under which mortgaged property delivered to possession of B in consideration of mortgage debt and interest thereon — An

13. "Existing or future debt."

A security may be given for a general balance that might be due on account Thus, a deposit of title deeds as security for money due on a general balance of account that may be struck in the future is a mortgage.(1) See also section 79.

The *onus* of proof that a security was intended to cover the balance of *an account current* is on those who assert it(2).

It is well settled that when there is a transfer of interest of immovable property by way of mortgage them all advances of money which may have been made both prior to the date of mortgage and subsequent thereto would be covered by it In such cases one mortgage covers all such advances(3).

Where *A* in consideration of a past debt due by him to *B*, executes a document in favour of *B*, by which *A's* property is handed over to *B* for 14 years, the debt to be liquidated from out of the proceeds of the property, it is a mortgage for the purpose of securing an existing debt(4). A mortgage may be executed to secure a future debt(5).

A security bond given to an officer of the Court to secure an amount that may be decreed or ordered by the Court is a mortgage to secure a future debt (6) But such a security bond executed in favour of the "Court" is not a mortgage, as the Court is not a juridical person, and so not a

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agreement containing stipulation that at end of ten years P shold deliver possession of land to A free from encumbrance — No stipulation in agreement for payment of mortgage debt nor property delivered made security for repayment of loan — **Held**, transaction was not mortgage) ** AIR 1956 All 332 (333) (Sale of grove in protected land without consideration and without permission — Sale cannot be converted into usufructuary mortgage under S 13(1)(a), U P Regulation of Agricultural Credit Act (14 of 1940), there being no principal amount towards which mortgagor could be required to make payment) ** ILR (1956) Cut 650 (664) (DB) (Mortgagee was simply to remain in possession paying the entire rajbhagam to mortgagor till mortgage money was paid, without getting anything towards his debt and without having a right to sell or foreclose — This did not amount to securing payment of money advanced.) ** (1911) 10 MLT 187 (187) (Consent decree stipulating for payment of the money by instalments and execution of mortgage for such payment forms one transaction and the mortgage is not without consideration) ** **AIR 1943 All 337 (339) : ILR (1943) All 802 (FB).** (Under the terms of a bond the executant covenanted that he would regularly pay the interest on the sum lent and it was agreed that in default of any payment of interest the obligees would be entitled to take possession of certain specified plots of land It was held that the bond was a mortgage bond from the date of its execution, the intention of the parties being, that the property specified at the foot of the bond should be security for the debt It was not a simple mortgage bond, but was a mortgage of a kind which by the amending Act of 1929 came to be known as an anomalous mortgage) ** AIR 1943 Pesh 15 (17) (DB). (Deed in the form of a (Mustaki) lease mortgage — Transferor letting transferee in possession for 7 years — Property to be taken back after 7 years as redeemed and mortgage debt to be treated as paid up — No payment on account of principal or interest to be made by transferor at any time Deed held lease and not a mortgage) ** AIR 1922 Pat 36 (37) (DB) ** AIR 1918 Oudh 279 (280) ** 1936 RD 365 (365) (BR)

Section 58 — Note 13

1. **(1880) 2 Mad 239 (257) : 7 Ind App 83 (PC).**
2. (1870) 39 LJ Ch 655 (656) : LR 10 EQ 467, In re Boys
3. 1987 Rev LR 140 (142) (Punj & Har) ** (1986) 89 Pun LR 671
4. (1934) 18 RD 231 (231).
5. (1912) 13 Ind Cas 653 (655) (DB) (Cal)
6. (1956) 58 Bom LR 622 (623) ** AIR 1915 Cal 533 (533, 534) (DB) ** (1905) 32 Cal 494 (496) (DB) (Security bond given to Registrar putting immovable property as security for costs of respondent in appeal) ** (1899) 26 Cal 246 (249) (DB)

mortgage (7) (As to when it will operate as a "charge" see Note 8 on S 100) The hypothecation of property for the purpose of securing a future liability to pay the mortgage money in case the mortgagee should be deprived of the mortgaged property is a mortgage to secure a contingent liability(8). (See also S 5, Note 7 and S 48, Note 7) A mortgage may be made not only to secure a present advance but also a future advance contemplated by the parties up to a particular limit(9)

14. "Or the performance of an engagement."

The word "engagement" means a contract and the phrase "which may give rise to a pecuniary liability" includes cases where the breach of the engagement will give rise to a right to claim *damages* (1) Where *X* executed a rent deed to *Y* in respect of the latter's property and by the deed itself he *(X)* hypotehcated certain property of his for the payment of the agreed rent and for delivery of certain articles yearly such as straw etc , it was held that the document was one "for securing the performance of an engagement" i e the engagement to pay rent and to deliver certain articles and was a mortgage (2) A *kootchit* executed by the stakeholder of a chit fund of his property in favour of the subscribers for the due performance of his obligation to conduct the *chit* properly is a mortgage for the performance of an engagement which may give rise to a pecuniary liability(3).

Where A sells property to *B* and executes a document of indemnity agreeing that if *B* was deprived of the property or suffered loss *A* would pay the whole amount of the mortgage the document contains an engagement which may give rise to a personal liability(4)

Where *A* took a loan of paddy stated as being worth Rs 300 from *B* and promised to pay interest on the loan in paddy at a specified rate and hypothecated certain property therefor it was held that the intention of the parties was that if the paddy was not returned as stipulated the mortgagee was entitled to recover the price thereof, that it was an engagement which would give rise to a pecuniary liability and that it was therefore a mortgage(5)

Where a person is a subscriber and bidder of chit of a chit company acknowledged his liability to pay instalments and mortgaged the property the chit company is entitled to realise future loan borrowed after execution of mortgage(6).

Where *A* a decree holder against *B* applied for possession of the property decreed, and *B* having appealed from the decree the Court ordered that *A* should be placed in possession if he furnished security for restoring the property to *B* if he should succeed in the appeal and *C* executed a security bond making himself liable to pay one and a half lacs of rupees compensation if *A* failed to restore possession and hypothecated certain property for that amount, it was held that it was a mortgage within the meaning of the Stamp Act(7).

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7. See Note 2B on S 145 of the AIR Commentaries on the Code of Civil Procedure, 10th (1985) Edn. ** (1956) 58 Bom LR 622 (623)

   [See also AIR 1929 All 834 (835, 836) (DB)]

   [But see (1908) 31 Mad 530 (DB) (Cannot be considered as good law)]

8. AIR 1925 Pat 288 (290) (DB).

9. (1889) 11 All 136 (143) : 16 Ind App 12 (PC) ** AIR 1955 Cal 194 (199) ILR (1956) 2 Cal 822 (DB).

Section 58 — Note 14

1. (1902) 25 Mad 50 (54) (DB) (Engagement to withdraw an appeal under certain circumstances.)

2. (1894) 17 All 56 (57) (FB). (Reference under Act No 1 of 1879 (Indian Stamp Act) S 49)

3. AIR 1927 Mad 773 (775) ** AIR 1918 Mad 997 (997) 38 Ind Cas 813 (DB)

4. AIR 1920 Mad 650 (651) (DB) ** (1908) 5 All LJ 723 (724) (DB)

5. AIR 1921 Cal 172 (173, 174) : 48 Cal 625 (FB).

6. 2001 AIHC 982 (Ker).

7. AIR 1928 Oudh 143 (143) : 3 Luck 298 (FB).

It must be noted that under the Stamp Act the restriction that the engagement must be one which may give rise to a pecuniary liability does not occur in the definition of "mortgage deed". See Note 2

15. "Mortgagor".

A person in order to be a mortgagor must transfer an interest in his property. Where *A* and *B* join in a mortgage as mortgagors but the property mortgaged is only *B*'s property and no property of *A* is included in the mortgage, *A* is not a "mortgagor"(1).

Although a person may be entitled to *redeem* the mortgage, if he is not the transferor himself or one deriving title from the transferor, he cannot be considered a mortgagor within the meaning of the section(2).

The person who has purchased the right of equity of redemption in the suit property from the original mortgagor by a registered document steps in the shoes of the original mortgagor. In view of Sec. 59 read with Sec. 60, such a purchaser for all practical purposes becomes the mortgagor(3).

A mortgagee cannot deny the mortgagor's title to mortgage the property during the pendency of the mortgage but this principle would not apply when the mortgagee in possession is evicted by a person having paramount title(4).

Where the property belonging to wakf was mortgaged by its mutawalli describing himself to be the owner of the property and there was no indication appearing from the transaction that it was made known to the mortgagee that the property belonged to wakf, the mortgagee would be precluded from denying right of mortgagor to redeem. The mortgage may be void against Allah Tala but it does not affect adversely the relationship between mortgagor and mortgagee(5).

Only, the owner i.e. the mortgagor can transfer the property itself, subject to the interest which he has transferred to others, out of totality of his rights which constitute the ownership(6).

Even after the creation of charge or mortgage the mortgagor constitutes to be Bhumiswami of the land and he can transfer the right of ownership to a third person on whom the charge of mortgage would be binding. The sale would be subject to charge or mortgage. The repayment of loan remains secured. The vendee gets the right to redeem the mortgage(7).

16. "Mortgagee".

It is the *transferee* of the interest that is the mortgagee. Where a judgment-debtor executes a security bond in favour of the Judge of a Court for the due performance of any decree or order that may be passed against him, the decree holder does not thereby become the mortgagee(1). As to

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Section 58 — Note 15

1. 1954 All LJ 336 (338) (DB) ** AIR 1924 All 787 (788) (DB)
2. 1964 All LJ 244 (246) (Grantee of Guzara having no power to transfer, mortgaging subject-matter of grant. Though mortgage becomes valid after lapse of 12 years, grantor of Guzara cannot be regarded as the mortgagor.)
3. AIR 1980 Pat 163 : 1980 BLJR 371 (FB) ** AIR 1983 All 197 (199) (1983) 9 All LR 69 ** AIR 1981 Guj 120 (131) : 22 Guj LR 473
4. AIR 1973 Mys 28 (30) : (1973) 1 Mys LJ 186
5. (1984) 10 All LR 757 (765)
6. ILR (1992) Kant 650 (654) (AIR 1933 Cal 728, AIR 1936 Mad 70, AIR 1945 Cal 135, Dissented from.)
7. 2000 (1) MPLJ 257 (258)

Section 58 — Note 16

1. (1903) 30 Cal 1060 (1062) (DB)

[illegible]

17. Mortgage-money.

[illegible]

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2. AIR 1992 Ker 146 (147): 1991 AIR Ker W 2643 (1992) 1 Ker L T Supp 29 (Mortgagee continuous possession of mortgaged property as a mortgagee for a period of sixty years before the date of coming into force of Kerala Land Reforms Act — Held — would be deemed tenant under S. 4-A(1)(a) of that Act.)

Section 58 — Note 17

1. AIR 1961 Mad 4[illegible] (DB) [illegible] ** AIR 1954 Mad [illegible] ** AIR [illegible] (DB) [illegible] mortgaged property under S. [illegible] under the term principal money [illegible] The expression "mortgage money" [illegible] ** AIR 1929 All [illegible] ** AIR [illegible] ** AIR [illegible] ** AIR [illegible] Interest on mortgage money [illegible] as principal [illegible] (DB)

   [See also AIR 1922 All 362 (363) (DB).]

2. AIR 1915 Mad 402 (403)

   [See [illegible] LR [illegible] Where principal amount [illegible] — Amount [illegible] cannot be considered as principal amount.]

   [See also [illegible] Travancore [illegible] But Travancore [illegible] Relief Act [illegible] in Travancore [illegible] warrant the [illegible] the mortgagee [illegible] redeem [illegible] property [illegible] redeem the mortgage on payment [illegible] Relief Act.]

3. AIR 1946 Pat 512 (513) (DB)

4. AIR 1924 PC 183 (183) = 51 Ind App 37[illegible] = 5 Lah 425 (PC)

5. Also see the following cases: [illegible] — Mortgage with possession — Mortgage deed containing personal covenant to pay and giving right to recover [illegible] based on such covenant — Recovery of [illegible] from mortgaged property [illegible] — Interest [illegible] mortgage money [illegible] — [illegible] contrary — Correctness of decision [illegible] AIR 1924 Lah [illegible] PC [illegible] ** AIR [illegible] ** AIR [illegible] (DB) — Mortgage with possession — [illegible] — Mortgage amount payable in 3 years — [illegible] payable [illegible] — Held — [illegible] under the deed [illegible]

Where a mortgage extends the security providing maximum limit of advance the security extends also to the interest on the amount lent(6) As to illustrations of a contract excluding interest from being a charge on the property see the undermentioned cases(7) Where there is no stipulation for interest express or implied, in the mortgage document, it cannot be claimed as part of the mortgage-money(8).

The question whether the interest claimed is money of which payment is secured must be decided on the particular terms of the mortgage document(9) Where there is no mention of any kind of interest in the mortgage document, simple interest would be allowable according to the ordinary *cursus curiae* But it is open to the parties to agree *aliunde* that the interest to be charged on accounting is to be compound interest. That would not be a variation of the original mortgage bond but would be an independent agreement and as such provable under the Evidence Act(10) Where the mortgage bond fixes a date for the payment of the mortgage-money and provides for payment of interest till that date, an agreement to pay interest even subsequent to the date so fixed, until payment of the principal, might be implied in the absence of an agreement to the contrary(11).

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on the property, as there was nothing in the contract to indicate that there was to be no such charge AIR 1924 PC 183 Foll) ** AIR 194, Oudh 498 (504) . 16 Luck 812 (DB) (The fact that mortgagor has made himself personally liable to pay up the deficiency if the interest is not realised from the profits does not make any difference) ** AIR 1939 Lah 129 (134) (DB) ** AIR 1935 Lah 142 (143) (DB) (The mere fact that separate date is mentioned for the payment of the interest is not sufficient to displace the rule) ** AIR 1933 Lah 289 (290) (A recital in the mortgage deed that in default of payment of interest, it may be recovered from the person and property of the mortgagor does not by itself necessarily mean that interest ceases to be a charge on the property) ** AIR 1928 Pat 398 (399) (DB) ** AIR 1928 Lah 342 (343) 9 Lah 140 (DB) (AIR 1924 PC 183, Foll) ** AIR 1928 Oudh 273 (275) 3 Luck 459 (DB) ** AIR 1927 Lah 817 (819) DB) ** AIR 1927 Lah 850 (850) (DB) ** AIR 1926 Lah 624 7 Lah 559 (DB) (The fact that the mortgagor undertook to pay the interest personally is not incompatible with the interest being a charge on the property) ** AIR 1926 Lah 530 (532) (AIR 1924 Lah 273 held must be taken to have been **Overruled** by AIR 1924 PC 183) ** AIR 1925 Lah 113 (114) ((1888) Pun Re No 57, Foll) **AIR 1923 Lah 587 (588) (DB) ** AIR 1923 Nag 181 (182) (Note — Facts not clear whether interest was by way of damages or under an agreement to pay) ** AIR 1915 Cal 77 (78) (Where under a Sudherma bond (usufructuary mortgage) the mortgagee obtains possession of the land, the land is security both for principal and interest) ** (1909) 3 Ind Cas 978 (979) (DB) (Lah) ** (1904) 1 All LJ 470 (473) (DB) **(1932) 135 Ind Cas 497 (498) (DB) (Lah) ** (1911) 33 All 107 (109) (DB)

[**See also** AIR 1967 Mys 41 (44) (DB) (Usufructuary mortgagee kept out of possession — Mortgagor is liable to pay him interest on the mortgage amount AIR 1958 Mys 32, Rel on)

6. (1970) 1 Mad LJ 200

7. AIR 1956 Mad 434 (441) ILR (1956) Mad 983 (DB) ** 1913 Pun Re No 45 (DB) ** (1932) 136 Ind Cas 332 (332, 333) (DB) (Oudh) For other illustrations, see Note 10 on S 60

8. AIR 1924 Pat 302 (303) (DB) (In a deed providing for interest being paid out of usufructuary mortgaged property, interest cannot be deemed to be charged on property) * (1913) 40 Cal 514 (517) (DB) ** (1886) 8 All 182 (185) (DB) ** (1910) 5 Ind Cas 285 (286, 287) (DB) (All). (Express agreement not to pay interest)

9. **(1911) 35 Bom 327 (332) (PC).** (Terms of the document were held to show that there was a covenant to pay.) ** AIR 1915 Lah 331 (332) (Mortgage held to contain agreement to pay interest up to payment.) ** AIR 1961 Mad 415 (416) (DB)

10. AIR 1952 Nag 25 (28, 29) : ILR (1951) Nag 858 (DB).

11. **(1901) 11 Mad LJ 183 (185) (SB)** ** AIR 1935 Oudh 213 (216) : 10 Luck 481 (DB) ** AIR 1928 Lah 342 (344) 9 Lah 140 (DB) (Principles in 19 All 39, Followed) ** AIR

In such cases, the *post diem* interest would clearly be part of the mortgage-money and would be a charge on the property(**12**). Where it was stipulated in general terms that interest at a particular rate was to run upon the principal sums advanced without any limitation as to the period of its currency and it was also stipulated that in default of punctual payment at the end of each year the creditors were to be at liberty to treat the interest as principal and to recover it from the mortgaged property *post diem* interest was granted by the Privy Council on the ground that the contract did not intend that the interest should cease after the stipulated period(**13**). Where it was stipulated that interest at a certain rate would be paid, that within one year the principal money and interest would be paid, that otherwise after the expiry of the period the property would be deemed to be sold for the entire money, it was held that the intention of the parties was that the relationship of mortgagor and mortgagee should cease after the expiry of the year and that no *post diem* interest was to be charged(**14**). In the undermentioned case it was, however, held that mortgage-money did not include interest unless it was *expressly* secured by the mortgage(**15**).

Where a mortgage deed provided for payment of principal and interest at a fixed rate "within one year" and a further covenant not to transfer the property till payment in full of the principal and interest", it was held, on a construction of the document that the contract was to pay interest *until payment*, and not merely for one year and that interest was therefore recoverable as part of the mortgage-money under the *contract* and not merely as *damages*(**16**). Where under a mortgage there is a stipulated rate of interest payable by the mortgagor for the mortgaged money and the amount of income recovered from the properties is to be first applied to the interest and balance towards the principal the mortgagee is entitled to recover the interest by filing a suit(**17**). Even if there is no express or implied provision for *post diem* interest, the mortgagee may be granted interest technically as damages(**18**) and the rate would be *prima facie* the same as that provided in the bond though there is no rule of law making that rate necessarily the measure of the damages(**19**). *Post diem* interest at a reasonable rate might also be decreed under the Interest Act 1839 though there

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1926 Oudh 378 (379) ** AIR 1924 Mad 736 (740) ** AIR 1923 Oudh 143 (145) (Time of the payment of the amount fixed — On default the mortgage to be treated as absolute sale — Interest continues after the fixed date.) ** AIR 1923 Lah 648 (649) (4 Lah 346 (DB)) (In a mortgage by conditional sale a covenant to pay *post diem* interest is implied.) ** AIR 1923 All 7 (8) (44 All 772 (774) (DB)) ** AIR 1915 Oudh 16 (23) (18 Oudh Cas 16 (DB)) ** AIR 1914 Oudh 137 (139) (DB) ** (1900) 23 Mad 534 (536) (DB) ** (1897) 20 Mad 371 (374, 375) (DB) ** (1912) 16 Ind Cas 216 (217) (DB)

[**See also** (1899) 22 Mad 339 (340) (DB) (Bond provided for payment of interest annually and of the principal at the end of three years — Intention to pay interest even subsequently implied.)]

12. AIR 1919 Cal 46 (47) : 46 Cal 448 (DB)

13. (1898) 20 All 171 (180) : 25 Ind App 915 (PC).

14. (1921) 63 Ind Cas 533 (535) (DB) (Lah)

15. AIR 1920 Pat 170 (171) (DB).

16. (1897) 19 All 39 (49) : 23 Ind App 138 (143, 144) (PC).

[**See also** AIR 1914 All 171 (172) (DB) ** (1898) 25 Cal 246 (249) (DB) (23 Ind App 138 (PC), Foll.)]

17. (1970) 2 SCJ 348.

18. (1906) 2 Nag LR 162 (168) (PC) ** (1891) 13 All 330 (333) (DB) ** (1889) 11 All 416 (419) (DB) ** (1887) 10 All 85 (90) (DB).

19. (1906) 2 Nag LR 162 (168) (PC) ** AIR 1922 Lah 254 (257) : 3 Lah 200 (FB) ** AIR 1933 Mad 171 (171) ** AIR 1923 Lah 632 (633) (4 Lah 406 (DB)) (Rate of interest reduced as it was unusual.) ** AIR 1915 Oudh 31 (56) (DB) (In fixing the rate the Court

may be no agreement express or implied, to pay interest(**20**) There was a difference of opinion on the question whether interest awarded as *damages* or under the Interest Act could be considered part of the mortgage-money so as to constitute a charge on the property(**21**). The present O. 34. R. 11 of the Code of Civil Procedure now makes it clear that even such interest is part of the mortgage-money(**22**). As to the meaning of interest, see the case noted below(**23**)

Where it was stipulated by the mortgage deed that if the entire amount is paid by the mortgagor without committing any default the mortgagee would not be entitled to more than 11½% and at the same time the mortgagor would be paying the mortgage money not in a lump sum but in 30 half yearly instalments, however in event of two defaults in payment of mortgage money, the entire sum would be due and on that entire sum mortgagee was entitled to additional interest of 2½%, such condition was penal in nature as it enured to the benefit of mortgagee(**24**).

The expression "mortgaged money" read with its definition in Section 58(a) does not include compensation for improvements effected by the mortgagee(**25**). However, if expenditure in making improvement and repairs of mortgaged property was permitted by terms of mortgage deed, it cannot be disallowed on ground that property was mortgaged for lesser sum(**26**).

See also Note 10 on S. 60 generally.

The term 'mortgage money' in S 58 is not exhaustive It includes all sums payable by mortgagor to the mortgagee at time of redemption(**27**).

The amount due under the mortgage or in other words the amount stipulated in the mortgage deed to be returned by mortgagor to get back the property mortgaged is debt(**28**).

Damdupt

The rule of damdupt is an equitable rule debarring the creditor to recover at any given time the amount of interest which is in excess of the principal amount due at that time As mortgage is principally a loan transaction, the rule of damdupt would also be applicable to mortgage(**29**).

As mortgage is principally a loan transaction there is no reason why the rule of Damdupat which is an equitble rule should not apply also to mortgage(**30**).

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must be guided by the circumstances of the case) ** (1886) 8 All 486 (489, 490) (DB) (*Post diem* interest granted as damages, but the rate of interest reduced)

[See also (1890) 38 WR (Eng) 732 (733) 60 LJ Ch 43 · 63 LT 189 · 45 Ch D 225, Mellersh v Brown ** (1911) 14 Oudh Cas 106 (106) (Rate provided in bond being exorbitant 6 per cent was allowed.)]

20. (1895) 17 All 581 (586) (FB).

21. (1895) 17 All 581 (588) (FB) (No.) ** (1897) 24 Cal 699 (703) (FB). (No.) **AIR 1918 Lah 99 (101) 1918 Pun Re No 56 (DB) (Yes) ** (1896) 18 All 316 (319) (DB). (No) ** (1895) 18 Mad 248 (250) (DB) (Yes) ** (1895) 5 Mad LJ 154 (155) (DB) (Interest awarded under the Interest Act XXXII of 1839 is a charge) ** (1895) 18 Mad 257 (261) (DB) (No.) ** (1894) 21 Cal 274 (277, 278) (DB) (Yes) ** (1891) 13 All 330 (336) (DB) (No.)**

22. AIR 1958 Mys 32 (33) : ILR (1957) Mys 125.

23. AIR 1935 Rang 525 (527) : 14 Rang 16 (DB).

24. ILR (1991) Kant 3186 (3195) (DB).

25. 1974 Ker LT 879 : ILR (1974) 1 Ker 201 (DB).

26. 1982 WLN (UC) 342 (344) (Raj).

27. AIR 1984 (NOC) 297 (All).

28. AIR 1991 Guj 85 (90)

29. AIR 1988 SC 1200 (1204) : (1988) 2 Civ LJ 388. ((1903) ILR 26 Mad 662, **Overruled.**)

30. AIR 1988 SC 1200 (1204) : (1988) 2 Civ LJ 388.

18. Non-payment of consideration — Effect.

A mortgage or a sale *without* consideration will be a void transaction(1). But where a mortgage or a sale is intended to be for a consideration, the transaction is not void. As has been seen in the Notes on S. 54 the non-payment of consideration for a sale does not prevent title from passing. On the same principle, a mortgage would, in the absence of a covenant or stipulation to the contrary, be complete, i.e., the transfer of interest is effected, not when the consideration is paid or made good, but when the mortgage contract is entered into, regardless of whether and when the consideration is paid(2). Merely because no consideration has passed to the mortgagor, that by itself is no ground to hold that it was a sham transaction or was not enforceable. Once the due execution of the mortgage deed stands proved, the passing of consideration is of no consequence so far as its validity is concerned because mortgage is not a contract but is a transfer of interest(3). There is, however, a difference between a sale and a mortgage in this respect. In the case of a sale, as has been seen in Note 14 on S. 54, the *non-payment* of the consideration does not prevent title from passing to the purchaser and the remedy of the vendor is only to sue for the recovery of the purchase-money or to enforce his seller's charge. In the case of a mortgage, the *non-payment* of consideration will not render the mortgage void but will disentitle the mortgagee from suing for the amount not paid by him. The reason is that a mortgage is *prima facie* only a security for a debt and where the debt does not exist to any extent, the security cannot be enforced to that extent(4).

Once the due execution of the mortgage deed stands proved, the passing of consideration is of no consequence so far as its validity is concerned because mortgage is not a contract but transfer of interest(5).

Section 58 — Note 18

1. AIR 1930 Nag 166 (169) ** AIR 1924 Lah 381 (381) ** AIR 1917 Mad 492 (493) (DB) ** AIR 1914 Mad 684 (685) (DB) ** (1876) 1 A L J 509 (31) (DB) [illegible] Ind Cas 4 (4) (DB) (All).

   [See also AIR 1958 Andh Pra 145 (146) (DB) (Where the mortgagee is not aware that the mortgagor's daughter for whose marriage the debt was alleged to have been contracted by her father by executing the mortgage was a minor aged 12, it cannot be said that the mortgagee's object in lending the amount was unlawful or that the provisions of the Child Marriage Restraint Act were to be contravened and hence the mortgage cannot be challenged as invalid or unenforceable.) ** AIR 1950 Mad 146 (150) (Sale of property by A to B on assumption that title vested in A — B mortgaging back same property for full sale price — B and not A found to have title to the property — Mortgage is devoid of consideration and is unenforceable.)]

   Also see Section 4, Note 4.

2. AIR 1916 Lah 155 (156) : 1916 Pun Re No. 53 (FB) ** AIR 1956 Trav-Co 234 (235) ILR (1956) TC 167 (DB) ** AIR 1930 Lah 678 (679) (Land mortgaged by D to P but mortgage money left in deposit with P as land was already under mortgage to H — Interest to be paid by mortgagor and in default mortgagee could sue for possession — Transfer of interest held to be effected.) ** AIR 1922 Pat 299 (301) (1 Pat 281 (DB) ** AIR 1919 Mad 781 (782) (42 Mad 20 (DB) (No suit for cancellation of mortgage under S. 39, Contract Act, would lie.) ** AIR 1919 Lah 402 (404) ** AIR 1917 Pat 514 (515) (2 Pat L Jour 168 (DB) ** 1908 Pun LR No. 60, P. 149 (150) ** (1912) 34 All 273 (276) (DB) ** (1912) 13 Ind Cas 653 (DB) (Cal) (1859-1896) Oudh Sel Cas No. 280 (DB).

3. AIR 1994 Punj & Har 15 (18) : 1993 Pun LJ 789.

4. AIR 1968 SC 1361 (1363) ** AIR 1972 Mys 23 (25, 26) (1971) 2 Mys LJ 62 (DB) ** AIR 1917 Mad 492 (495) (DB) ** 1911 Pun Re No. 31 (11 Ind Cas 321 (325) (DB).

   [See also AIR 1956 Trav-Co 234 (245) (ILR (1956) Trav-Co 167 (DB) ** AIR 1915 Mad 945 (946) (DB).]

5. AIR 1994 Punj & Har15 (18) : 1993 Pun LJ 789.

The covenant or stipulation to the contrary may be express or implied, the question in such cases being "when did the parties intend that the 'transfer of interest' should take place"? The presumption would be in favour of immediate transfer but this presumption could be rebutted by proof of an express stipulation to the contrary or by proof of acts and circumstances from which such a contrary intention might reasonably be inferred(**6**). A provision in a mortgage deed that the mortgagor will make over the mortgage deed to the mortgagee upon payment of the full consideration does not amount to a contract that the mortgage was not to take effect until payment of the consideration(**7**).

A mortgage of which the whole cash has not been paid is valid *to the extent* of the money advanced unless the mortgagor has expressly put an end to the mortgage(**8**). To the extent to which the money was not paid, there will be a failure of consideration(**9**). Where the mortgagee undertakes to pay the creditors of the mortgagor, there is no failure of consideration, if the liability of the creditors is cleared off and this is so even if the creditors forgo their rights(**10**). It has, however, been held in the undermentioned case(**11**) that where the liability is in respect of the amounts to be advanced by the mortgagee for the discharge of a particular debt and the consideration for the mortgage is not a mere promise to discharge a particular debt, the mortgagee is not entitled to anything more than what he has actually paid to discharge the debt. Where the mortgagee undertakes to pay the creditors of the mortgagor, he must pay them within a *reasonable* time(**12**). If he does not do so and the mortgagor suffers damages the mortgagee will be liable for it(**13**). Where the consideration for a mortgage has not been paid by the mortgagee the mortgagor cannot sue for

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6. **AIR 1916 Lah 155 (156) : 1916 Pun Re No. 53 (FB)** ** 1884 Pun Re No 16 Page 48 (49, 50) (DB) (Money not paid immediately — **Held**, as there was no indication that in default of the consideration being paid immediately or within a reasonable time the mortgage was to be void the mortgagor could not treat it as void) ** (1912) 13 Ind Cas 653 (655, 656) (DB) (Cal).

7. AIR 1922 Pat 299 (301) : 1 Pat 281 (DB).

8. **AIR 1916 Lah 155 (157) : 1916 Pun Re No. 53 (FB)** ** AIR 1942 Lah 234 (236) ILR (1943) Lah 746 (DB) ** AIR 1930 Lah 549 (551) (DB) ** AIR 1927 Pat 388 (389) (DB) (The mortgagor stipulated that mortgagee should pay the mortgage amount into Court in case an execution sale of the property was set aside — The execution sale was not set aside but the mortgagee paid the amount into Court, and it was attached in execution of other decrees against the mortgagor — **Held**, that the mortgagee was not entitled to recover the amount from the mortgagor) ** AIR 1925 Oudh 132 (134) ** AIR 1921 Cal 435 (440) (DB) ** AIR 1920 Mad 906 (906) (DB) ** AIR 1919 Mad 1117 (1124) (DB) ** AIR 1919 Oudh 104 (105) **AIR 1919 Oudh 251 (251) (DB) ** AIR 1918 Mad 898 (905) (DB) ** AIR 1917 Pat 514 (517) 2 Pat LJ 168 (DB) ** AIR 1916 Cal 349 (351) (DB) ** AIR 1916 Oudh 197 (198) 18 Oudh Cas 280 ** (1909) 32 Mad 281 (283) (DB) ** (1908) 35 Cal 1051 (1057) (DB) ** (1906) 10 Cal WN 932 (933) (DB) ** 1893 Bom PJ 82 ** (1913) 36 Mad 29 (31) ** (1912) 34 All 273 (280) (DB) ** (1912) 35 Mad 114 (118) (DB) ** (1911) 10 Ind Cas 258 (259) (DB) (Mad)

   [**See also** (1911) 35 Bom 395 (399) (DB) (Mortgagee failing to pay a part of consideration — Subsequent payment of that part cannot serve to undo the effect of partial failure of consideration.) ** AIR 1930 Nag 166 (169).]

   [**But see** (1894) 18 Mad 126 (128) (DB)]

9. **AIR 1917 Mad 630 (635) : 40 Mad 308 (FB)**. (Per Wallis, C J) ** (1912) 35 Mad 114 (118) (DB) ** (1910) 5 Ind Cas 334 (336) (DB) (Cal)

   [**See also** (1907) 31 Bom 552 (557, 558) (DB) ** 1881 All WN 13 (13) (DB)]

10. 1883 All WN 213 (214) (DB).

11. AIR 1947 Mad 197 (199) : ILR (1947) Mad 411 (DB).

12. AIR 1931 All 95 (96) 52 All 751 (DB) ** AIR 1918 Oudh 331 (332)

13. AIR 1953 Mad 603 (603) * AIR 1937 Oudh 138 (140) (DB) ** AIR 1936 All 598 (600)

specific performance of the contract to pay money, though he can sue for compensation(**14**), the measure of compensation being the difference between the amount stipulated and the amount paid(**15**) and any loss that the mortgagor may have sustained(**16**) (See also Note 6.)

A usufructuary mortgagor parting with possession but not receiving full consideration can not claim a return of the proportionate extent of land and mesne profits(**17**). Where a usufructuary mortgagee undertook to pay off a prior mortgagee and obtain possession, but did not pay him off and the mortgagor paid him off and obtained possession, the usufructuary mortgagee cannot compel the mortgagor to perform his part of the contract and claim possession from the mortgagor even though the mortgage cannot be said to be invalid(**18**). But where the redemption of the prior mortgage was not a condition precedent to obtaining possession, the mortgagee was given a decree for possession on condition of his paying the mortgagor the amount payable to the first mortgagee(**19**). Where under the terms of a simple mortgage the mortgagee deducts a certain sum of money from the principal sum of money to be advanced, towards the first year's interest in advance there is no reduction of the principal to that extent(**20**).

(DB) ** (1921) 63 Ind Cas 87 (89) (DB) (All) ** AIR 1918 Oudh 331 (331, 332) ** (1907) 10 Oudh Cas 69 (73) (DB). (These cannot be claimed as set off in a suit by the mortgagee on his mortgage bond — A separate suit must be brought.) ** (19.2) 15 Ind Cas 526 (527) (Oudh) ** 1901 All WN 14 (15).

14. AIR 1947 Mad 197 (200) : ILR (1947) Mad 411 (DB). (The rights of a mortgagor in a case where the entire consideration of the mortgage is not advanced by the mortgagee are rights personal to him and a purchaser in Court-auction of the mortgaged property will not automatically become entitled to such rights of the mortgagor. It is even doubtful if the right of the mortgagor which may sound in damages could be transferred or assigned validly.) ** AIR 1942 Lah 234 (236) : ILR (1943) Lah 746 (DB). (If possession has passed the mortgagor might sue to get it back after a time or take steps to relieve himself of some of the other conditions of the mortgage. If he has suffered any loss he may sue for damages. But it is clear that the unpaid part of the mortgage money is not a debt nor has the mortgagor an actionable claim for its recovery against the mortgagee.) ** AIR 1938 Lah 21 (22) ** AIR 1935 Pat 125 (126) ** AIR 1931 All 40 (44) : 52 All 1037 (DB) ** AIR 1923 Cal 567 (567) ** AIR 1916 Cal 530 (530, 531) : 43 Cal 59 (61, 63) (DB) ** (1908) 1 Oudh Cas 89 (92) (DB) ** (1908) 30 All 252 (255) (DB) ** (1891) 13 All 200 (204) (DB) ** (1884) Pun Re No. 16, P 48 (49, 50) (DB) ** (1913) 34 All 273 (276) (DB).

[**See also** AIR 1935 Nag 135 (136) : 31 Nag LR 235. (Mortgagee undertaking to pay creditors of mortgagor — Failure to pay — Mortgagor can sue for damages.)]

[**But see** AIR 1935 Lah 141 (142). (A suit for the recovery of the unpaid balance would lie. The amount must be treated as a debt due to the mortgagor. The fact that the unpaid balance is according to the contract between the parties to be paid not to the mortgagor but to another person who holds a mortgage on another property belonging to the mortgagor makes no difference as the mortgagee is merely an agent of the mortgagor for the payment of the amount in question to a mortgagee of another property.) ** AIR 1925 Lah 174 (174) ** AIR 1931 All 95 (98) : 52 All 761 (DB).

15. AIR 1938 Lah 21 (22).

[**But see** (1905) 8 Oudh 5 (9). (The sum agreed to be paid cannot be a measure of damages.)]

16. (1891) 13 All 200 (205) (DB).

17. AIR 1947 Mad 197 (200) : ILR (1947) Mad 411 (DB).

18. AIR 1925 Oudh 132 (134) ** AIR 1924 Oudh 425 (426) : 27 Oudh Cas 60 ** AIR 1916 Oudh 197 (198) : 18 Oudh Cas 280 ** 1906 Pun Re No. 103, P 363 (365) (DB).

19. AIR 1919 Oudh 104 (105). (34 All 273. **Rel. on.**)

[**See also** AIR 1919 Oudh 267 (269) : 22 Oudh Cas 112.]

20. AIR 1953 Sau 84 (85) (DB).

In the Punjab it has been held that non-payment of consideration *after demand* avoids the mortgage and destroys the mortgage lien and right to possession, in the absence of a stipulation postponing payment(21), unless the mortgagor condones the breach or the non-payment(22). This, however, will not apply where the mortgagor admits receipt of consideration though in point of fact, he did not receive any(23).

As to the burden of proof of non-payment of consideration, see the undermentioned cases(24).

See also S. 60, Note 5.

19. Mortgage without title — Subsequent acquisition — Principle of making good.

A mortgage of property to which the mortgagor has no title creates no lien on the property(1). But if A mortgages land to B to which he has no title, and subsequently acquires that property the principle of equity which regards that as done which ought to be done will be applied and the mortgage will attach to the property(2). But this principle will not apply where the mortgagee *knew* at the time of the mortgage that the property was not then owned by the mortgagor though he expected that the mortgagor would shortly own it(3). Nor will the principle apply so as to compel A who has acquired *other* property, to make good to B out of that property for the loss caused by want of title to the mortgaged property(4).

See also notes on Section 43 and also Section 5, Note 7.

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21. 1907 Pun Re No. 59, P. 274 (277) (FB) ** 1889 Pun Re No. 100, P. 344 (346).

22. AIR 1914 Lah 187 (197, 198) : 1915 Pun Re No. 3 (DB).

23. AIR 1914 Lah 316 (316, 317) : 1914 Pun Re No. 67 (DB).

24. AIR 1964 Raj 72 (74) : ILR (1963) 13 Raj 866 (Mortgagor admitting execution but pleading want of consideration — Burden of proof is on the mortgagor.) ** 1957 All LJ 475 (476) (Mortgage — Burden of proof is on the defendant to prove want of consideration.) ** AIR 1950 Kutch 84 (85) (Admission of receipt of consideration in mortgage deed — Presumption as to payment of consideration can be rebutted by minor heir of mortgagor — Burden on minor heir is discharged when he shows that the admission cannot be safely acted upon.) ** AIR 1949 Ajmer 52 (54) (Execution of mortgage bond proved or admitted — Purchaser from mortgagor alleging want of consideration must prove the same.) ** AIR 1947 Mad 310 (311) (Mortgagor — Consideration — Burden of proof — Suit by mortgagee to recover money on mortgage bond — Allegation that consideration as recited did not pass — Burden of proof is on executant — But burden to prove consideration is on plaintiff so far as persons not parties to deed are concerned.) ** (1918) 50 Ind Cas 71 (73) (Cal) (If the evidence given by mortgagee himself shows that the recital as to payment of consideration in the mortgage bond is false, the mortgagee must prove it by some other cogent evidence.)

Section 58 — Note 19

1. AIR 1957 Pat 706 (709) (DB) (Under-tenure sold in certificate proceedings for recovery of cess — Purchase by patnidar — Subsequent mortgage of under-tenure by under-tenure holder — Mortgagee gets no interest.) ** (1908) 4 Nag LR 28 (30) ** (1866) 1 Agra 286 (287) (DB).

   [**See also** AIR 1959 Pat 239 (242) : 27 Pat 904 (DB) (Compromise between decree-holder and judgment-debtor that if decretal amount was paid within 12 months, sale held by Court to be set aside — If not paid, sale to be confirmed — Compromise held not a mortgage.)]

2. AIR 1915 Mad 972 (974) (DB) (Transferor acquiring title by inheritance.) ** 1900 Pun Re No. 32, P. 112 (114, 115) (DB).

3. AIR 1938 Cal 48 (51) ** AIR 1938 All 22 (25) : ILR (1938) All 63 (DB).

4. 1900 Pun Re No. 32, P. 112 (114) (DB).

20. Mortgage by person having voidable title.

A person who has acquired property under a voidable title can himself give a good title in respect of that property to a *bona fide* purchaser or mortgagee from him who deals for value and has no notice of the defects in the title(1). See also Notes on Section 41.

21. Mortgage by co-owners.

One of the several co-owners, whether tenants in common or joint tenants, can ordinarily mortgage his share(1). If he mortgages the entire property, the mortgage is valid to the extent of his share in the property. If a suit brought by the other co-sharers for a declaration that the mortgage is not binding on their share, is decreed, the property furnished as security for the loan is evidently rendered insufficient and the mortgagee is entitled to sue under S. 68(2). Where a mortgage is executed by several muhammadan co-owners the mere fact that some of them are minors and *pardanashin* ladies, who had not executed the deed in accordance with law cannot make the execution by the rest invalid. The mortgage would be valid and binding against the rest(3). In the case of a mortgage by a *joint* tenant in England it has been held that it severs the joint tenancy so far as it affects that share(4). A coparcener of a joint Hindu family in some provinces cannot alienate even his share of the family properties(5). A mortgage by such coparcener of joint family property, neither for a family necessity nor for discharging an antecedent debt, is void *in toto* and is not binding even on his own share(6).

22. Mortgage by pardanashin woman.

In a transaction with a *purdanashin* woman it must be shown that the transaction was explained to her and its legal effect clearly understood by her(1). Where her legal adviser is himself

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Section 58 — Note 20

1. AIR 1924 Mad 67 (69) (DB).

Section 58 — Note 21

1. AIR 1971 Delhi 316 (318) ** AIR 1954 All 313 (314) AIR 1943 Pesh 17 (20) (He can mortgage only his share — The mortgage money is therefore payable by his share alone — Other co-sharers' shares are not affected.) ** (1906) 8 Bom LR 550 (551) (DB) ** (1903) 2 Low Bur Rul 167 (167) ** (1874) 11 Bom HCR 76 (80) (DB) ** (1911) 12 Ind Cas 858 (858) (Low Bur).

   [See also (1899) 23 Bom 385 (389) (DB) * (1874) 11 Bom HCR 72 (73) (DB) (Assumed.)]
2. AIR 1954 All 314 (314, 315).
3. AIR 1951 All 618 (619, 620) (DB).
4. (1863) 46 ER 746 (752) : 3 De GJ & Sm 541 : 142 RR 161 : *In re Pollards Estate*.
5. See cases cited in Note 7 on Section 7.
6. AIR 1917 PC 41 (42) : 44 Ind App 163 ** (1909) 31 All 176 (217) (FB).

Section 58 — Note 22

1. AIR 1914 PC 95 (96) ** (1954) 94 Cal LJ 39 (42, 43) (DB) (The cloak of protection which the Court puts round pardanashin women is available to them not only in the cases of documents executed by them but also in the cases of transactions like creating a mortgage by depositing title deeds. - Omission to record the certificate that documents were read out and explained cannot be lightly treated.) ** AIR 1944 All 42 (53) (DB) (The mere declaration by the lady, subsequently made, that she had not understood what she was doing, obviously cannot in itself be conclusive. It must be a question whether, having regard to the proved personality of the lady, the nature of the transaction, the circumstances under which it came into existence and the whole history of the parties, it is reasonably established that the transaction was a free and intelligent act of the lady or not.) ** AIR 1933 Oudh 365 (368, 369) : 9 Luck 12 (DB) (In order that a deed executed by a

the mortgagee and obtains a mortgage bond from her, the Court is entitled and bound to examine the transaction with close scrutiny and strictly insist on the mortgagee showing that the client was *fully aware of the meaning and effect* of the deed and that the transaction was a fair and honest one(2).

The circumstances under which a *purdanashin* woman agrees to sell or mortgage property must be carefully examined in order to ascertain that she had independent advice, *that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her*, that nothing was excluded and that there was no undue influence or misrepresentation(3). In a suit to enforce a mortgage-deed executed by a *pardanashin* illiterate lady, therefore, the burden is heavily on the plaintiffs to establish affirmatively that the mortgage bond was explained to and really understood by the executant lady and that she had independent advice or else that she had so much business capacity and strength of will as to dispense with the necessity of independent advice(4). In *Faridunnissa v. Mukhtar Ahmad*(5), Lord Sumner said :

> "Independent legal advice is not in itself essential . . . The real point is, that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it . . . If, however, the settlor's freedom and comprehension can be otherwise established, or if, as is the respondent's case here, the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor, and were then substantially embodied in the deed, there would be nothing further to be gained by independent advice. If the settlor really understands and means to make the transfer, it is not required that someone should have tried to persuade her to the contrary. Again, the question arises how the state of the settlor's mind is to be proved. That the parties to prove it are the parties who set up and rely on the deed is clear. They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution or after it under circumstances which establish adoption of it with full knowledge and comprehension."

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purdanashin lady may be valid it is necessary that she should have intelligently executed it. A lady who was both purdanashin and illiterate was said to have executed a mortgage deed which was in a large measure designed for the payment of her husband's debts and in which property mortgaged belonged exclusively to her having been given along with other property in lieu of her dower. It was in evidence that her husband was a man of violent temper and was addicted to drink and prostitutes. Further he had retained a sufficient portion of his property in his own hands for the payment of his debts. All that was proved was that there was a draft and that it had been read to the lady who instead of applying her mind to the contents of the deed as it was in the end written out, contended herself with an assurance that it was in accordance with the draft. **Held**, that there was no intelligent execution of the deed.) ** AIR 1931 Oudh 103 (105) : 5 Luck 526 (DB) ** AIR 1921 Cal 435 (441) (DB) ** AIR 1918 Cal 557 (560, 561, 562) (DB) ** (1921) 63 Ind Cas 574 (575) (DB) (All) ** (1910) 37 Cal 526 (533) (DB) ** (1910) 6 Ind Cas 689 (691, 692) (DB) (All).

[**See also** AIR 1936 All 858 (859) (DB). (Execution of a document in the case of a purdanashin lady means intelligent execution.)]

Also see S. 122, Note 3 and S. 126, Note 10.

2. **AIR 1914 PC 95 (96)** ** (1868) 1 Beng LR (OC) 31n (33n) ** AIR 1921 Cal 435 (441) (DB).

3. **AIR 1921 PC 118 (122) : 47 Ind App 265.** (On appeal from AIR 1918 Cal 557. AIR 1919 PC 24. **Rel. on.**) ** AIR 1921 Cal 435 (441, 442) (DB) ** (1868) 1 Beng LR (OC) 31n (32n, 33n).

   [**See also** (1868) 1 Beng LR (OC) 28 (33, 34) (DB).]

4. AIR 1958 Orissa 62 (64) : ILR (1958) Cut 67 (DB).

5. **AIR 1925 PC 204 (209, 210) : 52 Ind App 342.**

This view was reiterated in the case noted below(6) See also the undermentioned cases(7)

Where for want of explanation, a *purdanashin* woman did not understand an important feature of the transaction, namely that she was making herself personally liable to pay the money borrowed under a mortgage, it cannot be said that her mind and free consent went with her act in executing the deed The mortgage therefore does not bind her at all(8)

Where the execution of a mortgage deed by a *purdanashin* lady is found not to be her mental or conscious act, there being no room for a semi conscious act, the whole deed is affected and must be set aside If those founding on the deed fail to show that the grantor intelligently understood the deed there is an end of the matter The question of undue influence does not arise(9)

23. Mortgage by beneficiary under trust.

A person having a beneficial interest in property, under a trust deed, is competent to mortgage his interest. In *Hemachandra Roy v Suradhani Debya*(1), their Lordships of the Privy Council said

"No doctrine of the law of India has been indicated to their Lordships which prevents a beneficiary under a trust from dealing with his interest by way of mortgage though it is true enough that in India such an interest is not technically regarded as an equitable estate

24. Mortgage by person incompetent to contract.

A mortgage by a minor who is incompetent to contract is void(1) and the creditor cannot recover the money even under Ss 64 and 65 of the Contract Act which are based on there being a contract between *competent parties*(2) It is also settled that such a mortgage being a nullity is

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AIR 1936 PC 207 (210, 211) : 63 Ind App 326.

7. **(1901) 28 Cal 546 (554, 557) 28 Ind App 71 (PC)** (Deed was quickly read over to the illiterate purdanashin lady at the time of the execution) ** **(1870) 13 Moo Ind App 419 (431, 432) (PC)** ** AIR 1970 Cal 200 (201 to 204) 73 Cal W N 43 Where the executant a Purdanashin lady was found to have independent advice at the relevant time and the transaction was spontaneous and well understood mere execution of the document would only be a physical act) ** AIR 1944 All 42 53 54 (DB) A Purdanashin woman merely because she is purdanashin is not exempt from operation of all legal rules even when it is clearly established by evidence that she is intelligent and competent person capable of understanding and conducting business and that she had voluntarily deliberately intelligently and after fully realising the nature and effect of what she was doing done things on which other people are, under the law entitled to rely) ** AIR 1936 Cal 378 (380 381) (DB) ** AIR 1932 Oudh 123 (129) 7 Luck 454 DB) (Illiterate purdanashin lady deserves special consideration — Independent legal advice is not in itself essential) ** AIR 1915 Oudh 190 (191) : 18 Oudh Cas 147

8. **AIR 1940 PC 134 (135) : 67 Ind App 309.**

9. **AIR 1940 PC 147 (150) : 67 Ind App 377.**

Section 58 — Note 23

1. **AIR 1940 PC 134 (136) : 67 Ind App 309.**

Also see S 5, Note 6

Section 58 — Note 24

1. AIR 1958 Pat 29 (80) (Minor is not competent to make transfer by mortgage — Usufructuary mortgage entered into on behalf of minor by one who is neither the natural or de facto guardian of the minor — It is not void against the minor s and will not bind him) ** AIR 1921 All 326 (327) (DB) (If the minor sues for declaration that the mortgage is void he cannot get such declaration without repaying the amount if he was guilty of fraud) ** (1906) 28 All 508 (515) (DB) ((1903) 30 Ind App 114 PC), Foll)

[See also AIR 1919 All 453 (454) : 40 All 558 (DB).]

2. **(1903) 30 Cal 539 (548) : 30 Ind App 114 (PC).**

incapable of founding a plea of estoppel(3). The undermentioned cases to the contrary(4) are no longer good law. Where *A* and his minor brother *B* were owners of an estate as members of a joint Hindu family, and *A* mortgaged the estate as his own absolute property and got *B's* signature also by way of assent to the mortgage, it was held that so far as *B* was concerned the mortgage was *void*, and of no effect, that since *A* executed the mortgage as absolute owner of the property, he did not act as manager of the family or as guardian of *B*, and that, on that ground also, the mortgage was not binding on *B*(5).

25. Mortgage by one person when binding on another.

Guardians of minors and managers of the estates of disqualified persons can mortgage the property of their wards subject to restrictions imposed by law. Thus, the guardian of a minor under the Hindu law can mortgage the minor's property only in case of necessity and not otherwise(1). A guardian appointed under the Guardians and Wards Act, 1890, can mortgage with the sanction of the Court and not otherwise(2). Such mortgage without the sanction is, however, not void but *voidable* by the minor(3). When he does avoid it he has to restore any benefit he has received thereunder(4).

A *Hindu widow* can mortgage her husband's estate so as to bind the reversioners only in the case of necessity and not otherwise(5). But if the reversioners do not question it, a third party cannot question its validity(6).

An *executor or administrator* may make a valid mortgage binding on the estate(7).

A mortgage by a *partner* of a firm for the benefit of the firm will be binding on the other members of the firm.(8)

As to when a mortgage by a *Hindu father*, or the *manager* of a joint Hindu family, of family

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(See AIR 1959 All 788 (789) (DB) (Executant of mortgage not under general incapacity to contract — Deed becoming void as mortgage deed because of incapacity imposed on him by para 11, Sch 3, Civil P.C., as property is under attachment and sale in execution before the Collector — Held, that under S 65, Contract Act, executant was bound to restore to the lender the advantage received by him.)

3. **AIR 1928 PC 152 (156).**

[See also (1899) 26 Cal 381 (388) (SB). (Confirming on appeal 25 Cal 616, Section 115, Evidence Act, does not aply to the case of minor.]

4. **(1898) 25 Cal 371 (394) (SB)** ** (1895) 21 Bom 198 (201) (DB)

5. **(1912) 34 All 296 (306) : 39 Ind App 109 (PC).**

Section 58 — Note 25

1. **(1899) 26 Cal 707 (711) : 26 Ind App 97 (PC)** ** (1912) 17 Ind Cas 247 (249) (DB) (Lah)

2. AIR 1936 Lah 946 (956) 17 Lah 686 (DB) ** AIR 1927 Mad 233 (235) 50 Mad 217 (DB) ** (1880) 2 All 902 (903) (DB)

[See also (1910) 5 Ind Cas 334 (335) (DB) (Cal) (A mortgage executed by a certificated guardian of a minor's property in pursuance of a permission obtained on misrepresentation of a fact and not by fraud is a valid mortgage, even though the permission ought not to have been granted.)]

Also see S. 7, Note 7 and S. 38, Note 5

3. (1899) 22 Mad 289 (291) (DB) ** (1898) 23 Bom 287 (290) (DB). (Such a transaction was void under Act XX of 1864.) ** (1912) 14 Ind Cas 515 (516) (DB) Cal).

4. (1899) 22 Mad 289 (291) (DB) ** (1912) 14 Ind Cas 515 (516) (DB) (Cal).

5. AIR 1933 Oudh 170 (175) : 8 Luck 538 (DB).

6. AIR 1923 Pat 122 (126, 127) : 2 Pat 217 (DB).

7. **(1878) 1 All 710 (720) (FB).**

8. **(1841) 2 Moo Ind App 487 (500) (PC).** (Such members will be 'mortgagors'.)

property is binding on the other members of the family, see the undermentioned cases(9).

Where certain male members of a family governed by Muhammadan law mortgaged property belonging to themselves and to *purdanashin* members of the family, the mere fact that the ladies left the management of the property in the hands of the males does not show that the male members *represented* the female members in the transaction, it is not therefore binding on them(10). As to when and how far the owner of a *life-estate* can create a charge on the property so as to be binding on the remainderman, see the case noted below(11).

26. Mortgage in favour of minor.

It has been seen in the Notes on S 7 that a minor can be a *transferee* of property. Consequently, a mortgage executed in favour of a minor who has advanced the whole of the mortgage money is enforceable by him or by other persons on his behalf(1). In the undermentioned case(2) it was held that the fact that the minor may have had no power to transfer the mortgage-money and may, on that ground, be entitled to recover it back is not a sufficient ground for holding that a mortgage in favour of a minor cannot be enforced against the property, although the minor may not be entitled to sue the mortgagor on the *personal covenant to pay*, and the advance, by reason of his incapacity to contract, may not be strictly by way of loan.

27. Simple mortgage.

The nature and incidents of a simple mortgage before the Act were stated by Turner, J., of the Allahabad High Court in *Khub Chand v. Kallian Das*(1), as follows:

> "It is an arrangement by which the borrower, binding himself personally for the repayment of a loan, pledges his land as a collateral security. The pledge does not directly confer on the mortgagee the power of sale. In order to make his security available he must obtain an order of a Civil Court directing a sale. The mortgagee, in the case of a simple mortgage, has, in the event of

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9. **(1880) 5 Cal 855 (863) (FB).** (Where the father of a Mitakshara family consisting of himself and a minor son, mortgages ancestral property and there is no proof of legal necessity for the loan or of its immorality or illegality or of any enquiry on the lender's part of the purpose for which it was raised the mortgagee-lender cannot in a suit against the father and the son enforce the mortgage itself.) ** AIR 1968 Cal 213 (215) (DB). (Mortgage by sole coparcener — Mortgagee is entitled to rely on his mortgage against all coparceners born subsequent to date of mortgage.) ** AIR 1929 Pat 130 (133); 7 Pat 798 (DB). (Legal necessity does not mean indispensable or compelling necessity.) ** AIR 1928 Oudh 465 (466); 4 Luck 107 (DB). ** AIR 1926 Oudh 470 (472); 2 Luck 226 (DB). ** AIR 1926 Nag 449 (451). (Cost of necessary litigation is legal necessity.) ** AIR 1922 Pat 122 (144) (DB). ** AIR 1917 Cal 375 (377) (DB). ** (1909) 1 Ind Cas 442 (443) (DB) (Cal). ** (1908) 7 Cal LJ 195 (196) (DB). ** (1907) 34 Cal 184 (188, 189) (DB). ** (1900) 27 Cal 762, 767) (DB). ** (1898) 2 Cal WN 603 (604) (DB). * (1898) 21 Mad 28 (29) (DB). (Hindu father.) ** (1904) 27 Mad 326 (327) (DB). (Do.) ** (1886) 12 Cal 389 (399) (DB). ** (1883) 6 Mad 400 (401) (DB). ** 1881 Bom PJ 293 (DB). ** (1880) 5 Cal 792, 805, 806 (DB). ** (1877) 2 Cal 438 (444, 445) (DB). ** 1864 Suth WR 143 (144) (DB).
10. **(1913) 40 Cal 378 (385) (PC).**
11. AIR 1921 Pat 397 (399) (DB).

Section 58 — Note 26

1. **AIR 1917 Mad 630 (635, 638) : 40 Mad 308 (FB).** (33 Mad 312 **Overruled**.) ** (1965) 69 Cal WN 593 (607). (English mortgage.) ** AIR 1929 All 604 (605) (DB). ** AIR 1919 Pat 561 (563); 4 Pat LJ 682 (DB). ** (1881) 3 All 408 (412) (DB).

   [**See also** (1910) 33 Mad 312 (314) (DB). (A sale in favour of a minor is void.)]
2. **AIR 1917 Mad 630 (635) : 40 Mad 308 (FB).** (Per Wallis, C.J.)

Section 58 — Note 27

1. **(1876) 1 All 240 (244) (FB).**

default being made in the payment of the debt two causes of action the one arising out of the breach of the personal obligation, and the other arising out of the contract of hypothecation

He may put both these causes of action in suit at once or he may pursue the one remedy at one time and the other at another If he sues on the personal undertaking only he obtains what is known as a money decree, if he sues on the contract of hypothecation, he obtains only an order for the sale of the property.

Notwithstanding the pledge the mortgagor remains the owner of the property, and may deal with it in any manner he pleases not inconsistent with the condition of the mortgage Subject to the charge created by the mortgage he may alien his property in part or wholly(2)'

Where a bond hypothecates property for money advanced, it is, in the absence of anything to show the contrary, only in name, but not in its incidents, different from simple mortgage(3)

Clause (b) of the section merely enacts the principles so stated above. The outstanding characteristics of a simple mortgage under the clause are :

(1) Possession remains with the mortgagor(4). (See Note 28)

(2) The mortgagor obliges himself personally that he will repay to the mortgagee the mortgage-money or the amount of the debt(5). (See Note 29)

(3) The mortgagor agrees, expressly or impliedly, that in the event of default in payment the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied in payment of the mortgage-money so far as may be necessary(6) (See Note 30).

The mortgagee has thus a two-fold security for his money, namely the personal obligation and the mortgaged property(7). Thus, where the document consisted of personal liability as well as a right to the creditor to recover the amount by sale of specific immovable property the document

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2. **See also** AIR 1917 Mad 880 (882) (DB) ** **(1896) 19 Mad 249 (252, 254) : 23 Ind App 32 (PC).** (Notwithstanding mortgage, the mortgagor remains the owner of property) ** AIR 1938 Cal 524 (525) (DB) (Do.)

3. (1870) 14 Suth WR 461 (462) (DB)

[**See also** AIR 1915 All 15 (15) (DB) (Hypothecating the interest with a condition, not to transfer it till the debts are satisfied — **Held,** simple mortgage)]

4. **AIR 1927 Rang 33 (36) : 4 Rang 368 (FB)** ** AIR 1940 Lah 486 (489) ILR (1941) Lah 601 (DB) ** (1938) 40 Pun L R 541 (542) (Till it is brought to sale in execution proceedings) ** AIR 1918 Cal 933 (937, 938) 44 Cal 425 (DB) ** AIR 1914 Nag 32 (34) 10 Nag LR 81.

5. **AIR 1939 Rang 321 (322) : 1939 Rang LR 403 (FB)** ** 1965 All LJ 1104 (1107) (Mortgage is a transfer of an interest in property while charge is merely a right to receive payment out of some property In the case of simple mortgage there is a personal liability to pay the debt The liability may be express or implied) ** AIR 1961 MP 216 (220) ILR (1969) MP 1029 (DB) (Mortgage of Jagir lands with possession Jagir resumed by Government under Vindhya Pradesh Abolition of Jagirs and Land Reforms Act — Effect of substituting simple mortgage under S 6(1)(g) of that Act is that the Jagirdar becomes personally liable for the debt) ** AIR 1938 Cal 524 (525) (DB) ** AIR 1915 Nag 63 (64) . 12 Nag LR 19 ** AIR 1914 Mad 114 (115) (DB) ** (1912) 16 Ind Cas 209 (210) (Mad) (DB) ** (1911) 11 Ind Cas 629 (632) (Mad) (DB).

6. **AIR 1939 Rang 321 (322) : 1939 Rang LR 403 (FB).** (The right to bring the land to sale must be worked out in execution proceeding under the supervision of Court) ** 1965 All LJ 1104 (1107) ** ILR (1956) Cut 650 (663) (DB) (Document held not simple mortgage as possession was delivered to mortgagee but there was no right of sale in default of payment) ** AIR 1939 Cal 323 (325) (DB) ** AIR 1938 Cal 524 (525) (DB) ** AIR 1914 Nag 32 (34) 10 Nag LR 81

7. AIR 1969 Manipur 23 ** AIR 1932 Pat 360 (361, 362) (DB) (He cannot satisfy his claim

would be simple mortgage(8)

Rights of mortgagee in case of or otherwise are not spelled out from definition of simple mortgage(9).

28. Possession remains with the mortgagor.

As has been seen already possession with the mortgagor is one of the characteristics of a simple mortgage The security which the mortgagee obtains is that of the mortgaged property and not of the rents and profits arising out of it In the absence of an express stipulation, the rents and profits of the land belong to the mortgagor(1) The fact that possession *subsequently* passes to the mortgagee does not convert a simple mortgage into a usufructuary mortgage(2) The onus of proving what the transaction is by which possession passed to the mortgagee under a simple mortgage is on the mortgagor(3) The mortgagee can set up and plead an agreement to sell under which the possession was given(4). An instrument styled a simple mortgage provided "if the whole or portion of the interest remains unpaid by the due date the mortgagee shall take possession immediately thereafter and enjoy the said properties as a usufructuary mortgagee"

It was held by their Lordships of the Privy Council in a suit for sale on the mortgage on default of payment, that the mortgagee retained the position of a simple mortgagee and was entitled to a decree(5) Where a bond provided for the payment by the mortgagor of the loan advanced by a particular date with interest, and recited that possession had been given to the mortgagee but this was not a fact, it was held that the recital as to possession having been delivered was a mere form

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out of the rents and profits of the mortgaged property nor can he acquire the absolute ownership of the estate by foreclosure) ** AIR 1922 Nag 98 (99) 18 Nag LR 135 (DB) ** (1866) 3 Mad HCR 241 (243 245) (DB) (Both medics may be pursued at the same time although of course the claimant cannot recover more that the amount due on the obligation.)

8. ILR (1985) Kant 1742 (1747)

9. 1991 Har Rent R 634 (639) (Punj & Har)

Section 58 — Note 28

1. **AIR 1962 Mad 59 (70) · ILR (1961) Mad 1158 (FB) ** AIR 1939 Rang 321 (322) · 1939 Rang LR 403 (FB)** 1980 Mah LJ 246 (249) ILR (1982) Bom 427 (The preferential claim of a secured creditor in winding up proceedings in a case where the secured creditor as a mortgagee had advanced mortgage money on a security of a simple mortgage under S 38 T P Act can be available only with respect to the security covered by a mortgage that is to say the right to use and enjoy the property is not hypothecated to the mortgagee, and the income received from mortgaged property would not be a mortgage security since in a simple mortgage the mortgagor continues to enjoy the income of property However a mortgagee may be able to lay its hands over the income of property if a receiver is appointed in the execution of the decree which is a mode of execution) ** AIR 1934 All 772 (775) (DB) (Mortgagee would be entitled to usufruct only when mortgaged property is sold and he purchases that property)

2. AIR 1923 Nag 161 (161).

   [See also AIR 1961 Assam 70 (73) ILR (1961) 13 Assam 101 (DB)

3. AIR 1928 Rang 44 (46) : 5 Rang 668 (DB)

4. **AIR 1927 Rang 33 (35) : 4 Rang 368 (FB).** (AIR 1925 Rang 322. **Overruled.**)

   [See also (1963) 2 Mad LJ 528 (530) (Mortgagee not shown to have got into possession *qua* mortgagee — Oral sale set up disbelieved — No evidence to show case of permissive possession — Possession of mortgagee held adverse.)]

5. **(1911) 10 Ind Cas 272 (272) (PC).**

   [See AIR 1963 Raj 100 (103) ILR (1963) 13 Raj 54 (Document evidencing transaction of loan — Stipulation to repay loan with interest within certain period — In default mort

and that the mortgage was a simple one(6).

Where a simple mortgagee was let into possession in pursuance of a contemporaneous oral agreement to the effect that the mortgagee should go into possession in satisfaction of his claim for the interest agreed upon under the mortgage, it was held that the agreement not being one which contradicted or varied the terms of the mortgage could be proved so as to preclude the mortgagee from claiming any interest in his suit on the mortgage(7).

However it was held in undermentioned case(8) that claim that there was contemporaneous agreement under which mortgagee was to take possession of mortgaged property and that he was in occupation thereof which had the effect of converting simple mortgage into mortgage with possession cannot be allowed as it is hit by S. 92 of Evidence Act.

Where land is mortgaged under a simple mortgage grant of lease by the mortgagor during pendency of a suit mortgage does not violate the doctrine of lis pendens(9).

See also the undermentioned case(10).

29. Mortgagor binds himself personally to pay.

In order to constitute a transaction a simple mortgage, the mortgagor must bind himself to pay the mortgage-money(1). The personal liability may be express or may be a matter of implication(2).

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gagee entitled to enter into possession of property given by way of security for loan — Document is simple mortgage — Express personal covenant to pay not destroyed by stipulation as to possession — Mortgagee entitled to sue for simple money claim based on personal covenant) ** AIR 1932 Lah 630 (632) 13 Lah 508 (DB) (Condition that mortgagee is entitled to take possession only in default of payment, will not by itself convert a simple mortgage into a usufructuary mortgage) ** (1892) 21 Bom 267 (272) (DB). (Special stipulation in a simple mortgage for possession, inserted for securing the due payment of interest during the continuance of the mortgage, does not convert mortgage into a usufructuary one)]

6. (1906) 2 Nag LR 162 (163) (PC).

7. AIR 1928 Mad 233 (233) (DB) ** 1887 All WN 61 (61) (DB).

8. (1988) 101 Mad LW 517 (519)

9. AIR 1973 Bom 75 (80) : 74 Bom LR 666 (FB). (Where a land is mortgaged by way of simple mortgage, grant of lease by mortgagor during pendency of suit by mortgagee does not violate the doctrine of lis pendens.)

10. 1958 Ker LT 777 (778) (Illom granting kanom demise to A — Puramkadam for money lent by kanomdar A also executed on same day by the illom — Puramkadam providing that A was to appropriate from purappad payable to illom interest payable by illom for money rent — **Held** puramkadam was only a simple mortgage of jenmom rights and the fact that the illom allowed him to appropriate interest from purappad would not make it a usufructuary mortgage)

Section 58 — Note 29

1. AIR 1969 Manipur 23 (A document reciting the borrowing of money and mortgaging cetain land and promise to pay within certain period amounts to a simple mortgage.) ** AIR 1992 Kant 388 (390) (Mortgagor agreeing to give possession of property under certain circumstances — Mortgagor not binding himself to pay mortgage money — Absence of personal obligation — It is equitable mortgage and not simple mortgage) ** 1965 All LJ 1104 (1107) ** AIR 1961 Assam 70 (73) ILR (1961) 13 Assam 101 (DB) ** AIR 1961 Madh Pra 216 (220) ILR (1960) Madh Pra 1029 (DB) ** AIR 1918 Mad 997 (997) (DB). (Kootchit deed is a mortgage — The mere fact that there was no express covenant to pay, when one must necessarily be implied, will not affect the construction of the document) ** AIR 1918 Mad 558 (559) (DB) (A stipulation for repayment of a certain amount within a specified time involves a personal covenant to pay.)

2. 1965 All LJ 1104 (1106) ** AIR 1952 Kutch 65 (66) ** AIR 1941 Lah 274 (276) (DB)

In England a mortgage (analogous to the English mortgage defined in clause (e)), involves a personal covenant on the part of the mortgagor to pay the mortgage-money. In *King v. King*(3) it was held that every mortgage implied a loan and every loan a debt(4). *Prima facie* even though there is no express covenant to pay, the borrower remains personally liable to pay off the mortgage(5). In *Ram Narain Singh v. Adhindranath*(6), it was held by their Lordships of the Privy Council that in considering the question whether there is a personal liability to pay, "it must be borne in mind—

(1) that a loan *prima facie* involves such a personal liability(7),

(2) that such a liability is not displaced by the mere fact that security is given for repayment of the loan with interest(8); but

(3) that the nature and terms of such security may negative any personal liability on the part of the borrower."

See also the undermentioned cases(9) to the same effect.

It follows that a personal covenant to repay the mortgage-money must be *presumed* to exist in all mortgages unless thre is something in the nature or terms of the mortgage to negative it(10). A

(Implied.) ** AIR 1937 Rang 151 (153) : 14 Rang 685 (Undertaking to redeem mortgage if mortgagee requires it — **Held**, covenant to pay implied.) ** AIR 1932 Lah 164 (166) : 13 Lah 259 (DB) (Implied.) ** AIR 1924 Nag 97 (98) : 20 Nag LR 46 (Deed ran as follows :— 'If I do not pay in fifteen months I shall go on paying interest as long as I remain responsible for the debt.' — **Held**, covenant to pay implied.) ** (1906) 4 Cal LJ 510 (516) (DB) (Implied.) ** (1870) 4 Beng LR (App) 48 (49) (Promise to repay expressed.) ** (1911) 9 Ind Cas 660 (661) (DB) (Cal) (Do.)

3. (1735) 24 ER 1100 (1101) : 3 P Wms 358.

4. See (1813) 12 RR 82 (85) : 2 Ball and Bey 224 (Goodman v. Grierson (King v. King : 1735) 3 P Wms 358, Followed.) ** (1843) 62 RR 316 (323, 326) : 4 QB 182 (Yates v. Aston).

5. AIR 1944 Nag 289 (290, 291) : ILR (1944) Nag 568 (FB). (Whether the mortgage is simple or by a conditional sale, the mortgagor is bound by the contract in the first instance to pay the debt.)

[See (1882) 52 LJ Ch 333 (336) : 48 LT 95 (Sutton v. Sutton) (Every mortgage implies a personal liability to repay the amount advanced.) ** (1910) 8 Ind Cas 302 (304) (Mad) ** AIR 1925 Mad 991 (992) (The question whether a mortgagor binds himself personally to repay the loan or not "must depend on the construction of the mortgage bond in each case and the intention of the parties as evidenced by the circumstances.")]

6. AIR 1916 PC 119 (120) : 44 Ind App 87 (On rehearing of AIR 1916 PC 169.)

7. See also AIR 1939 Pesh 41 (44) (DB) ** AIR 1940 Lah 486 (489) : ILR (1941) Lah 601 (DB) ** (1873) 19 Suth WR 281 (281) (DB) ** AIR 1929 Pat 605 (608) : 8 Pat 16 (DB) ** (1906) 4 Cal LJ 246 (248) (DB) ** (1909) 1 Ind Cas 442 (443) (DB) (Cal) ** (1896) 5 Cal LJ 287 (288, 289) (DB).

8. See also (1906) 29 Mad 491 (495) (DB) (Where a deed provided that 'the mortgagor will pay the money on the liability of the mortgaged property — **Held**, that the personal liability of the mortgagor was not excluded by the terms of the deed.) ** AIR 1916 Mad 13 (14) (DB). (Hypothecation does not bar the personal liability.) ** (1906) 4 Cal LJ 510 (515, 516) (DB).

9. AIR 1963 Raj 100 (102) : ILR (1963) 13 Raj 54 ** AIR 1940 Lah 486 (486) : ILR (1941) Lah 601 (DB) ** AIR 1924 Nag 97 (97) : 20 Nag LR 46 (AIR 1915 Nag 63 : 12 Nag LR 19 held no longer good law.) ** AIR 1922 Nag 98 (99) : 18 Nag LR 145 (DB).

10. AIR 1961 Punj 477 (480) ** AIR 1957 Pat 575 (578) : 36 Pat 323 (DB) (Overruled on another point in AIR 1958 Pat 630 (FB).) ** AIR 1935 Pesh 10 (10) ** AIR 1932 Lah 164

Welsh mortgage in England(11) or a usufructuary mortgage(12) or a mortgage by conditional sale(13) is of such a nature that there is no personal covenant to pay the mortgage-money, and even a sentence in such a mortgage that the mortgagor will pay the money cannot be taken to import a personal covenant to pay. Some such sentence is found in almost all mortgages, the test in each case is what is the remedy provided for in the deed for the satisfaction of the debt(14). As regards the *terms* of a document negativing a personal liability, the general rule is that a covenant to pay the debt in a *particular manner* will exclude the general personal liability for such payment(15)— *expressum facit cessare tacitum* In the undermentioned case(16) where the mortgagor covenanted to pay the debt *out of the hypothecated estate*, it was held by their Lordships of the Privy Council that there was no personal covenant to pay Where the mortgagor stipulated that he will pay the mortgage-money on a particular date and that *if the property was sold for arrears of revenue*, then the mortgagee could recover from the person or other property of the mortgagor, it was held that there was no personal covenant to pay(17) Where the remedy provided in the mortgage was *foreclosure* of the mortgage in default of payment, it was held that there was no personal liability(18). But where a mortgage deed contained an express covenant to pay personally the option given to the mortgagor of repaying the loan by selling the mortgaged property or a provision in the deed that the mortgagee would be entitled to bring the property to sale was held not to exclude the personal covenant(19) See

(166) 13 Lah 259 (DB) ** (1908) 30 All 388 (390) (DB) ** (1892) 14 All 513 (519) (DB) (Mortgagee must however sue for his remedy against the property first)

Also see S. 68, Note 2.

11. (1745) 26 ER 962 (963) 3 Atk 278 (280) Lawely v Hooper

12. **AIR 1916 PC 119 (120) : 44 Cal 388 : 44 Ind App 87** ** AIR 1959 Madh Pra 178 (179) (but the nature of the transaction i e , whether it is a simple or usufructuary mortgage depends on construction of the deed embodying the transaction If personal covenant can be made out from terms the mortgagee can sue for recovery of mortgage money notwithstanding the parties have described the transaction as usufructuary mortgage) ** AIR 1957 Pat 575 (578) 36 Pat 323 (DB) (**Overruled** on another point in AIR 1958 Pat 630 (FB)) ** **(1900) 22 All 149 (159) : 27 Ind App 58 (PC)** ** AIR 1940 Lah 486 (489) ILR (1941) Lah 601 (DB) ** **AIR 1932 Lah 164 (167) : 13 Lah 259 (DB).**

Also see S. 68, Note 2.

13. **AIR 1929 Nag 254 (257) : 25 Nag LR 187 (FB).** (Lahangahan mortgage which is on the same footing as a mortgage by conditional sale) ** AIR 1959 Madh Pra 178 (179) ** AIR 1957 Pat 575 (578) 36 Pat 323 (DB) (**Overruled** on another point in AIR 1958 Pat 630 (FB)) ** AIR 1937 Oudh 517 (519) (DB) ** (1909) 12 Oudh Cas 275 (277)

[**See also** AIR 1922 Nag 119 (119) 19 Nag LR 67 (Lahangahan mortgage does not involve personal liability)]

Also see S 68, Note 2.

14. AIR 1959 Madh Pra 178 (179) ** (1955) 21 Cut LT 459 (461) (DB) ** AIR 1937 Oudh 517 (519) (DB)

15. **(1895) 22 Cal 434 (444) : 22 Ind App 68 (PC)** ** (1955) 21 Cut LT 459 (461) (DB) ** **AIR 1929 Nag 254 (256) : 25 Nag LR 187 (FB).** (Lahangahan mortgage — Remedy for foreclosure expressly given — Implied covenant of personal liability does not exist) ** AIR 1940 Lah 486 (489) ILR (1941) Lah 601 (DB) (Agreement to repay the loan out of particular fund and in a particular manner — **Held,** no personal liability ** (1910) 8 Ind Cas 302 (304) (Mad) ** (1857) 108 RR 810 (815) 26 LJ Ex 150 Mathew v Black More.

16. **(1883) 10 Cal 740 (742) : 11 Ind App 83 (PC).**

17. (1889) 16 Cal 540 (543, 544) (DB). (10 Cal 740 (PC), **Foll.**)

18. AIR 1915 Nag 63 (64) : 12 Nag LR 19

19. AIR 1949 Nag 354 (356, 357) ILR (1949) Nag 284 (DB)

also the undermentioned cases(20)

The words "we shall, on paying the money advanced, recover the property" have been interpreted by the Madras High Court as containing a promise to pay the amount(21)

It may be noted that even if there be no personal covenant to pay, the mortgagor may become personally liable under Section 68(22)

A suit to enforce the personal liability on the personal covenant to pay in a mortgage deed is not governed by Art 62 of the Limitation Act of 1963 (which corresponded to Art 132 of the Act of 1908 which has now been repealed)(23) A right to recover money from the mortgagor personally under a covenant to pay and the right to realise the security are independent and distinct causes of action A mortgagee wishing to enforce the personal liability is not bound to sue also for the realisation of the security(24).

[**See also** AIR 1955 Vindh Pra 4(5) (Merely because the document contains a term under which the mortgaged property is to be deemed to have been sold outright on failure of payment the mortgage does not become mortgage by conditional sale.)

20. **(1913) 35 All 164 (166) (FB)** ** AIR 1963 Raj 129 (131, 132) ILR (1963) 13 Raj 334 (An agreement in a usufructuary mortgage to pay interest or to the fact that the mortgagor has undertaken not to claim the property until the debt is paid cannot by itself amount to a promise by the mortgagor to pay the mortgage money personally.) ** AIR 1963 Raj 100 (103) ILR (1963) 13 Raj 54 (Document evidencing transaction of loan — Stipulation to repay loan with interest within certain period — In default mortgagee entitled to enter into possession of property given by way of security of loan — Document is simple mortgage — Express personal covenant to pay not destroyed by stipulation as to possession — Mortgagee entitled to sue for simple money claim based on personal covenant.) ** AIR 1959 Madh Pra 178 (179, 180) (Stipulation that borrowers would pay mortgage money after two years and take back the land but if they fail to do so the creditor would continue to remain in possession and enjoy the profits in lieu of interest until the amount is repaid implies no covenant enforceable personally against the borrowers.) ** 1935 OWN (199) (1200) (Deed stating executant had borrowed certain sum at a certain rate of interest and that he promised to repay it in 3 years — In case of default the amount of the deed which was of further charge would be borne by the mortgaged property under previous deeds and would be payable at the time of the redemption of the said mortgages — **Held,** there was only a promise for payment as is to be found in every loan transaction and not a personal liability as is contemplated in S 58.) ** AIR 1959 Mad 847, 848, (DB)

21. **(1903) 27 Mad 526 (527) (FB)** ** 1968-1 Mad LJ 139 (144)

[**See also** (1964) 77 Mad LW 666 (668) (Clause in usufructuary mortgage that on the money being paid by particular date the land and the mortgage deed would be returned to the mortgagor but if there is default on that date money may be paid on the corresponding date of any following year and on payment the land and the deed would be handed over to the mortgagor by the mortgagee held contained a personal covenant to pay 27 Mad 526 (FB) Foll.) ** AIR 1946 Mad 312 (313) (Oth — Clause "I shall pay the amount and redeem" amounts to a personal covenant to pay the oth amount enabling the mortgagee to bring a suit for sale.) ** AIR 1924 Mad 513 (514) (DB) (In a usufructuary mortgage deed there was this clause "you shall yourself enjoy the said land from this date in lieu of interest and having paid the amount of the principal by 7th July, 1917 having endorsed on this deed I shall enjoy the said land, if the amount be repaid at the cultivation season of any Ani month after due date on which it falls due the same must be received in full and the land restored to my possession" — It was held that there was a personal covenant to pay.)]

22. **AIR 1916 PC 119 (120) : 44 Cal 388 : 44 Ind App 87** ** AIR 1963 Raj 100 (102) ILR (1963) 13 Raj 54 ** AIR 1961 Punj 477 (480) (Case under S 68(1)(d).) ** AIR 1924 Pat 91 (93) (DB) ** AIR 1923 Rang 242 (243, 244) ** (1886) 12 Cal 389 (395) (DB)

23. **(1885) 7 All 502 (505, 506) : 12 Ind App 12 (PC).**

24. **AIR 1935 Lah 672 (676) : 16 Lah 640 (DB).**

A covenant to pay does not run with the land and the assignee of the equity of redemption is not personally liable to the mortgagee for the amount(25)

30. "Mortgagee shall have a right to cause the mortgaged property to be sold".

In a simple mortgage, the interest transferred is the right to have the mortgaged property sold in satisfaction of the debt(1) The agreement by the mortgagor that, in the event of his failing to pay the mortgage-money according to contract, the mortgagee shall have a right to cause the mortgaged property to be sold, need not be express(2) It may be implied from the words used(3). It may be implied when there is a *personal covenant* to pay the mortgage-money(4), though this is not necessarily so in all cases. Words of hypothecation generally import the right of the mortgagee to bring the mortgaged property to sale for the satisfaction of the claim(5) In the undermentioned case(6) where in a document purporting to be a mortgage, there was a personal covenant to pay but the language in other parts of the document showed that there was no covenant, express or implied, that the mortgagee shall have a right to cause the mortgaged property to be sold, it was held that it was not a simple mortgage and that the mortgagee had no right to bring to sale the mortgaged property. Where the terms of the document ran as follows . "I mortgage my field, the same shall stand mortgaged so long as the money is not paid off If repayment is not made within time I shall pay compound interest until liquidation", it was held that an agreement that the creditor may get the land sold was implied(7) Where the mortgagor expressly agreed to pay the mortgage money with interest at a specified rate and in case of default of the mortgagee was given two options namely either to recover the money with interest at a higher rate or to get possession of mortgaged property in lieu of the principal money, it was held that the mortgage was a simple mortgage in which a right of sale was impliedly given to the mortgagee(8).

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25. AIR 1930 Nag 139 (142) : 26 Nag LR 312.

Also see Section 68, Note 8

Section 58 — Note 30

1. AIR 1968 Pat 222 (226) ILR 46 Pat 1202 (DB) ** 1965 All LJ 1104 (1107) ** AIR 1916 Pat 11 (13) : 1 Pat L Jour 563 (DB) ** 1894 All WN 57 (58) (DB).

   [See AIR 1917 All 149 39 Ind Cas 119 (120) (DB) (Under the law which existed prior to the passing of the T P Act (1882), the mortgagee could proceed against either the hypothecated property or any other property of the mortgagor.)]

2. 1965 All LJ 1104 (1107) ** AIR 1951 Pat 327 (329) (DB) (Any words placing the property as security for the debt are sufficient to imply a power of sale) ** AIR 1937 Mad 148 (149) ** AIR 1915 Mad 370 (371) (DB) ** AIR 1914 Mad 333 (333) (DB) ** (1912) 16 Ind Cas 209 (209) (DB) ** (1912) 16 Ind Cas 236 (236, 237) (DB) (Mad) (Even in mortgages before the Act the power of sale was incidental to a simple mortgage) ** (1911) 9 Ind Cas 828 (829) (DB) (All) ** (1911) 9 Ind Cas 163 (163) (DB) (Mad). (Hypothecation bond executed before Transfer of Property Act — No express provision for sale — Simple mortgage.) ** (1911) 11 Ind Cas 629 (632) (DB) (Mad).

3. ILR (1956) Cut 650 (663) (DB) ** AIR 1951 Pat 327 (329) ** AIR 1922 Pat 529 (532) : 1 Pat 387 (DB) (The word bandhak implies a mortgage) ** AIR 1916 Pat 11 (13) 1 Pat L Jour 562 (DB)

4. **AIR 1947 Lah 40 (47) : ILR (1946) Lah 805 (DB) ** (1904) 27 Mad 526 (528) (FB) ** AIR 1934 Oudh 255 (256) . 10 Luck 10 (DB) ** AIR 1929 Lah 289 (290) ** AIR 1914 Nag 32 (35, 36) : 10 Nag LR 81.**

5. (1899) 12 CPLR 26 (33) ** (1911) 9 Ind Cas 828 (829) (DB) (All) ** (1910) 6 Nag LR 20 (24).

6. **AIR 1938 All 418 (421) : ILR (1938) All 714 (FB)**

7. AIR 1914 Nag 32 (35) : 10 Nag LR 81.

8. AIR 1958 Punj 309 (340) (DB) (Even assuming it was anomalous mortgage the mortgagor

A mortgagee is normally entitled to realise the entire amount from any and every bit of the mortgaged property and the liability cannot be apportioned pro rata between ancestral and non-ancestral character of the land mortgaged(9)

The words *rehan, arh* and *mustagharaq* import a power of sale(10) but not the words *muakhaza*(11), *dastawez makfuli*(12), *tamassuk*(13) or *makbuza*(14)

The right to "cause the mortgaged property to be sold", means a right to cause the property to be sold *through the intervention of the Court*(15) The mortgagee cannot exercise the power of sale himself. Sale of mortgaged land by mortgagee — mortgagee can confer no better title than what he had under deed of mortgage i e. right of mortgagee(16) As to the procedure to be followed for bringing the mortgaged property to sale, see O 34 of the Code of Civil Procedure

The mortgagee, under a simple mortgage, has a right *only* to cause the mortgaged property to be sold and not to claim *possession* of the property A decree therefore which gives possession to the mortgagee on default of payment is illegal(17)

It is specific kind of right which could be exercised against mortgagors However, mortgagors of property under simple mortgage would not acquire interest of mortgagee on paying off the debt(18).

31. Mortgage by conditional sale.

(A) Legislative history.

Mortgages by conditional sale under various names such as *bai-bil-wafa, kutkubala* and *lahan gahan*(1) have been a very common form of mortgage in India from very early times It is not necessary in such mortgages that the mortgagor should make himself liable for the repayment of the loan(2) Nor is the mortgagee entitled to possession in such cases, though generally possession

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having clearly undertaken to repay the amount with interest the mortgagee was entitled to file a suit for the recovery of the money and to have the property sold)

9. 1969 Cur LJ 804

10. 1894 All WN 57 (58) (DB) ** (1891) 13 All 28 (41 43) (DB) ** (1913) 20 Ind Cas 870 (871) (Oudh) (Mustagharaq) ** (1913) 19 Ind Cas 658 (660) (DB) (All) ** (1913) 19 Ind Cas 661 (662) (DB) (All).

11. (1912) 34 All 446 (449) (DB) (Merely denotes a charge) ** (1890) 13 All 28 (42) (DB) (Do.)

12. (1912) 15 Ind Cas 851 (851) (DB).

13. (1912) 16 Ind Cas 638 (639) (All).

14. AIR 1917 All 439 (440, 441) · 38 All 361 (DB)

15. **(1896) 19 Mad 249 (252) : 23 Ind App 32 (PC) ** AIR 1939 Rang 321 (322) : 1939 Rang LR 403 (FB) ** (1890) 13 All 28 (48) (DB)**

16. (1991) 1 Kant LJ 597 (597).

17. **(1896) 19 Mad 249 (254) : 23 Ind App 32 (PC).**

Also see S. 67, Note 13 and S. 76, Note 4

18. 1988 Jab LJ 653 (655) (Madh Pra)

Section 58 — Note 31

1. **(1882) 4 Mad 179 (183) (FB).** (Innes, J , **Dissenting.**) ** AIR 1949 Nag 34 (36) (DB) (Lahangahan mortgage — Essence of, is foreclosure whether there is a personal covenant or not) ** **AIR 1929 Nag 254 (255) : 25 Nag LR 187 (FB).** (Lahangahan) ** AIR 1927 All 137 (140) · 48 All 787 (DB) ** (1877) 2 Bom 231 (238) (DB) (Lahangahan) ** (1883) 7 Bom 532 (535) (DB). (Do) ** (1868) 5 Bom HCR (AC) 109 (115) (DB) (Bai-bil-wafa.)

2. **(1900) 22 All 149 (159) : 27 Ind App 58 (PC) ** (1882) 4 Mad 179 (183) (FB).**

also is transferred(3). Where he is put in possession under the terms of the deed, he is entitled, if wrongfully dispossessed, to recover possession even though his right to foreclosure is barred, but such possession is only that of a mortgagee(4) When a mortgage by conditional sale is effected *without delivery* of possession but subsequently with the consent of the mortgagor, the mortgagee obtains possession, this will not change the nature of the mortgage and convert it into a usufructuary mortgage(5). However, if a mortgage is by way of conditional sale it does not necessarily mean that it is not usufructuary mortgage If the ingredients of usufructuary mortgage are also satisfied by way of delivery of possession, it may also amount to usufructuary mortgage The two mortgages are not necessarily mutually exclusive and one mortgage can be of both types(6).

The nature of a mortgage by conditional sale, as it was common in India before the Act, was described by Macpherson in his work on *Mortgages* as follows

> "The mortgage by conditional sale '*katkubala* or '*bai-bil-wafa* is that in which the borrower not making himself personally liable for the repayment of the loan, covenants that on default of re payment of the principal and interest on a certain date, the land pledged shall pass to the mortgagee.'

In *Thumbusawmy v Hossain Rowthen*(7) their Lordships of the Privy Council, after referring to the above passage in Macpherson on *Mortgages*, observed

> "Such a mortgage might or might not be usufructuary If usufructuary, it usually contained a stipulation that the usufruct should be in lieu of interest . The essential characteristic of a mortgage by conditional sale was that on the breach of the condition, the contract executed itself, and the transaction was closed and became one of absolute sale without any further act of the parties or accountability between them.(8)

In *Mt Bakhtawar Begam v Hussaini Khanum*(9) it was again observed, that a mortgage by conditional sale was a form of security recognised throughout India, that the form which it usually took was, for the mortgagor to execute a deed of sale in respect of the mortgaged property in favour of the mortgagee, who on his side, executed an agreement covenanting that on liquidation of the debt according to the terms of the contract the sale would be cancelled and he would reconvey the property to the mortgagor, and that on breach of the condition relating to re-payment the contract executed itself and the transaction became one of absolute sale.

It would thus be seen that under the ancient law of India there was no right of redemption in a mortgage by conditional sale after default was made in payment as agreed upon.(10) The sale simply became absolute, and the mortgagor lost his property (11) It was necessary for the mortgagor if he wished to save his estate from forfeiture, to pay or tender the amount due within the specified time.

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3. (1893) 16 Mad 64 (66) (DB).
4. AIR 1933 Bom 439 (442, 443) 57 Bom 593 (DB) (Per Rangnekar, J) ** (1899) 27 Cal 185 (187) (DB).
5. AIR 1917 Cal 217 (218) (DB).

   Also see S. 76, Note 5
6. 1985 Guj LH 1207 (1209)
7. (1875) 1 Mad 1 (16) : 2 Ind App 241 (PC).
8. AIR 1926 All 493 (496) : 48 All 302 (DB).

   [See also AIR 1933 Lah 174 (175).]
9. AIR 1914 PC 36 (36) : 36 All 195 : 41 Ind App 84.
10. (1880) 2 All 633 (635) (DB).

    [See also AIR 1949 Kutch 10 (11)]
11. AIR 1916 Mad 841 (844) . 39 Mad 1010 (DB) ** AIR 1914 Mad 42 (43) : 38 Mad 667 (DB).

The first attempt to relieve the mortgagor from the severity of this rule was made in Bengal by Regulation XVII of 1806 It introduced a modification of the strict rights given by the contract analogous to, though not identical with, that which Courts of Equity imposed on mortgagees in England The seventh section extended the period within which the mortgagor might redeem, to any time within one year from and after the application of the mortgagee to the Court under S 8 The latter provided that the mortgagee desirous of foreclosure on the expiration of the stipulated period or at any time subsequent before the sum lent was repaid, should after demanding payment from the borrower, apply for that purpose to the Court, which would cause a copy of the application to be given to the mortgagor and notify to him that if he did not redeem the property within one year from the date of the notifications, the mortgage would be finally foreclosed and the conditional sale made absolute. If anything be due on the mortgage and the mortgagor made an insufficient deposit and a *fortiori* if he made no deposit at all, the right of redemption was gone at the expiration of the year of grace **(12)** But the title of the mortgagee however was even then not complete he had to bring a regular suit to recover possession if he was out of possession or to obtain a declaration of his absolute title if he was in possession **(13)** In such a suit the mortgagor was entitled to contest on any sufficient grounds, the validity of the conditional sale or the regularity of the proceedings taken under the Regulation in order to make it absolute **(14)** He could also allege and prove that nothing was due or that the deposit, if any, which he had made was sufficient to cover what was due But the issue so far as the right of redemption was concerned was whether at the end of the year of grace anything remained due to the mortgagee and if so whether the necessary deposit had been made

If that was found against the mortgagor, the right of redemption was gone **(15)** The functions of the Judge under S 8 of the Regulation were purely ministerial **(16)** and the provisions as to service of notice and the furnishing of a copy of the application to the mortgagor were imperative and had to be strictly followed, being intended for the protection of the mortgagor **(17)**

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12. (1906) 3 All LJ 531 (533) ** (1868) 3 Agra 358 (363) (DB) ** (1867) 8 Suth WR 476 (477) (DB)

Also see S 60, Note 1

13. (1883) 12 Cal LR 479 (482, 483) (DB)

14. (1868) 3 Agra 358 (362, 363)

15. **(1865) 10 Moo Ind App 340 (348, 349, 350, 351) (PC).**

[See also (1878) 3 Cal 397 (405) : 5 Ind App 19 (PC).]

16. **(1865) 10 Moo Ind App 340 (350) (PC) ** (1896) 23 Cal 228 (244) : 22 Ind App 183 (PC) ** (1878) 3 Cal 397 (405) : 5 Ind App 18 (PC).**

17. **(1884) 11 Cal 111 (117) : 11 Ind App 186 (PC)** ** (1877) 2 Cal 311 (317, 319) (DB) (Service of copy of application) ** (1873) 20 Suth WR 363 (364) (DB) (Failure in furnishing the mortgagor with a copy of the application to foreclose) ** (1872) 15 Suth WR 263 (263) (DB) (Omission to give notice) ** (1867) 7 Suth WR 123 (124) (DB) (Under Regulation XVII of 1806 the Zillah Judge is judicially required to see that it is proved before him that the notice has been duly served, and to record a proceeding certifying that all that Regulation XVII of 1806 required has been duly carried out and also any elucidating facts necessary to be recorded as occurring within the year of grace) ** 1864 Suth WR 49 (50) (DB) ** (1911) 12 Ind Cas 530 (531) (Lah) (Defective notice) ** 1912 Pun Re No 59 (DB) (The omission to affix the seal of the Court on the foreclosure notice is fatal to a suit by the mortgagee.)

[See however 1864 Suth WR 36 (36) (DB) (Copy of the application not furnished — **Held,** whatever effect might have been given to the irregularity at or soon after the time when it occurred had long since been waived by mortgagor's conduct in allowing the mortgagee to build houses on the land and use them without objection)]

As to other decisions under this Regulation, see the undermentioned cases.(18)

Regulation XVII of 1806 was applicable only to Bengal but it was adopted even in Provinces

18. **(1867) 7 Suth WR 66 (66) : 4 Moo Ind App 392 (PC) ** (1889) 16 Cal 693 (701) : 16 Ind App 85 (PC) ** (1857-1859) 7 Moo Ind App 323 (354) (PC).** (Mortgage under the Regulation were redeemable and were subject to foreclosure) **** (1886) 12 Cal 583 (587, 589) (FB) ** (1868) 1 Beng LR 14 (16, 22) (FB).** (The year mentioned in S 8 of the Regulation is to be reckoned from the date of the service of the notice of foreclosure under that section) ** AIR 1929 Pat 537 (545) (DB) ** AIR 1926 Lah 302 (302) (DB) ** AIR 1926 All 755 (756) 48 All 643 (DB) ** AIR 1923 Nag 274 (277, 280) ** AIR 1914 Lah 396 (397) 1914 Pun Re No 57 (DB) ** (1907) 4 All LJ 717 (720) (DB) ** (1907) 29 All 145 (147) (DB) (If the parwanh is otherwise correct it does not become invalid only because the Judge has initialled it instead of signing in full 16 All 59 **Overruled** on this point) ** 1907 Pun Re No 46 P 191 (192) 1908 Pun LR No 192 ** 1907 Pun Re No 70 P 380 (382) 1908 Pun LR No 38 (DB) ** 1907 Pun Re No 105 P. 491 (493) (DB) ** 1906 Pun LR No 74 P. 222 (223) (DB) ** 1906 Pun Re No 65, P 237 (238) 1907 Pun LR No 72 ** 1906 Pun Re No 119 P 457 (458) 1907 Pun LR No 81 (DB) ** (1906) 2 Nag LR 113 (114) ** (1906) 3 Nag LR 97 (100) (Regulation makes no reference whatever to costs) ** (1893) 16 All 59 (65) (Petition for foreclosure made before the date of payment Foreclosure proceedings invalid) ** (1893) 20 Cal 269 (271, 272) (DB) ** (1889) 12 All 189 (192) (DB) (Notice not signed by the Judge but by munsarim — Foreclosure proceedings void ab initio) ** (1889) 11 All 164 (171) ** (1888) 15 Cal 357 (361, 362) (DB) ** (1887) 14 Cal 599 (604) (DB) ** (1887) 14 Cal 451 (456) (DB) ** (1886) 8 All 388 (392) (DB) ** (1886) 12 Cal 138 (140) (DB) ** (1886) 13 Cal 50 (52) (DB) (A notice of foreclosure not signed by the Judge but signed by the Sheristadar of the Court and bearing the seal of the court is not valid under S 8 of Regulation XVII of 1806) ** (1885) 11 Cal 341 (342) (DB) (The purchaser at a sale in execution of a money decree held before the institution of the foreclosure proceedings is entitled to a notice though the sale is confirmed and the sale certificate issued later on) ** (1885) 12 Cal 614 (619) (DB) ** (1884) 6 All 344 (350) (DB) ** (1882) 4 All 276 (277) (DB) ** (1882) 4 All 332 (333) (DB) ** (1881) 3 All 413 (414) (DB) (The holder of a decree for money does not merely because he has attached land belonging to his judgment-debtor while it is a subject to conditional mortgage become the 'legal representative' of the mortgagor within the meaning of S 8 of the Regulation) ** (1881) 3 All 509 (514) (DB) ** (1881) 3 All 408 (411) (DB) ** (1879) 2 All 313 (314) (DB) ** (1877) 1 All 499 (501) (DB) ** (1875) 14 Beng LR 315 (318) (DB) ** (1875) 15 Beng LR 34n (35n) (DB) ** (1875) 15 Beng LR 28 (33) (DB) ** (1875) 25 Suth WR 139 (139) ** (1874) 22 Suth WR 168 (168) (DB) ** (1874) 22 Suth WR 475 (476) (DB) (A second mortgagee under a mortgage bond is entitled to notice of foreclosure under the Regulation.) ** (1874) 22 Suth WR 539 (540) (DB) ** (1873) 19 Suth WR 170 (170) (DB) ** (1873) 19 Suth WR 274 (275) (DB) ** (1873) 5 NW PHCR 29 (30) (DB) (Sale could become absolute by agreement and act of parties without following the procedure under the Regulation) ** (1873) 20 Suth WR 176 (176 177) (DB) ** (1872) 17 Suth WR 230 (230) (DB) ** (1871) 3 NWPHCR 176 (177) (DB) ** (1871) 3 NWPHCR 325 (327) (DB) ** (1871) 3 NWPHCR 35 (36, 37) (DB) ** (1870) 14 Suth WR 423 (424) (DB) ** (1870) 5 Beng LR 389 (393) (DB) ** (1870) 2 NWPHCR 444 (445) (DB) ** (1869) 11 Suth WR 544 (546) (DB) (Purchaser from mortgagor is his legal representative) ** (1869) 1 NWPHCR 81 (84) (DB) ** (1869) 3 Beng LRAC 172 (173) (DB) ** (1869) 12 Suth WR 105 (107) (DB) ** (1868) 10 Suth WR 359 (360) (DB) ** (1868) 3 Agra 129 (130) (DB) ** (1868) 3 Agra 184 (185) (DB) ** (1867) 2 Agra 176 (177) (DB) ** (1868) 3 Agra 358 (359) (DB) ** (1868) 3 Agra 307 (308) (DB) ** (1868) 10 Suth WR 326 (327) (DB) ** (1868) 10 Suth WR 478 (480, 482) (DB) ** (1865) 1 Beng LR (SN) 3a (3a) (DB) (Purchaser from mortgagor comes within category of legal representatives under the Regulation) ** (1866) 6 Suth WR 230 (231) (DB) ** (1865) 3 Suth WR 230 (231) (DB) ** (1864) Suth WR 285 (286) (DB) ** 1864 Suth WR 183 (184) (DB) (The benefit of Regulation XVII of 1806 could not be applied to mortgages made prior to the passing of that enactment) ** (1926) 95 Ind Cas 863 (863) (Lah) ** (1922) 67 Ind Cas 161 (162) (DB) (Lah) (Mortgagee's omission to

where it was not in force, as a *cursus curiae* **(19)** Sections 7 and 8 of the Regulation were declared to be in force in the Punjab by S. 3 of the Punjab Laws Act 4 of 1872

The Transfer of Property Act repealed the Regulation as well as the Punjab Laws Act, 1872 so far as it related to the Regulations but as the Act itself does not extend to the Punjab, the Regulation is still in force in the Punjab.**(20)** Sections 7 and 8 of the Regulation only laid down rules of *procedure*.

Section 2, Cl (c) of this Act provides that all legal relations constituted before the Act came into force are left unaffected, and, as has been seen in the Notes on that section this does not apply to rules of *procedure*. Therefore, it was held that even if a mortgage was executed while the Regulation was in force, the mortgagee, if he wanted to foreclose after this Act had come into force must follow the procedure laid down in the Transfer of Property Act (now transferred to the Code of Civil Procedure).**(21)**

The Regulation had no force in Madras and the law in that Presidency as laid down by decisions up to the year 1858**(22)** was the same as it was in Bengal before the Regulation namely that the contracts were enforceable according to the strict terms thereof and that the interest of the mortgagee became absolute according to the terms of the contract by the mere failure of the mortgagor to redeem within the stipulated time But in the year 1858, the Court began to apply the English doctrine of the equity of redemption in such cases and the mortgagor was held entitled to redeem even after breach of the condition **(23)** This was disapproved by their Lordships of the Privy Council in the case of *Pattabhiramier v. Venkata Row Naickeni***(24)** decided in the year 1870 Their Lordships observed that what was known as "the equity of redemption" in the law of England depended upon the doctrine established by Courts of Equity that the time stipulated in the mortgage was not of the essence of the contract and that such a doctrine was unknown to the ancient law of India. Their Lordships, however, remarked .

- "It must not be supposed that, in allowing this appeal their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the Law of the Forum wherever such may prevail, or to affect any title founded thereon."

In the Province of Bombay also the view taken up to the year 1864 was the same as that taken in Madras up to the year 1858. But in 1864 the Court adopted the later Madras view**(25)** which, as

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make a demand for mortgage money before notice is issued in foreclosure proceedings is a fatal flaw in the proceedings and renders them nugatory ** 1913 Pun Re No. 91 (DB) ** (1912) 17 Ind Cas 467 (468) (A L) (A right barred under the Regulation cannot be resuscitated by T.P. Act.) ** 1912 Pun Re No. 31 (DB) ** (1912) 14 Ind Cas 332 (333) (Lah)

19. **(1873) 13 Beng LR 205 (213) (PC)** ** AIR 1914 Lah 274 (274) (DB) ** (1865) 8 CPLR 113 (115) (7 CPLR 22 and 7 CPLR 29 **held no longer good law** in view of 13 Beng LR 205 (PC).)

20. AIR 1933 Lah 174 (175)

[**See also** AIR 1933 Lah 676 (677) : 14 Lah 640 (DB)]

20. **(1884) 6 All 262 (267, 268) (FB).** (Stuart J., contra ** AIR 1926 All 667 (668)

22. See the cases cited in **(1869-70) 13 Moo Ind App 560 (565) (PC)**

23. See the cases cited in **(1869-70) 13 Moo Ind App 560 (565) (PC)** ** (1865) 2 Mad HCR 420 (421) (DB) ** (1865) 2 Mad HCR 450 (450) (DB)

[**See also** (1875) 7 Mad HCR 6 (12) (DB). (Deed held to be sale)]

24. **(1869-70) 13 Moo Ind App 560 (569, 571, 572) (PC).**

25. **(1872) 9 Bom HCR 69 (78) (SB) ** (1872) 9 Bom HCR 79 (82) (SB) ** (1864) 1 Bom HCR 199 (202, 203) (SB)** ** (1868) 2 Bom HCR 214 (218) (DB). (1 Bom HCR 199 (SB) Foll)

in Madras, was followed even 'after the decision in *Pattabhiramier's case*.(26) In this state of affairs the question came on again before the Privy Council in *Thumbusawmy v. Hossain Rowthen*(27) and it was held by their Lordships that the departure from the original line of decisions both in Madras and Bombay was wrong, but in view of the great hardship that might be caused to persons whose titles may have come into existence on the basis of the Madras and Bombay decisions, their Lordships suggested, without deciding, a rule of guidance to be followed in future cases, in the following words :

> 'On a stale claim to redeem a mortgage, and dispossess a mortgagee who had before 1858 acquired an absolute title there would be strong reasons for adopting the former course In the case of a security, executed since 1858, there would be strong reasons for recognising and giving effect to the Madras authorities, with reference to which the parties might be supposed to have contracted"

After the decision in *Thumbusawmy's case*(28) where the claim arose out of a conveyance executed before 1858, redemption was not allowed after the due date(29), while in cases of conveyances executed after 1858, the rule according to the Madras decisions was followed and redemption was allowed even after the due date (30) In the undermentioned cases(31) of Burma and Sind where the Transfer of Property Act did not apply, *Thumbusawmy's case*(32) was followed and it was held that the contract executed itself and that the right of redemption was lost The Bombay High Court, however, even after the decision in *Thumbusawmy's case*(33) continued to adopt its own view and allowed redemption after the due date, and held that *Thumbusawmy's case*(34) did not have the effect of overruling the course of decisions in the Presidency.(35)

The incidents of a mortgage by conditional sale as it prevailed before 1882 have now been embodied in S 58, Cl (c) (36) As observed by their Lordships of the Privy Council in Balkishen Das v Legge,(37) in enacting clause (c) of S 58, "it may be assumed that the framers of it intended

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26. (1869-70) 13 Moo Ind App 560 (571, 572)

27. **(1876) 1 Mad 1 (23) : 21 Ind App 241 (PC).**

28. **(1876) 1 Mad 1 (13) : 21 Ind App 241 (PC).**

29. (1884) 8 Mad 185 (191, 192) (DB) ** (1881) 3 Mad 26 (30) (DB).

30. **(1882) 4 Mad 179 (190) (FB).** (Innes J , dissenting) ** AIR 1941 Mad 666 (669) (DB). (Mortgages of 1873 and 1880) ** AIR 1926 Mad 386 (387) (DB) ** AIR 1917 Mad 232 (232) (DB) (Mortgage deed executed in 1879 — Redemption allowed) ** AIR 1915 Mad 33 (33) (DB) ** (1904) 14 Mad L Jour 347 (349) (DB) ** (1899) 23 Mad 114 (118) (DB) ** (1892) 15 Mad 230 (232) (DB). (Mortgage of 1880.)

    [**See also** (1883) 6 Mad 339 (341) (DB) (Document before 1858 — **Held**, time fixed was not of the essence of the contract — Redemption allowed after due date)]

31. AIR 1927 Sind 46 (48) (DB) ** AIR 1917 Low Bur 39 (39) (Case before S 60 was extended to Lower Burma.) ** AIR 1917 Low Bur 178 (178) (DB) ** AIR 1915 Low Bur 147 (148) ** (1900) 1 Low Bur Rul 192 (193) ** (1912) 6 Sind LR 178 (179) (DB)

32. **(1876) 1 Mad 1 (13) : 21 Ind App 241 (PC).**

33. **(1876) 1 Mad 1 (13) : 21 Ind App 241 (PC).**

34. **(1876) 1 Mad 1 (13) : 21 Ind App 241 (PC).**

35. (1904) 6 Bom LR 630 (630) (DB) ** (1890) 14 Bom 78 (81) (DB) ** (1890) 14 Bom 19 (23) (DB) ** (1883) 7 Bom 139 (145) (DB) ** (1877) 2 Bom 231 (238) (DB)

36. **AIR 1914 PC 36 (36) : 36 All 195 : 41 Ind App 84 (PC)** ** AIR 1927 All 137 (140) 48 All 787 (DB) (Mortgage by conditional sale in vogue before 1882 was known as bai-bil-wafa.)

    [**See also** (1906) 29 Mad 531 (532) (DB).

37. **(1900) 22 All 149 (160) : 27 Ind App 58 (PC).**

to state the existing law and practice in India" See also the ndermentioned cases **(38)**

(B) Ostensible sales.

For a mortgage by conditional sale under clause (c) there must, to begin with, be an ostensible sale**(39)**, i.e., a transaction which bears the appearance of a sale, but is not really that of which it bears the appearance.**(40)** The sale being merely an *ostensible* one, the mortgagor does not lose his title or the right to possess the property**(41)** though, as has been seen already, possession also may be transferred The document by which mortgage by conditional sale is created is one by which the mortgagor ostensibly sells the property, ostensible sale is not by itself a sale though it may become one when the condition regarding repayment is not fulfilled The mortgagor continues to be the owner of the mortgaged property till the date for repayment of mortgage debt has not expired, it is only after that date that the mortgagee can claim right of ownership **(42)** Where the plaintiff has sold certain land subject to condition of reconveyance within stipulated period on payment of the amount the transaction is mortgage by conditional sale the plaintiff's right to sue for specific performance is not taken away by the U P Zamindari Abolition and Land Reforms Act (1951)**(43)** where the document purports to be a *mortgage* only but says that on default of payment the land is to be regarded as sold, it is not a mortgage by conditional sale **(44)**

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38. AIR 1964 Pat 193 (196) (DB) ** AIR 19,4 Cal 824 (823) (DB) ** (,9,1 10 Ind Cas 630) (631) (DB) (All)

39. **AIR 1921 Mad 12 (16) : 43 Mad 589 (FB)** (Provision as to future sale – Mortgage is not one by conditional sale) ** AIR 1961 Mad 226 (228) ILR (1961) Mad 387 **Reversed** on another point in AIR 1966 SC 902) ** ILR (1960) 1 Punj 70 (74) ** AIR 1959 Pat 239 (242) 37 Pat 904 (DB) (Property sold in execution — Compromise between decree holder and judgment-debtor that if decretal amount were paid within 12 months sale to be set aside, if not paid sale to be confirmed — Compromise held not a mortgage by conditional sale) ** AIR 1958 Pat 67 (69) (DB) ** AIR 1940 Cal 486 (487) ILR (1948) 2 Cal 573 (DB) (By a document described as a mortgage by conditional sale the possession of the properties was delivered over to the mortgagees and the stipulation was that they would enjoy the usufruct and credit the same towards interest — The document mentioned a due date for payment of entire mortgage debt and provided that in default of payment on or before that date, the mortgagee would be entitled to foreclose and that the conditional sale would then ripen into an absolute sale — **Held,** that the transaction was not a usufructuary mortgage but a mortgage by conditional sale) ** **AIR 1926 Bom 107 (109) (DB).** (AIR 1921 Mad 12 (FB), **Followed.**) ** AIR 1917 Cal 217 (217) (DB)

[See also (1956) 2 Mad LJ 565 (566) (To establish that a particular document which purports to be a sale deed is a mortgage by conditional sale according to S 58(c) it is not necessary to show that there was a mortgagor mortgagee mortgage property and mortgage money at the time of the execution of the ostensible sale)]

40. AIR 1964 Pat 193 (196) (DB) ** AIR 1961 Mad 226 (228) ILR (1961) Mad 387 (**Reversed** on another point in AIR 1966 SC 902) ** AIR 1929 All 174 (177) (**Reversed** on another point by AIR 1931 All 196.)

[See also AIR 1952 All 716 (724) : ILR (1952) 2 All 200 (FB) (Per Agarwala J The word 'ostensible' in S 58(c) has two meanings (a) that the object bears a certain form or appearance without suggesting that it is or is not that of which it has the superficial appearance and (b) that the object bears a certain appearance but is not really that of which it bears the appearance)]

41. AIR 1939 Nag 287 (294) (DB).

42. 2001 (252) ITR 350 (351) (Mad)

43. 1980 UPLT (NOC) 18 : (1979) 5 All LR 373 (374)

44. AIR 1955 Vind Pra 4 (5) ** AIR 1921 Mad 12 (16) 43 Mad 589 (DB) ** (1931) 14 Nag LJ 31 (32, 33) (Rev) (Mortgage deed with possession and after happening of certain contingency to ripen into a sale — **Held,** not mortgage by conditional sale)

Where a property is ostensibly sold by a mortgagor to the mortgagee with a condition that on making payment by the mortgagor to the mortgagee and getting the sale executed and registered, the sale shall become void or on committing default in payment of the mortgage money on a specified date, the sale shall become absolute or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called only a mortgage by conditional sale and it is not sale out and out.(45)

In instant case property was sold but there was an agreement to reconvey if the consideration is repaid within a period of 3 to 5 years. Within about 6 months from the date of execution of sale, the vendor executed an agreement to sell the property to another person, that person subsequently brought suit for specific performance which was decreed. The purchaser challenged the same Held that the first sale transaction was not a mortgage by conditional sale but a conditional sale with an option to repurchase.(46) Where the landlord on receipt of money gave possession of land to purchaser and it was stipulated in the agreement that the purchaser was to execute reconveyance on payment of amount by landlord otherwise sale was to be confirmed and there was no stipulation for payment of interest, the transaction amounted to sale with condition to repurchase and not mortgage by conditional sale (47) Where the sale deed contained condition regarding recovery of property within two years of payment on same consideration, the deed was mortgage with conditional sale and not a sale deed with condition of reconveyance suit for specific performance was therefore not maintainable.(48)

(C) Personal liability.

There is no covenant to pay in a mortgage by conditional sale (49) This characteristic chiefly distinguishes it from an English mortgage.

The absence of a personal covenant does not render the transaction any the less a debt secured by immovable property.(50) See Note 35.

(D) "On default of payment of mortgage-money on a certain date."

The words "on a certain date" mean "on or before a certain date (51)

It was held in the undermentioned cases(52) that the fixing of a certain *date* for payment was an essential ingredient of this mortgage The High Court of Madras has held that the words "on a certain date" refer to the default in the second clause and not to the payment in the third and fourth clauses (53) in the case noted below(54) it was held that the absence of the mention of certain date was no indication that the transaction was not a mortgage

45. (1987) 2 LS (AP) 289 (291).

46. ILR (2000) Kant 2912 (2916).

47. AIR 2001 Bom 369 (372) : 2001 (3) Bom LR 436

48. 2002 All LJ 576 (579) : 2001 (44) All LR 289.

49. AIR 1959 MP 178 (179) ** AIR 1954 Trav Co 142 (144) ILR (1953) Trav-Co 999 ** AIR 1952 Kutch 65 (66) ** AIR 1920 Nag 244 (244) ** AIR 1917 Nag 57 (57)

50. **AIR 1944 Nag 289 (291) ; ILR (1944) Nag 568 (FB). (Overruling** AIR 1942 Nag 88 in so far as it held that a preliminary decree for foreclosure is not a debt)

[**But see** AIR 1941 Oudh 479 (481) 16 Luck 789 (DB) (Submitted not correct)]

51. AIR 1941 Cal 823 (823, 824) (DB).

52. AIR 1956 Bhopal 59 (61) ** AIR 1928 Cal 825 (825) (DB) (If the mortgage deed contains a clause that the mortgage would be turned into an out and out sale on the expiry of a certain period, a clause which is essential for a mortgage by conditional sale under S 58, Transfer of Property Act, the deed is not an out-and-out sale to begin with, but only a mortgage by conditional sale, although the deed contains the word (Bikrita) meaning "sold ")

53. AIR 1928 Mad 28 (32, 34) (DB).

54. AIR 1925 Cal 1151 (1153).

Where on default of payment of mortgage money at the end of a certain period, the sale does not take effect owing to the waiver of the mortgagee or any laches on his part, the original terms as to payment of interest and the method of repayment would be the same as that entered in the original contract.(55)

See the undermentioned case(56) under Bengal Money Lenders Act

32. Distinction between mortgage by conditional sale and a sale with a clause for re-purchase.

A mortgage by conditional sale is a transaction essentially different from a sale with a condition of repurchase In the latter, the ownership vests in the transferee from the date of the document, and there is no question of any debt being in existence after the date of the transaction Further, the right of re-purchase can be exercised only on a strict compliance with the terms of the agreement (1) In the former the *debt* subsists and the right to redeem remains with the debtor (2) The mortgage by conditional sale is a mortgage in which the ostensible sale is conditional and is intended as a security for the debt and in case of payment at the time fixed, condition was that the sale

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55. AIR 1926 Lab 237 (237).

56. AIR 1984 Cal 130 (135) (1984) 1 Cal LJ 204 A borrower in order to get the protection of Bengal Money-Lenders Act must show among other things that he ostensibly sells the mortgaged property on any of the conditions enumerated in S 58(c) of Transfer of Property Act namely (i) that on default of payment of the mortgaged money on a certain date the sale becomes absolute or (ii) that on condition of such payment being made such sale becomes void or (iii) that on such payment being made the buyer shall transfer the property to the seller Section 37-A of Bengal Act overrides the proviso to S 58(c)

Section 58 — Note 32

1. **AIR 1966 SC 902 (903). (Reversing** AIR 1961 Mad 276 on facts) ** **AIR 1963 SC 1906 (1907)** ** **AIR 1963 SC 1182 (1184)** ** (1965) 31 Cut LT 233 (235) ** AIR 1964 Pat 193 (195) (DB) ** AIR 1964 Punj 81 (82) (DB) ** AIR 1961 Mad 276 (278) ILR (1961) Mad 387 (**Reversed** on facts in AIR 1966 SC 902) ** AIR 1960 Punj 444 (448) ILR (1960) 2 Punj 741 (DB) ** AIR 1958 Pat 371 (374) (DB) ** (1954) Madh BLJ HC R (610) (615) (DB) ((1890) 12 All 387 17 Ind App 98 (PC) Foll ** 1949 Bur LR (HC) 58 (61) (621) (However, the conduct of a creditor may amount to a dispensation with the literal compliance of the conditions set out in the agreement) ** AIR 1942 Cal 452 (453) (DB) ** **AIR 1925 Oudh 533 (534) (DB).**

   [**See also** ILR (1960) 1 Punj 70 (74) (Sale with condition of repurchase — Transferee having accepted the sale is bound also by the stipulation to reconvey the property to transferor — He must either accept the transaction as a whole with all obligations or repudiate it altogether) ** AIR 1927 Oudh 159 (160) (Sale with condition for reconveyance — Vendor to exercise right on or before 31-3-1925 — Vendee not complying with vendor's request to take the money and execute a sale deed — Vendee filing a suit and tendering the amount in Court on 30-3-1925 though order of Court was passed on 31-3-1925 and the Bank received the payment on 1-4-1925 — **Held**, that the vendor had complied with the terms of the deed and was therefore entitled to have an order directing the vendee to reconvey the house to the vendor.)]

2. **AIR 1963 SC 1906 (1907) : (1965) 31 Cut LT 233 (235).** (Postponement of absolute character of legal title of transferee till expiry of certain date and avoidance of entire transaction on repayment by transferor are two features, laid down in S 58(c) as appertaining to mortgage by conditional sale) ** AIR 1964 Pat 193 (195) (DB) ** AIR 1964 Punj 81 (82) (DB) ** AIR 1961 Mad 276 (278) ILR (1961) Mad 387 (**Reversed** on another point in AIR 1966 SC 902) ** AIR 1960 Punj 444 (448) ILR (1960) 2 Punj 741 (DB) ** AIR 1958 Pat 371 (374) (DB) ** AIR 1942 Cal 452 (454) (DB) (Mortgage by conditional sale is essentially in the nature of security and that being so, notwithstanding

becomes void or that the mortgagee would execute a reconveyance.(3) In other words, a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In the sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed (4) Whether a transaction is mortgage by conditional sale or sale with a condition of repurchase will depend on (1) absence of conveyance of absolute title from the date of document, (2) an absolute title to rest only in the amount is not repaid within stipulated time (3) whether the transferee is entitled or not to occupy the premises, (4) whether title deeds are handed over to the vendee or not, and (5) provision for return of the same amount as borrowed.(5)

The following are some tests as laid down by Gujarat High Court(6) to determine whether a transaction is mortgage by conditional sale or sale with condition to repurchase. They are not exhaustive .

1. Nomeclature hardly conclusive To be taken into consideration when consistent with intention of parties
2. Existence of relationship of debtor creditor
3. Stipulation of payment of interest or delivery of possession
4. Incorporation of two transactions in one document

Two separate document — Sale with condition to repurchase

5 Mortgage by conditional sale — Vesting of title postponed Repurchase — Immediate Vesting of title
6. Inadequacy of consideration.
7. Same price in reconveyance
8 Recital that purchaser may deal with property in any matter — Repurchase
9. Intention to be gathered from attending circumstances and evidence.

There is a lot of difference between an agreement of sale and an agreement of reconveyance In agreement of sale the agreement holder is definitely bound to prove that he had been ready and willing always but such a strict requirement of pleading and proof is not required in case of reconveyance In agreement of reconveyance a period is normally fixed for performance and time is the essence of the contract while in agreement for sale it is not.(7)

Where a question arises, whether a particular document executed by the mortgagor, is a mortgage by conditional sale or an out and out sale with a condition to repurchase the document presents no difficulty in its being construed as mortgage by conditional sale when (a) not only the

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the form of the transaction, the mortgagor's right to redeem the security will remain even if the due date may have passed — But notwithstanding this, if a decree for foreclosure is passed the effect is the same as if the mortgagor has himself executed an out and out transfer to the mortgagee and where such a transfer is not allowed, the foreclosure also will come under the prohibition. See S. 67, Note 10) ** AIR 1939 Cal 730 (731) : ILR (1940) 1 Cal 133 (DB).

[See AIR 1929 All 864 (865) (DB).]

3. 1999 (3) Mad LJ 713 (719).
4. AIR 1966 SC 902 (903) : (1966) 2 SCR 918. (Reversing AIR 1961 Mad 276 on another point.) ** AIR 1964 Orissa 17 (18).
5. AIR 1969 Guj 239 (246 to 248) : 10 Guj LR 811.
6. 1998 (1) Guj LR 633 (638).
7. 1998 AIHC 2232 (2238) · 1998 (1) Mad LW 173 (Defendant agreeing to reconvey property on last date of fixed period — But not appearing before sub-Registrar on that date — Plaintiff entitled to decree for reconveyance .)

twin ingredients of S 58 (c) of T P Act viz. (i) that the document does not only constitute an ostensible sale but (ii) has a condition that on repayment of the prescribed amount the buyer shall re-transfer the property to the seller are fulfilled; but also (b) the surrounding circumstances which could be gathered from the document itself indicate irresistibly the intention of the parties to treat it as a mortgage by conditional sale **(8)** Thus, where the recital of the deed would clearly establish that the vendor had an intention to part with the title on execution of the document and so it was stated that if the reconveyance was not obtained within the time stipulated, the purchaser could continue to enjoy the property as absolute owner and though it was pleaded that value mentioned in the document did not reflect the correct value, no evidence was let in to that effect and no relationship of creditor and debtor existed between the vendor and vendee, it was held that the document was sale deed and not mortgage by conditional sale **(9)** Where a deed hypothecated property with a stipulation that in default of payment within a stipulated period, or if the mortgagor dies without payment within that period, the transaction should be a "complete sale," it was held by their Lordships of the Privy Council that the transaction was a mortgage by conditional sale **(10)** Where a sale -deed incorporated a condition that vendor was entitled to get back property within period of limitation it was held that the intention was to create mortgage and not out and out sale **(11)**

Where the first part of the document spoke about outright sale, however second part contained reference for redemption of suit land, the document cannot be interpreted as document of sale only on basis of first part. The document has to be read as a whole In case of sale transaction with condition to repurchase, there is no lending and borrowing arrangement No question of redemption would arise in case of sale with condition of retransfer But in a mortgage by conditional sale, right of redemption subsists, notwithstanding that the mortgagor has failed to pay at the stipulated time.**(12)**

Where the first part of a document speaks about outright sale while the second part contains a reference for geting the suit land redeemed, the document constitutes mortgage by conditional sale and not sale with right to repurchase.**(13)**

The deed in the instant case was held to be a deed of mortgage of property by conditional sale and that since mortgage money has been paid, the property stands released from the mortgage, the mortgage comes to an end though the statutory rights to recover possession services **(14)**

Where a property is alleged to have been sold to a money lender at a price less than market price, the vendor continued to remain in possession, same property was agreed to be reconveyed the transaction was one of mortgage and not sale **(15)**

Sale with condition to repurchase

In instant case there was no debtor-creditor relationship between the parties Intention of the parties was to create assignment deed The executant was in much better financial position than opposite party. There was no stipulation for interest nor any charge created. Inadequecy of consideration was not established. In the facts of the case held that the document was sale with condition to repurchase and not mortgage with conditional sale **(16)**

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8. (1982) 2 Andh LT 260 (271).
9. 2002 (2) Mad LJ 26 · 2002 (3) Mad LW 532 (542).
10. (1906) 28 All 496 (507) : 33 Ind App 107 (PC).
11. (1979) 20 (2) Guj LR 51 (55).
12. AIR 1994 Guj 8 (11).
13. AIR 1994 Guj 8 (10).
14. 1999 (1) Cur CC 209 (212) (Madh Pra).
15. 1999 AIHC 2126 (2131) : 1999 (1) Andh LT 199.
16. AIR 1997 Ker 173 (174) : 1997 (1) Ker LJ 213.

Where possession of mortgaged property was given to transferee, he was to pay taxes and on repayment of loan was to endorse receipt and would execute sale deed in favour of transferor and consideration was to be fixed by 4 persons it was held that the transaction was a mortgage with conditional sale and not sale with condition to repurchase.(17)

Where the owner executed a document for himself and his minor son for certain sum of money on condition that transferee would possess the property by paying tax etc and in case money is repaid within stipulated time, the factum would be endorsed on the document and possession should be re-delivered to executant and in case he fails to repay, a sale deed for the consideration to be fixed would be executed, and the purchaser shall enjoy the property absolutely, such recital is consistent with transaction of mortgage with conditional sale rather than sale with condition to repurchase.(18)

See also the undermentioned case to the same effect.(19)

A co-sharer of a *patti* took possession of the share of another co-sharer under an agreement that any sharer who pays the revenue due by a defaulting sharer should take possession of such defaulting sharer's share without power of transfer and without liability for rendition of accounts; on failure of the defaulter to pay the amount within 12 years, the possessor should be the owner of it It was held that the transaction was a mortgage by conditional sale.(20)

33. Sale or mortgage — Tests of distinction.

Questions very often arise as to whether a particular transaction, whether consisting of a single document or consisting of two documents, one a sale and the other an agreement to reconvey is an out and out sale or a mortgage The form of the transaction may give rise to a presumption that the transaction is what it purports to be. Where the transaction is apparently a sale, the *onus* of showing that it is a mortgage lies on the person who contends against the tenor of the deed.(1) Similarly, where the document is apparently a mortgage, the *onus* is on the person who alleges it to be a sale to prove it.(2) The form of the transaction is not, however, the final test. The true test is the

17. 1998 AIHC 2382 (2383) : 1997 (3) Civ LJ 77 (Orissa).
18. 1998 AIHC 2382 (2383) : 1997 (3) Civ LJ 77 (Orissa).
19. AIR 1927 Lah 748 (751) (DB)
20. (1904) 26 All 337 (341) (DB).

Section 58 — Note 33

1. **AIR 1936 PC 65 (69).** ("Strong evidence is required to establish the contention that a conveyance in form absolute ought to be treated as a mortgage since the contention requires that the written document should be in some sense modified or added to for the purpose of carrying out the true intent of both the parties to it") ** AIR 1964 Punj 81 (83) (DB) ** AIR 1960 Manipur 11 (13) ** AIR 1960 Punj 444 (448) ILR (1960) 2 Punj 741 (DB) ** AIR 1954 Nag 193 (197) (DB) ** AIR 1953 Mys 105 (106) ILR (1952) Mys 247 (DB) ** AIR 1952 Punj 181 (183) ** AIR 1950 Nag 198 (200) . ILR (1950) Nag 719 ** AIR 1944 Oudh 305 (306) (DB) ** AIR 1934 Nag 18 (19) ** AIR 1917 Low Bur 161 (161) ** (1911) 9 Ind Cas 770 (771) (Low Bur)

   [**See also** AIR 1957 Manipur 9 (11) (Contents showing out and out sale — Mere fact that word 'Mahajan' has been used in the deed will not make it a loan transaction) ** AIR 1955 Manipur 37 (38) (Property conveyed by registered deed, through out and out sale — No condition of repurchase attached to this deed — Mortgage cannot be deemed to be a mortgage by conditional sale within S 58(c) — Mere fact that the word "Mahajan" was used will not in any way go to establish that it was really a mortgage by conditional sale)]

2. AIR 1983 Pat 60 (61, 63) 1982 BLJR 473 (DB) ** (1965) 31 Cut LT 233 (235) ** AIR 1960 Punj 444 (448) ILR (1960) 2 Punj 741 (DB) ** AIR 1954 Pat 562 (564) ILR 33 Pat 638 (DB) ** AIR 1925 Rang 377 (379) 3 Rang 367 (DB)

   [**See also** AIR 1953 Madh B 143 (144) (DB) (Where the document is on the face of it a

intention of the parties in entering into the transaction **(3)** If the parties intended that the transfer was only *by way of security*, the transaction would be a mortgage **(4)** But if the parties intended a *permanent transfer* the transaction would be a sale even though the deed happens to be in the form

mortgage it cannot be regarded as a sale merely because the mortgage was executed for defeating the right of pre-emption.)]

3. **AIR 1954 SC 345 (346) ** AIR 1916 PC 49 (50) : 43 Ind App 284 ** AIR 1926 Bom 497 (507) : 50 Bom 566 (FB) ** AIR 1919 Mad 1 (5) : 42 Mad 407 (FB) ** 1895 Pun Re No. 100, p. 471 (473) (FB)** ** AIR 1957 All 740 (741) (DB) ** ILR (1967) 2 Ker 69 (71) ** (1967) 11 Law Rep 767 (772) (Mys) ** AIR 1967 Orissa 191 (192) ILR (1967) Cut 32 ** AIR 1966 Andh Pra 252 (255) (DB) ** AIR 1965 Assam 90 (92) ILR (1963) 15 Assam 496 ** (1865) 31 Cut LT 233 (235) ** AIR 1964 Pat 193 (198) (DB) ** AIR 1964 Punj 81 (82) (DB) ** 1962 Mys LJ (Supp) 534 (539) (DB) ** AIR 1961 Mad 276 (278) ILR (1961) Mad 387 [**Reversed** on another point in AIR 1966 SC 902] ** ILR (1961) Mys 542 (545, 546) ** ILR (1961) Cut 487 (489) (DB) ** AIR 1960 Punj 444 (448) ILR (1960) 2 Punj 741 (DB) ** 1959 Andh LT 457 (459) ** (1959) 63 Cal WN 430 (434) ** 1956 Andh LT 534 (535) ** AIR 1954 Nag 193 (196) (DB) ** AIR 1950 All 430 (433) ** AIR 1930 Mad 160 (162) (DB) ** AIR 1944 Lah 175 (177) ** AIR 1941 Oudh 479 (48[illegible] . 16 Luck 789 (DB) (**Held** on facts a mortgage) ** AIR 1931 Lah 258 (259) 12 Lah 488 (DB) ** AIR 1931 Bom 371 (374) (DB) ** AIR 1931 Rang 210 (21[illegible]) 9 Rang 452 (DB) ** AIR 1929 All 174 (178) (**Reversed** in AIR 1931 All 196 on another point) ** AIR 1928 Lah 726 (727) (DB) ** AIR 1927 All 321 (323) 49 All 405 (DB) ** AIR 1925 Mad 37 (38) ** AIR 1923 All 586 (587) 45 All 581 (DB) ** AIR 1916 Bom 215 (215, 216) 40 Bom 378 (DB) ** AIR 1915 Mad 656 (657) (DB) ** (1911) 33 All 337 (339, 340) (DB) ** (1904) 6 Bom LR 630 (631) (DB) ** (1898) 22 Bom 245 (251) (DB) ** (1898) Bom PJ 239 (241) (DB).

[**See also** 1967 Ker LJ 835 (835) (In this case the question was whether the transaction was a mortgage or a lease) ** ILR (1966) Andh Pra 39 (44) (DB) (In this case the question was whether the transaction was a mortgage or lease.)]

4. **AIR 1960 SC 301 (304) ** AIR 1954 SC 345 (347) ** AIR 1936 PC 65 (69) ** (1894) 21 Cal 882 (898) : 21 Ind App 96 (PC)** ** ILR (1967) 2 Ker 69 (74) ** AIR 1965 Assam 90 (91, 92) ILR (1963) 15 Assam 496 ** AIR 1964 Punj 81 (82) (DB) ** AIR 1960 Punj 444 (448) ILR (1960) 2 Punj 741 (DB) ** (1959) 63 Cal WN 430 (434) ** AIR 1967 Ker 169 (170) (If the absolute transfer of right is intended to be postponed so as to take effect only on a future date the transaction will be a mortgage) ** 1956 Andh LT 534 (535) ** AIR 1950 All 430 (431) ** 1946 Jaipur LR 379 (385, 384) (DB) (An orchard was mortgaged under a deed for a certain sum of money and later on some more money was taken under another deed providing that if the money is not paid back by a certain date the orchard shall be deemed to have been sold absolutely for the consolidated sum **Held**, that the later document was not independent of the original mortgage transaction and did not change the nature of the original transaction from mortgage to a sale) ** AIR 1930 Mad 160 (162) ** AIR 1931 All 196 (197) (**Reversing** AIR 1929 All 174) ** AIR 1930 All 101 (102) (DB) (Two contemporaneous deeds, one purporting to sell the property, other giving right of repurchaser to vendor — **Held**, transaction is not mortgage) ** AIR 1928 Mad 28 (33) (DB) ** AIR 1928 Mad 690 (700) (DB) ** AIR 1925 Mad 37 (39) ** (1906) 8 Bom LR 764 (770) (DB) (Per Heaton J) ** (1875) 8 Mad HCR 31 (35) (DB) ** (1926) 94 Ind Cas 756 (758) (DB) (Mad) ** (1910) 6 Ind Cas 512 (512) (DB) (Mad) (If all indicia showing relation of a debtor and creditor are present an instrument will not operate as a sale merely because it provides that the alienee would retransfer the property to the alienor if the debt would be paid up by the alienor within a certain period.)

[**See also** 1967 Ker LJ 835 (835, 836) (Question in this case was whether the transaction was a mortgage or a lease) ** ILR (1966) Andh Pra 39 (44) (DB) (Question in this case was whether transaction was a lease or mortgage **Held**, on a consideration of the document that it was a possessory mortgage and not a lease) ** **AIR 1951 Orissa 362 (373) : ILR (1951) Cut 281 (FB)**, (Ray C J — A mere delay in launching the suit for redemption will not make the transaction a sale which from its very inception was a mortgage)]

of a mortgage.(5) The question whether a document which is ostensibly a sale deed is intended to be only a pretence for a mortgage deed is in every case a question of fact to be determined on the contents of the documents and the surrounding circumstances.(6) A mortgage is none the less a mortgage even though its terms are onerous.(7) or its terms are such as to render redemption impossible.(8)

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5. AIR 1982 Mad 57 (61) (1981) 2 Mad LJ 122 ** ILR (1967) 2 Ker 69 (74) ** AIR 1957 Ker 169 (170) (If the transferee became entitled to all the rights of the transferor on the date of the execution of the document the document will be regarded as a sale) ** 1956 Andh LT 534 (535) ** AIR 1947 Pesh 33 (34) ** AIR 1931 Lah 258 (260) 12 Lah 488 (DB) (Case of pre-emption) ** AIR 1925 Mad 37 (39) (Vendee agreeing to reconvey the property at any time within a specified time on payment of consideration amounts to out and out sale) ** AIR 1917 Mad 368 (369 373) (DB) ** 1895 Pun Re No 100n, p 477n (478n) (DB) (Case of pre-emption) ** (1890) 3 CPLR 154 (155) (A mortgage is a temporary transfer and the fact that it may result in a permanent transfer cannot be deemed to make it a permanent transfer) ** (1872) 2 Bom 113 (116) (DB) (A deed which, on the face of it was described as a mortgage stated that the grantee was already in possession under a previous mortgage by the grantor, and was under the new deed to receive the profits in liquidation of interest so far as they would go and that the grantor was not to be liable to repay the principal money or such balance of interest (if any) as might accrue upon it, unless he adopted a son and the grantee unless that event happened, was to enjoy the property conveyed in right of purchase for the sum due to him, both on account of principal and interest — **Held**, that such a deed was a sale liable to be converted into a mortgage and not a mortgage liable to be converted into a sale)

   [See also AIR 1962 Pat 53 (55) (DB) (Where the document in express and clear terms purports to be an absolute sale with a condition to repurchase within a stipulated time, the terms serve as the best guide for determining the nature of the deed and any other consideration such as the inadequacy of price or the payment of cost of stamp by the executant cannot alter the nature of the deed.)]

6. **AIR 1966 SC 902 (908). (Reversing** AIR 1961 Mad 276 on facts) **** AIR 1960 SC 301 (304)** ** (ILR (1967) 2 Ker 69 (71) ** (1967) 11 Law Rep 767 (772) (Mys) ** AIR 1967 Orissa 191 (192) ILR (1967) Cut 32 ** AIR 1965 Assam 90 (91) ILR (1963) 15 Assam 496 (Evidence of contemporaneous conduct is admissible as surrounding circumstance) ** AIR 1964 Punj 81 (82) (DB) ** AIR 1964 Pat 193 (198) (DB) ** 1962 Mys LJ (Supp) 534 (538) (DB) ** AIR 1962 Pat 53 (55) (DB) ** ILR (1961 Mys 542 (545) ** ILR (1961) Cut 487 (489) (DB) ** (1959) 63 Cal WN 430 (434) ** AIR 1957 All 740 (741) (DB) ** ILR (1957) 9 Assam 109 (114) (DB) (Each case will have to depend on its own facts, and any other decision on the point cannot be of much use or guidance unless the facts are essentially similar or identical) ** AIR 1957 Ker 169 (170) ** (1956) 1 Mad LJ 385 (387) ** AIR 1954 Nag 193 (196) (DB) ** AIR 1953 Madh B 143 (144) (DB) (Very little assistance can be derived from the construction put on different documents by the Courts in decided cases) ** AIR 1953 Mys 105 (105) ILR (1952) Mys 247 (DB) ** AIR 1950 All 430 (431) ** (1946) 51 Mys HCR 187 25 Mys LJ 1 ** AIR 1944 Lah 175 (177, 178) (But when in deciding that question, the lower Court fails to consider all the essential conditions of the document as a whole and also the definition in S 58 its finding is not binding in second appeal) ** AIR 1941 Oudh 479 (481) : 16 Luck 789 (DB) ** AIR 1941 Oudh 582 (584) : 17 Luck 198 (DB) ** AIR 1934 Nag 18 (20)

   [See also 1967 Ker LJ 835 (837) (Question whether transaction is a mortgage or a lease) ** AIR 1944 Oudh 305 (306, 307) (DB) (The conduct of the vendor pursuant to the deed is also an important factor to be taken into consideration.)]

7. AIR 1954 Pat 562 (565) ILR 33 Pat 638 (DB) ** AIR 1928 Oudh 103 (104) 2 Luck 470 (DB) ** AIR 1919 Oudh 374 (375)

8. AIR 1951 Pat 327 (328) (DB) (Stipulation in mortgage to sell at the end of stipulated period amounts to a clog and is void) ** (1913) 16 Oudh Cas 9 (18) (DB) ** (1912) 15 Oudh Cas 1(5) (DB)

It is not the form of document that is a decisive factor but it is only the intention of the parties at the time of the execution of the deed. A document which is ostensibly a sale deed could be a mortgage if the intention could be gathered from the circumstances attended upon the document. Strong evidence would be required to establish that the conveyance in form obsolute ought to be treated as mortgage. The intention could only be gathered from the recitals of the document itself, and if the language is ambiguous then only it will be possible to look into surrounding circumstances to determine what was intended. It does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale, a mortgage transaction must of necessity have been intended.(9)

We must concentrate our attention on the document to find out the real jural relationship between parties, but in so doing, neither the nomenclature employed by the parties nor even the formal terms of the deed should be taken as conclusive and it is permissible to even travel outside and have regard for the surrounding circumstances (10) Having regard to the fine distinction between a mortgage by conditional sale and sale with an option to repurchase, one should be guided by the terms of the document alone without much help from the case law. The attendant circumstances could be looked into to gather the intention. Such an intention if explicitly expressed in the document itself, there is no scope for looking at the attendant circumstances. If therefore there is no relationship of debtor and the creditor the question of it being a mortgage by conditional sale does not arise.(11)

It is only where the deed of sale and the contract to repurchase are parts of *one and the same transaction* that the sale could be a mortgage but the mere fact of singleness of the transaction though a strong piece of evidence, is not conclusive that the transaction is a mortgage (12)

It cannot be said broadly that where there is an *ostensible sale subject to the condition of repurchase* the transaction must necessarily always be a mortgage by conditional sale. It will be for the person pleading that it is an out and out sale to establish it. In the absence of such proof it must be held to be a mortgage (13) There is no presumption that a sale with a clause for repurchase executed in favour of a Muhammadan is only a mortgage clothed in the garb of a sale in order to avoid the prohibition in Muhammadan law against charging interest (14) In England the Laws of Evidence permit the establishment of facts showing the intention of the parties by proof at large. But in this country the matter of evidence is governed by S 92 of the Evidence Act. In *Maung Kyin v Ma Shwe Law* (15) Lord Shaw in delivering the judgment of the Board said

> "The principles of equity which are universal forbid a person to deal with an estate which he knows that he holds in security as if he held it in property. But to apply the principles you must be placed in possession of the facts, and facts must be proved according to the law of evidence prevailing in the particular jurisdiction. In England the Laws of Evidence for the reasons set forth in *Lincoln v Wright*(16) and other cases permit such facts to be established by a proof at large, the general view being that unless this were done the Statute of Frauds would be used as a protection or vehicle for frauds. But in India, the matter of evidence is regulated by S 92 of the Indian Evidence Act and it

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9. (1986) 1 Andh LT 531 (537).
10. 1983 TLNJ 179 (180) (Mad)
11. AIR 1992 SC 1236 (1238) . 1992 AIR SCW 1170 : 1992 (2) JT 525 · ** (1992) 2 RRR 301 (303) (SC).
12. 1961 MPLJ 1298 (1300) ** AIR 1927 All 321 (327) 49 All 405 (DB)
13. AIR 1951 Orissa 362 (370) : ILR (1951) Cal 281 (FB) ** AIR 1944 Oudh 305 (309) (DB) ** AIR 1929 All 619 (619) (DB).
14. AIR 1944 Oudh 305 (309) (DB).
15. AIR 1917 PC 207 (209) : 45 Cal 320 : 44 IA 236 : 9 Low Bur Rul 114.
16. (1859) 45 ER 6 (9) : 7 WR (Eng) 350.

accordingly remains to be asked, what is the evidence which under that statute may be competently adduced?"

It is now definitely settled by their Lordships of the Privy Council in *Balkishen Das v Legge*(17) that, as between the parties to the document or documents, the intention to treat the transaction as an out and out sale, or as a mortgage, must be decided on a consideration of the *contents of the documents themselves* with such extrinsic evidence of *surrounding circumstances* as may be required to show in what manner the language of the documents is related to existing facts *Oral evidence* of such intention is not admissible by virtue of S 92 of the Evidence Act See also the undermentioned cases to the same effect.(18)

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17. **(1900) 22 All 149 (158, 159) : 27 Ind App 58 (PC).** (On appeal from 19 All 430)

18. **AIR 1966 SC 902 (903). (Reversing** AIR 1961 Mad 276 on another point) ** **AIR 1960 SC 301 (304)** ** **AIR 1924 PC 226 (227) : 51 Ind App 305** ** **AIR 1916 PC 49 (53, 54) : 38 All 570 : 43 Ind App 284.** (Cogent evidence is required to prove that an instrument which is very old, is not what it purports to be) ** **(1901) 28 Cal 289 (291, 292) (SB)** ** **(1902) 26 Bom 252 (256) (FB)** ** **(1866) 5 Suth WR 68 (68, 72, 76) (FB)** ** **(1866) 5 Suth WR 76 (76, 78) (FB)** ** **AIR 1951 Orissa 362 (370) : ILR (1951) Cut 281 (FB).** (This rule of admissibility of evidence is subject to the exception that only in case of fraud, the oral evidence of real intention may be admissible) ** AIR 1984 Orissa 62 (63) (1984) 1 Orissa LR 135 (**Impliedly overruled** in view of (1900) 22 All 149 (PC) ** AIR 1968 Orissa 65 (66) (DB) ** AIR 1967 Orissa 191 (192) ILR 1967 Cut 32 ** AIR 1965 Assam 90 (92) ILR (1963) 15 Assam 496 ** AIR 1965 Mys 297 (299) ** (1965) 31 Cut LT 233 (235) ** AIR 1964 Punj 81 (82) (DB) (But evidence to explain or even contradict recitals as distinguished from terms of the document can be given) ** AIR 1962 Manipur 45 (47) (Oral evidence though not of the parties or attesting witnesses or the scribes, to show that at the time of the execution of the document the parties agreed as between themselves that the document was not a sale but a mortgage, will be admissible to show the surrounding circumstances, or the conduct of the parties which will show that it was only a mortgage and not a sale) ** AIR 1962 Mys 44 (46) ILR (1961) Mys 513 ** 1962 Mys LJ (Supp) 534 (539, 540) (DB) (It is only in cases of ambiguity that it is possible to adduce and rely upon oral evidence within the limits prescribed by proviso 6 to S 92, Evidence Act with a view to ascertain how the language employed is related to existing facts) ** AIR 1962 Pat 53 (55) (DB) ** AIR 1961 Mad 301 (302) ** ILR (1961) Cut 487 (489) (DB) ** AIR 1960 Punj 444 (448) ILR (1960) 2 Punj 741 (DB) ** AIR 1960 Manipur 11 (12, 13) (Subsequent purchaser from party who was vendor in prior sale deed of same property — He is representative in interest of said vendor within S 92, Evidence Act and would be precluded from contending that first sale deed was only mortgage and not sale deed) ** AIR 1959 Pat 230 (233) (DB) ** AIR 1957 Bom 6 (7) ILR (1957) Bom 283 ** AIR 1957 Pat 673 (674) (DB) ** AIR 1956 Bhopal 59 (61) ** ILR (1956) 1 Cal 59 (64) (DB) ** AIR 1955 Ajmer 28 (29) ** AIR 1954 Nag 193 (196) (DB) ((1900) 22 All 149 (PC) **Foll.**) ** AIR 1954 Pat 562 (567) ILR 33 Pat 638 (DB) ** AIR 1952 All 200 (203) (DB) ** AIR 1950 Nag 198 (200) ILR (1950) Nag 719 ** (1946) 51 Mys HCR 187 ** AIR 1947 Mad 60 (61) ILR (1947) Mad 265 (DB) ** AIR 1947 Pat 345 (347) 25 Pat 666 (DB) ** AIR 1944 Lah 175 (177) ** AIR 1942 Nag 115 (116) ILR (1942) Nag 592 (DB) (Intention of parties must be deduced from the actual words used in the instrument and it is only when the words used are ambiguous and do not yield clear meaning that extraneous evidence of surrounding circumstances may be looked into, 22 All 149 (PC), **Rel. on.**) ** AIR 1940 Bom 1 (3) (DB) ** AIR 1934 Nag 18 (19) ** AIR 1934 Pat 217 (219) (DB) (The question was whether transaction was lease or usufructuary mortgage) ** AIR 1933 Lah 104 (104) ** AIR 1933 Cal 381 (382) · 60 Cal 167 ** AIR 1931 Rang 210 (211) 9 Rang 452 (DB) ** AIR 1931 Bom 371 (374) (DB) ** AIR 1929 All 174 (178) ** AIR 1929 Lah 530 (531) ** AIR 1929 Cal 548 (550, 553) (DB) (After a lapse of considerable period cogent evidence is required to hold that the instrument is not what it purports to be) ** AIR 1928 Mad 690 (696) (DB) ** AIR 1928 Rang 58 (60) 5 Rang 644 (DB) ** AIR 1927 All 321 (323) 49 All 405 (DB) ** AIR 1926 Bom 107 (110) (DB) (Per Madgavkar, J) ** AIR 1926 Cal 458 (459) (DB) ** AIR

There is a conflict of opinion on the question whether evidence of the *conduct* of parties can be let in to show the intention of the parties, one view(**19**) being that such evidence is admissible.

1925 Bom 501 (503) 49 Bom 662 (DB) (Oral evidence is not admissible to prove that a document which on the face of it is a sale deed was really intended to operate as a mortgage.) ** AIR 1928 Nag 182 (184) (Do.) ** AIR 1925 Bom 288 (288) (DB) (Sale by Hindu father as manager. Son cannot adduce evidence under S. 92 Evidence Act in seeking to dispute the nature of the transaction. He is a party to the document of sale within the meaning of S. 99.) ** AIR 1925 Cal 115 (115) (DB) (In construing a document between Mohammadans in order to find whether the transaction is a mortgage by conditional sale or an out and out sale it should be remembered that documents are executed by Mahommadans in which they conceal or at least try to conceal the real nature of the transaction and attempt to make out that the transaction is an out and out sale although as a matter of fact the intention of the parties is to create a mortgage.) ** AIR 1924 Rang 57 (58) 1 Rang 472 (DB) ** AIR 1923 All 586 (588) 45 All 158 (DB) ** AIR 192 Mad 498 (500) (DB) ** AIR 1920 Bom 117 (118) 44 Bom 961 (DB) (Subsequent unregistered document of reconveyance held not admissible in evidence to look into the nature of a sale deed.) ** AIR 1920 Cal 683 (684) (DB) (The claim to redeem on the footing that the transaction was a mortgage and not a sale made after a lapse of 26 years.) ** AIR 1919 Cal 1077 (1077, 1078) (DB) (Where parties to a document style it as kabala but a word that indicates a mortgage by way of conditional sale and all the terms contained in the document are consistent with the terms of a mortgage by way of conditional sale the proper construction is that the document is a mortgage by way of conditional sale.) ** AIR 1919 Low Bur 140 (140) ** AIR 1918 Mad 500 (502) (DB) ** AIR 1918 Low Bur 70 (70) (DB) ** AIR 1916 Mad 1074 (1077) (DB) ** AIR 1916 All 153 (154) (DB) ** AIR 1914 Lah 174 (175) (DB) ** AIR 1914 Mad 37 (39) (DB) ** AIR 1914 Cal 823 (824) (DB) ** AIR 1914 Oudh 366 (367) ** (1926) 98 Ind Cas 497 (497) (All) ** (1908) 11 Oudh Cas 95 (98) ** (1907) 3 Nag LR 97 (99) ** (1907) 3 Nag LR 19 (34) ** (1906) 30 Bom 119 (121) (DB) ** (1906) 30 Bom 426 (429) (DB) ** (1906) 2 Bom LR 1058 (1062) (DB) ** (1892) 14 All 195 (199, 200) (DB) ** (1889) 2 CPLR 125 (126) ** (1879) 5 Cal LR 386 (390) (DB) ** (1876) 1 Bom 333 (337) (DB) ** (1923) 67 Ind Cas 113 (114) (DB) (Cal) ** (1921) 64 Ind Cas 583 (584) (DB) (Cal) ** (1913) 21 Ind Cas 90 (90) (DB) (Cal) ** (1913) 6 Sind LR 245 (246) (DB) ** (1911) 35 Bom 93 (96) (DB) (22 All 349 27 Ind App 58 (PC) **Foll.**) ** (1911) 35 Bom 231 (235, 236) (DB) (Do.) ** (1911) 33 All 337 (339) (DB) ** (1910) 34 Bom 59 (64) (DB) (Evidence cannot be set up to prove the oral agreement except on **grounds of fraud or misrepresentation.**)

[See also AIR 1946 PC 178 (179) ILR (1947) Kant (PC) 20 (Sale or mortgage - Court must find the substance behind form. But where oral evidence is unreliable and contradictory Court cannot safely depart from written evidence of documents.)]

Also see S. 105. Note 67.

[**But see** (1864) 1 Suth WR 22 (22) (DB) (**No longer good law.**)]

19. (1901) 28 Cal 289 (291, 292) (SB) ** (1898) 25 Cal 603 (608) (FB) ** (1866) 5 Suth WR 68 (72, 76) (FB). (Although evidence of the acts and conduct of the parties is admissible in suits in which third parties are not concerned the rights of a third party acting *bona fide* upon the faith of an absolute sale would not be affected even by the acts or conduct of the original parties and the third party would not be precluded by such acts or conduct from having effect given to the contract as expressed by the writing.) ** **(1866) 5 Suth WR 76 (77, 78) (FB).** (Do.) ** AIR 1928 All 34 (36, 37) (DB) ** AIR 1920 Cal 683 (684) (DB) ** AIR 1917 Cal 565 (566) (DB) ** AIR 1914 Oudh 335 (335) ** (1901) 28 Cal 256 (258, 259) (DB) ** 1898 Bom PJ 239 (240, 241) (DB) ** (1893) 16 Mad 80 (83) (DB) (Oral evidence is admissible to prove the nature of the transaction provided the innocent purchaser for value without notice is not prejudiced.) ** (1890) 13 Mad 494 (495) (DB) ** (1883) 9 Cal 898 (900) (DB) (The rule of admitting evidence for the purpose of defeating the fraud involved in the conduct of the person who is really a mortgagee but who sets

the other view(20) being that it is not admissible inasmuch as evidence of conduct could be relevant only on the ground that the conduct leads to the inference that there was a contemporaneous oral agreement or statement between the parties that the document, in form an absolute sale, was to operate as a mortgage and not a sale. But S. 92 of the Evidence Act enacts that *no* evidence of any oral agreement shall be admitted to vary the terms of the contract or grant and no exception is made in the provisos in favour of evidence which consists of the acts and conduct of the parties from which an inference might be drawn that there was such an oral agreement. In *Maung Kyin v. Ma Shwe Law*(21) their Lordships of the Privy Council approving the decisions taking the latter view have held that such evidence is inadmissible. See also the undermentioned cases to the same effect decided after the above Privy Council decision.(22) The decisions taking the former view are now no longer good law.

The mere fact that a sale is accompanied by *an agreement to reconvey* the property sold, on repayment of the purchase-money within a certain time is not such a circumstance as will be sufficient, by itself, to show that the transaction was a mortage(23) irrespective of the intention of the parties.

An agreement of repurchase before a specified date on payment of purchase money with

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himself up as an absolute purchaser would not apply to an innocent purchaser without notice of the existence of the mortgage who merely buys from a person who is in possession of the title deeds and is the ostensible owner of the property) ** (1883) 9 Cal 528 (532, 533) (DB) ** (1883) 7 Bom 73 (76) (DB) ** (1883) 7 Bom 78 (81) (DB) ** (1880) 4 Bom 594 (598) (DB) ** (1873) 19 Suth WR 333 (334) (DB) ** (1872) 18 Suth WR 256 (257) (DB) ** (1866) 5 Suth WR 104 (105) (DB).

[**See also** (1898) 26 Cal 160 (163) (DB) (25 Cal 603 Foll — Case of a lease) ** (1908) 12 Cal WN 878 (881, 884) (DB) (Conduct taken into consideration by the Court in deciding whether transaction amounted to a mortgage or out and out sale) ** (1906) 8 Bom LR 669 (670) (DB).]

20. **(1905) 3 Low Bur Rul 100 (104) (FB).** (22 All 149 Foll 2 Low Bur Rul 1 **Overruled.**) ** AIR 1934 Nag 18 (19) ** AIR 1928 Rang 58 (59 60) 5 Rang 644 (DB) ** AIR 1925 Cal 1151 (1152) (DB) ** AIR 1916 Low Bur 26 (27) ** AIR 1914 Mad 37 (39) (DB) ** (1907) 3 Nag LR 19 (33) ** (1902) 25 Mad 7 (13) (DB) ** (1880) 5 Cal 300 (302) (DB)

21. **AIR 1917 PC 207 (209) : 45 Cal 320 (332) : 44 Ind App 236 : 9 Low Bur Rul 114.**

22. **AIR 1960 SC 301 (304).** (Only evidence of contemporaneous conduct is admissible.) ** (1991) 1 Kant LJ 477 (482) ILR (1991) Kant 2445 (Normally contemporaneous conduct of parties to document is taken into account for determining nature of document But where the subsequent conduct of the parties is closely connected with document itself and they have treated the document in a particular manner and have acted accordingly the fact that such a conduct is subsequent to the document could not in any way be made a ground to exclude such conduct from consideration in determining the nature of the document, as such conduct being relevant cannot at all be excluded from consideration) ** AIR 1965 Assam 90 (92) ILR (1963) 15 Assam 496 (Evidence of subsequent conduct not admissible as evidence of surrounding circumstance) ** AIR 1964 Orissa 17 (18) (If there is ambiguity in the language employed evidence of contemporaneous conduct is always admissible as a surrounding circumstance But evidence as to subsequent conduct of the parties is inadmissible) ** AIR 1964 Punj 81 (82) (DB) (But evidence of contemporaneous conduct is admissible as a surrounding circumstance) ** ILR (1961) Cut 487 (489) (DB) ** AIR 1959 Pat 230 (233) (DB) ** AIR 1957 Pat 126 (127) (Proviso 6 to S 92, Evidence Act, can be resorted to where there is any ambiguity in the document itself) ** AIR 1955 Hyd 179 (184) ILR (1955) Hyd 440 (DB) ** AIR 1952 Pat 431 (433) (DB).

23. **AIR 1954 SC 345 (346) ** AIR 1919 Mad 1 (5, 6) : 42 Mad 407 (FB). (Overruling** AIR 1914 Mad 37 ** AIR 1966 Andh Pra 252 (254) (DB) ** AIR 1960 Punj 444 (449) ILR (1960) 2 Punj 741 (DB) ** 1959 Andh LT 457 (460) ** AIR 1931 Bom 371 (373) (DB). (Though there may be an agreement of sale with a right of repurchase that circumstance in

interest will not by itself make a transaction of sale a mortgage, nor can the permission to the vendor to sell the property to others with a view to repurchase make it a mortgage.(24)

In *Williams Owen*(25) Lord Cottenham, L. C., said :

> "That this Court will treat a transaction as a mortgage although it was made so as to bear the appearance of an absolute sale if it appear that the parties intended it to be a mortgage is no doubt true but it is equally clear, that if the parties intended an absolute sale a contemporaneous agreement for a repurchase, not acted upon, will not of *itself* entitle the vendor to redeem The question always is, was the original transaction a *bona fide* sale with a contract for re-purchase, or was it a mortgage under the form of a sale?"

The leading case on the point in India is *Bhagwan Sahai v Bhagwan Din*(26) where their Lordships referred with approval to the following observations of Lord Granworth in *Alderson v White* :(27)

> "The rule of law on this subject is one dictated by common sense the *prima facie* an absolute conveyance, containing nothing to shew that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right of repurchase In every such case the question is what upon a fair construction, is the meaning of the instrument? Here the first instrument was on the face of it, an absolute conveyance the second gave a right to re-purchase on payment not of what should be due, but of the full amount of the purchase money of £ 4 739 Was that of taken according to its terms a lawful contract? Clearly so What then is there to shew that it was intended to be a mere mortgage?"

The question whether a sale and an agreement to reconvey were intended to create a mortgage or not must be decided with reference to the surrounding circumstances (28) Where two

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itself is not a sufficient basis for the inference that the transaction is a mortgage) ** AIR 1929 All 174 (177 180) ** AIR 1927 Rang 314 315) ** AIR 1925 Mad 37 (38 ** AIR 1923 All 48 (50) 45 All 72 (DB) ** AIR 1921 Mad 498 (500) (DB ** AIR 1916 All 305 (306) ** (1902) 1 Low Bur Rul 257 (258) (Transaction held to be a sale with a covenant to repurchase and not a mortgage) ** (1897) 21 Bom 528 (532) (DB) ** (1891) 14 Mad 170 (172) (DB) (A mortgagor executed a deed of conveyance for an inadequate price to the mortgagee, who executed in his turn a counter part on the same date agreeing to reconvey the same if the sum without interest be repaid in a certain time No payment was made in time but after a long time the property was sought to be redeemed — **Held,** that there was no evidence to show that the parties intended to enter into a transaction different from what appears on the face of the documents and that the plaintiff could not redeem) ** 1883 Bom PJ 258 (DB) ** (1877-78) 2 Bom 231 (246) (DB) ** (1912) 15 Ind Cas 423 (423) (Low Bur) ** (1911) 11 Ind Cas 124 (125) (Cal) ** (1911) 33 All 337 (339 340) (DB) ** (1910) 8 Ind Cas 981 (982) (Low Bur).

[See also (1911) 35 Bom 258 (260) (DB) (Sale with option to repurchase at any time — Suit by vendor's grandson for redemption — **Held,** that the covenant repurchase was personal and that there being no debt existing at any time there was no mortgage) ** AIR 1917 Low Bur 161 (161) (Sale and an agreement that vendor may repurchase within three years — Suit by vendor for redemption of alleged mortgage — **Held,** onus was on vendor to prove that the transaction was mortgage and not sale.)]

24. (1971) 2 Andh WR 2 (12) (DB).

25. (1840) 48 RR 322(324) : 9 LJ (NS) Ch. 70.

[See also (1863) 1 Mad HCR 460 (464) (DB).]

[But see (1864) 2 Mad HCR 289 (290) (DB).]

26. (1890) 12 All 387 (391) : 17 Ind App 98 (PC).

[See also (1910) 6 Ind Cas 183 (185) (DB) (All).]

27. (1858) 44 ER 924 (928) : 2 De G and J 97.

28. AIR 1966 SC 902 (903). (Reversing AIR 1961 Mad 276 on another point) ** AIR 1968

deeds, one a sale and the other an agreement to reconvey, are of *even date*, there would arise a *presumption* in favour of the transaction being a mortgage **(29)** But where they are not of even date and, at the time of the sale, there was no intention of executing an agreement to reconvey, the documents would not constitute a mortgage **(30)** Where the intention of the parties is not otherwise ascertainable from the document or from the surrounding circumstances, the name or the heading of the document may be taken as evidence of intention of the parties.**(31)**

Some of the surrounding circumstances that will tend to show that a transaction is a mortgage and not a sale, though in form a sale, are :

(1) The Price fixed being far below the real value of the property **(32)** Where the amount paid by the transferee has no relation to the market price of the property, but is merely the amount advanced for interest as debt to the transferor, it is an indication that the transac-

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Orissa 65 (66) (DB) ILR (1967) 2 Ker 69 (71) ** AIR 1965 Assam 90 (91) ILR (1963) 15 Assam 496 (Evidence of subsequent conduct is not admissible as evidence of surrounding circumstance though evidence of contemporaneous conduct is admissible) ** AIR 1964 Punj 81 (82) (DB) ** ILR 1961 Cut 487 (489) (DB) ** AIR 1957 All 740 (741) ** (1956) 1 Mad LJ 388 (389) ** (1956) 1 Mad LJ 385 (387) ** AIR 1915 Mad 651 (651) (DB)

29. **(1911) 9 Ind Cas 1013 (1014) (FB) (All).** (Deed of reconveyance was executed after a week from the execution of the deed of sale — Transaction held not to be mortgage) ** AIR 1964 Punj 81 (83) (DB) ** 1961 MPLJ 1298 (1301) ** AIR 1957 All 740 (741) (But that fact is not conclusive of the matter) ** AIR 1952 Mad 11 (12) ILR (1952) Mad 604 (DB) ** AIR 1952 Punj 181 (183) ** AIR 1915 Mad 790 (790) (DB) ** AIR 1914 Bom 177 (178) ; **39 Bom 119 (DB) ** AIR 1914 Bom 179 (180) (DB).**

[See also 1959 Andh LT 457 (463) (Agreement for repurchase coming into existence contemporaneously with sale deed — It is not a sure sign of transaction being a mortgage) ** AIR 1915 Bom 229 (231) 40 Bom 74 (DB) (Sale deed with the deed of agreement to reconvey and another deed providing for annual payment of sum equal to assessment and interest executed on one day — **Held** that in view of circumstances of the case transaction was mortgage.)]

30. **(1883) 5 All 324 (329, 330) (FB)** ** 1959 Andh LT 457 (463) ** AIR 1952 Mad 11 (12) ILR (1952) Mad 604 ** AIR 1952 Punj 181 (183) ** AIR 1937 Rang 402 (403) 1938 Rang LR 216 (DB) ** AIR 1935 Rang 212 (213) ** (1895) 17 All 451 (453) ** (1883) 6 All 37 (37) (DB).

[See also (1906) 29 Mad 307 (308, 309) (DB).

31. (1959) 63 Cal WN 430 (434)

32. **AIR 1966 SC 902 (904). (Reversing** AIR 1961 Mad 276 on facts) ** **AIR 1924 PC 226 (230) : 47 Mad 729 : 51 Ind App 305** ** AIR 1985 Cal 133 (138) (1984) 88 Cal WN 915 (Mortgage by conditional sale — Possession of suit land remaining with mortgagor — Value of suit property as recited in deed was below market value prevailing at relevant time — Transaction is mortgage by conditional sale and not out and out sale with agreement for reconveyance) ** AIR 1972 J & K 81 (83, 84) 1972 J & K LR 75 (The document providing that on payment of the consideration vendor will take back possession — Intention is to create a mortgage and not sale) ** AIR 1968 Orissa 65 (66) (DB). (Price fixed at Rs 800 when value of property is Rs 3,500) ** (1967) 11 Law Rep 767 (773) (Mys) ** AIR 1967 Orissa 191 (193) ILR (1967) Cut 32 (But the inadequacy or adequacy of consideration is not the only factor to be taken into consideration Thus where the possession is delivered to the transferee and he is to enjoy the usufruct without any liability to account and he has to reconvey on payment of the consideration for the document and there is no evidence that there was any bargaining fixing the market price the adequacy of that consideration does not militate against the transaction being a mortgage) ** (1965) 2 Mad LJ 480 (481) ** AIR 1964 Pat 193 (197) (DB) ** AIR 1964 Punj 81 (83) (DB) ** AIR 1961 Mad 276 (279) ILR (1961) Mad 387 (**Reversed** on another point in AIR 1966 SC 902 ILR 1961 Cut 487 (489) (DB) ** AIR 1960 Punj 444 (448) ILR (1960) 2 Punj 741 (DB) (Question of ad-

tion is intended to be a mortgage.**(33)** So also where the amount agreed upon as the price of repurchase is the same as the consideration for the original sale that is generally considered as indicative of a mortgage by conditional sale.**(34)**

(2) The sale deed being accompanied by an agreement to reconvey, stated in the sale deed itself, and imposing an *obligation* on the seller to repurchase the property **(35)**

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equacy has to be judged as at the time of transaction and not after the property had acquired a greatly enhanced value from some unexpected cause — ** 1956 Andh LT 534 (538) ** AIR 1954 Nag 193 (198) (DB) ** AIR 1952 Mad 11 (12) ILR (1952) Mad 604 (DB) ** AIR 1952 Punj 181 (183) ** AIR 1947 Pat 345 (347) 25 Pat 666 (DB) (Inadequacy of price and absence of bargaining to settle the price are circumstances to be considered.) ** (1946) 51 Mys HCR 187 ** AIR 1944 Oudh 305 (309) (DB) ** AIR 1941 Oudh 582 (584) 17 Luck 198 (DB) (Adequacy of consideration is one circumstance.) **(1866) 5 Suth WR 68 (72) (FB)** ** AIR 1940 Bom 1 (4) (DB) ** AIR 1940 Nag 84 (86) ** AIR 1934 Nag 18 (20) ** AIR 1931 Bom 371 (374) (DB) ** AIR 1928 Mad 696 (697) (DB) ** AIR 1925 Cal 1151 (1152) (DB) ** (1883) 9 Cal 528 (534) (DB) ** (1877) 2 Bom 231 (245) (DB) ** (1921) 64 Ind Cas 583 (584) (DB) (Cal) ** (1913) 2 Ind Cas 90 (91) (DB) (Cal.)

[**See also** AIR 1960 Ker 198 (199) ILR (1960) Ker 857 (Failure to give due importance to value of property that by itself does not vitiate conclusion arrived at as to nature of document.) ** 1959 Andh LT 457 (463, 464) ** AIR 1928 Nag 300 (302) (The primary object of a mortgage is to secure the payment of debt usually much below the market value of the property mortgaged.)]

[**See however** AIR 1962 Pat 53 (55) (DB) (Document purporting to be absolute sale with condition of repurchase is express and clear terms — Intention of parties be determined from document itself and not from surrounding circumstances — Inadequacy of price or payment of cost of stamp by executant cannot alter its nature — ** AIR 1944 Lah 175 (178) (The fact that the price stipulated to be paid is adequate does not by itself render the transaction a sale because adequacy of consideration is a circumstance which is consistent with the transaction being a mortgage by conditional sale or its being an out and out sale.)

33. **AIR 1925 PC 75 (78) : 3 Rang 106** ** 1956 Andh LT 534 (536) ** AIR 1916 Mad 1074 (1078) (DB) ** (1900) 2 Bom LR 1058 (1066) (DB). (Per Ranade, J.)

[**See also** (1904) 6 Bom LR 630 (631) (DB) (The fact that the consideration money represented the full value of the property in dispute is not conclusive circumstance to show that the transaction is intended to be a sale.) ** AIR 1921 Mad 498 (500) (It was, however, held that consideration of the disproportion between the price and the value of the property was excluded by the evidence Act.) ** AIR 1925 Mad 37 (39)

34. AIR 1968 Orissa 65 (67) (DB) ** AIR 1984 A I 219 (223) 1984 A I C J 185 (Transfer of possession of immovable property worth Rs 1 lakh in favour of X for consideration of Rs 45,000/- only — Deed making reference to loan of Rs 45,000/- received in cash and providing that on payment back of Rs 45,000/- by executant on specified date X would reconvey property to executant — Held, document was mortgage by conditional sale and not out and out sale.) ** (1867) 11 Law Rep 767 (772) (Mys) ** AIR 1961 Mad 276 (278) ILR (1961) Mad 387 (**Reversed** on another point in AIR 1966 SC 902.) ** (1956) 2 Mad LJ 565 (567) (Sale deed for Rs 900 the pre-existing debt — Condition that transferee would reconvey property to transferor if that amount was paid by certain date.) ** 1956 1 Mad LJ 388 (389).

[**See however** AIR 1988 Bom 94 (104) 1988 Mah LR 764 (Execution of sale deed in favour of person — Agreement of same date agreeing to reconvey property on payment of same amount as mentioned in sale deed by fixed date — Held, transaction was sale and not mortgage.)]

35. **AIR 1924 PC 226 (230) : 51 Ind App 305.**

[**See also** AIR 1954 Nag 193 (197) (DB) (AIR 1924 PC 226, Foll.)]

(3) The time fixed for repurchase not being of the essence of the contract **(36)**

(4) That there was a debt subsisting at the time to discharge which the document was executed.**(37)**

(5) Possession not having been given to the purchaser at the time of the ostensible sale **(38)** Where, however, possession was handed over to the purchaser in furtherance of an agreement to guarantee interest, it was held that the handing over of possession indicated a mortgage rather than a sale.**(39)**

(6) When the stipulated period for repurchase is a long term **(40)**

(7) The purchase of stamp paper by the vendor, and the vendor remaining in possession.**(41)**

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36. **AIR 1924 PC 226 (230) : 47 Mad 729 : 51 Ind App 305** ** AIR 1954 Nag 193 (199) (DB) ** AIR 1941 Oudh 582 (584) ILR 17 Luck 198 (DB) (Short period of time for repurchase suggests sale while long period a mortgage AIR 1937 All 724 and AIR 1939 All 713, Relon.)

[**See however** 1959 Andh LT 457 (462) (Fact that time is not made essence of contract of repurchase does not make transaction a mortgage — **Held** that provision for refund of sum paid in contingency specified showed that parties considered time to be of essence)]

37. (1965) 2 Mad LJ 480 (481) ** AIR 1964 Punj 81 (83) (DB) ** 1956 Andh LT 534 (536) ** (1956) 2 Mad LJ 565 (567) (Sale deed executed for the pre existing debt with a condition for repurchase if the vendor paid that amount by a certain date) ** AIR 1952 Mad 11 (12) : ILR (1952) Mad 604 (DB) ** AIR 1916 Mad 1074 (1077, 1078) (DB).

[**See also** AIR 1960 Punj 444 (449) ILR (1960) 2 Punj 741 (DB) (Financial embarrassment of the grantor at the time of the execution of the deed is sometimes considered as a circumstance showing that the transaction was intended as a mortgage)]

38. **AIR 1966 SC 902 (904).** (**Reversing** AIR 1961 Mad 276) ** AIR 1964 Punj 81 (83) (DB) ** 1961 MPLJ 1298 (1301) ** AIR 1952 Mad 11 (12) ILR (1952) Mad 604 (DB) ** AIR 1952 Punj 181 (183) ** AIR 1934 Nag 18 (20) ** AIR 1931 Bom 371 (374) (DB) ** (1907) 6 Cal L Jour 208 (211) (DB) ** (1883) 9 Cal 528 (534) (DB) ** **(1866) 5 Suth WR 68 (71) (FB) ** (1921) 64 Ind Cas 583 (584) (DB) (Cal)**

[**See** 1959 Andh LT 457 (463) (But significance may attach to non-delivery of possession only in a case where the possession is to come into effect from the final date fixed for the sale becoming irrevocable Where the deed expressly recites that possession is given to the vendee subject to the rights of lessee the fact that the receipt of rent by the vendee from the lessee of the seller is postponed (because the lessee has already paid the rent in advance) will not indicate that the seller is to continue in possession until that date and as there is non-delivery of possession contemporaneously with the deed, the transaction is a mortgage.)]

39. **AIR 1954 Nag 193 (199) (DB).**

40. AIR 1975 Guj 120 (122) 16 Guj LR 509 (Though the document described a transaction as a sale it also provided that the transferee would become absolute owner if the amount paid by the transferee was not returned within a period of 21 years, the fact of such long period provided for exercising the right of purchase shows the transaction to be a mortgage — **Overruled** on another point in AIR 1978 (NOC) 16 (Guj) ** (1967) 11 Law Rep 767 (773) (Mys) ** AIR 1964 Punj 81 (83) (DB) ** 1961 MPLJ 1298 (1301) ** 1959 Andh LT 457 (463) (Period of one year and five months not a long period indicative of mortgage) ** 1956-1 Mad LJ 388 (389) ** AIR 1954 Nag 193 (199) (DB) (It was held, that the period of five years fixed for repurchase was not abnormally short) ** AIR 1953 Mys 105 (106) ILR (1952) Mys 247. (Short period provided for repayment is indicative of sale and not a mortgage) ** AIR 1952 Mad 11 (12) ILR (1952) Mad 604 (DB) ** AIR 1952 Punj 181 (183). (Short period indicative of sale) ** AIR 1950 Nag 198 (200) ILR (1950) Nag 719 (A short period such as 2 years is indicative of sale rather than of mortgage) ** (1921) 64 Ind Cas 583 (584) (DB) (Cal).

41. (1969) 11 Law Rep 767 (773) (Mys) ** (1956) 2 Mad LJ 565 (567) ** AIR 1952 Mad 11 (12) ILR (1952 Mad 604 (DB) ** AIR 1919 Cal 109 (109, 110) (DB)

(8) That a relation of debtor and creditor existed between the parties at the time of the sale(42) though it is not a test by itself (43) In the undermentioned case(44) it has been held that an antecedent transaction resulting in the relationship of debtor and creditor is not essential and that by the very act by which the parties enter into a mortgage by conditional sale they can bring about a relationship of debtor and creditor

(9) In the Punjab, the term "Shartiah Bai" is usually employed as indicative of an intention to execute a mortgage by conditional sale.(45)

(10) Stipulation for payment of interest suggests a mortgage but is not conclusive.(46)

(11) Restrictions imposed on transferee as to enjoyment, improvements on property, etc.(47) or

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[See however AIR 1962 Pat 53 (55) (DB) (Document purporting to be absolute sale with condition of repurchase in express and clear terms — Intention of parties be determined from document itself — Inadequacy of price or payment of cost of stamp by executant cannot alter its nature) ** AIR 1934 Nag 18 (19)

42. (1967) 11 Law Rep 767 (773) (Mys) ** (1965) 2 Mad LJ 480 (481) (Sale deed — No cash paid for entire amount of consideration — Entire amount representing prior debts — Intention to show that relationship of debtor and creditor subsisted was apparent) ** (1965) 31 Cut LT 233 (236) ** AIR 1960 Ker 198 (199) ILR (1960) Ker 857 (Relationship of debtor and creditor is one of the circumstances to be considered) ** AIR 1960 Punj 444 (448) ILR (1960) 2 Punj 741 (DB) (If, however pre existing debt is recovered by parties as extinguished that would be strong proof in favour of conditional sale) ** 1959 Andh LT 457 (462) (Where there is no undertaking by the seller to repay the sum and what is imposed is an obligation on the buyer to reconvey the property if and in case the seller pays him a certain amount calculated in a particular manner the mere fact that the consideration for the repurchase is to be in a particular manner is not necessarily indicative of a subsisting relationship of debtor and creditor between the seller and the buyer) ** (1956) 2 Mad LJ 565 (567) ** (1956) 1 Mad LJ 388 (390) ** AIR 1954 Nag 193 (197) (DB) ** AIR 1953 Mys 105 (105) ILR (1952) Mys 247 (DB) ** (1946) 51 Mys HCR 187 ** AIR 1940 Bom 1 (3) ** AIR 1940 Nag 84 (86) ** AIR 1939 All 539 (541) ** AIR 1937 Rang 402 (403) 1938 Rang LR 216 (DB) ** AIR 1934 Nag 18 (20) ** AIR 1931 Bom 371 (374) (DB) ** AIR 1929 Rang 39 (40) (DB) ** AIR 1927 Rang 314 (315) ** AIR 1925 Can 105 (105) (DB) ** AIR 1917 Low Bur 72 (72) (DB) ** (1898) 22 Bom 245 (251) (DB) ** (1883) 7 Bom 73 (76) (DB) ** (1878) 2 Bom 231 (243 244) (DB) ** (1912) 15 Ind Cas 423 (423) (Low Bur) ** (1910) 8 Ind Cas 981 (982) (Low Bur)

[See (1897) 21 Bom 528 (532) (DB) (To make a mortgage there must be a debt)]

[See also AIR 1944 Lah 175 (178) ** (1900) 2 Bom LR 1058 (1064) (DB)]

43. AIR 1941 Oudh 479 (481) 16 Luck 789 (DB) ** (1982) 2 Andh LT 260 (270)

44. AIR 1962 Mys 238 (239)

45. AIR 1944 Lah 175 (178) (Document described as Shartiah Bai provided that certain shop was transferred to the vendee by way of conditional sale for a certain sum out of which major portion was to go in discharge of previous mortgage in favour of vendee — Vendee given proprietary possession with power to repair Deed also providing that if the purchase price with its interest and also the amount spent on repairs with interest thereon was not repaid within three years the sale was to become absolute but in case of such payment the vendee was to resell the shop — *Held* that the document created a mortgage by conditional sale.)

46. (1967) 11 Law Rep 767 (773) (Mys) ** AIR 1964 Punj 81 (83) (DB) ** AIR 1960 Punj 444 (448) ILR (1960) 2 Punj 741 (DB) ** (1959) 63 Cal WN 430 (434) ** 1956 Andh LT 534 (536) (Vendee made accountable for rents and profits - Vendor to pay balance of interest at stipulated rate after deducting rents and profits) ** 1956 1 Mad LJ 385 (387) ** AIR 1954 Nag 193 (199) (DB) ** AIR 1952 Mad 11 (12) ILR (1962) Mad 604 (DB) ** AIR 1952 Punj 181 (183) ** AIR 1947 Pat 345 (347) 25 Pat 666 (DB)

47. AIR 1947 Pat 345 (348) : 25 Pat 666 (DB).

condition in the document to pay compensation for the improvements, if any, effected by the purchaser.(48)

(12) Where the covenant for resale provides that *after* a certain period the transferor might repay and obtain a reconveyance, a mortgage is indicated (49)

(13) An express provision for postponement of mutation of the grantee's name in the landlord's papers till after the time for payment expires, is decisive of the transaction being a mortgage.(50)

(14) A convenant for refund of the consideration money with interest on dispossession or disturbance of possession of the vendee not attributable to the vendor's defective title is indicative of a mortgage.(51)

(15) The mortgagor building a house on the property mortgaged at his own expense (52)

Illustrations

(1) In an agreement for repurchase accompanying a sale, the words used were similar to those in Bengal Regulation I of 1898 relating to the deposit of *mortgage-money* into the treasury and the amount payable on repurchase included not only the price fixed but also a sum due on an account open to be increased It was held that these circumstances indicated a mortgage (53)

(2) A purported to execute an absolute sale to B. A was then in great difficulties,the consideration was inadequate A's object within the knowledge of B was only to obtain a loan and not to sell One solicitor acted for both parties B had been suddenly introduced to A instead of an intended lender on the date of the transaction It was held that the transaction was only a mortgage (54)

(3) Where a transfer was in terms absolute but for a consideration far less than the real value, and was accompanied by an agreement that if the amount is satisfied from out of the rents and profits, the vendee will give back the land to the vendor, it was held by their Lordships of the Privy Council that the transaction was a mortgage.(55)

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48. (1967) 11 Law Rep 767 (773) (Mys)

49. AIR 1966 SC 902 (904) (Reversing AIR 1961 Mad 276 on another point) ** AIR 1940 PC 160 (166) : ILR (1940) All 625 : ILR (1940) Kar (PC) 287 : 67 Ind App 318 ** AIR 1988 SC 1074 (1077) : (1988) 1 JT 652(2). (A selling property to B — Contemporaneous agreement to resell property to A executed by B for same consideration — Period 10 years stipulated for claiming resale — Possession of property to remain with A on payment of rent to B — Transaction in reality was a mortgage (obiter)) ** AIR 1991 Guj 85 (89) (Stipulation in the document describing the transaction evidenced by it as conditional sale, that at any time within 10 years of its execution, the seller could remain the same amount of consideration as paid by the buyer and that thereupon the land would be returned to the seller would be indicative that there was no outright sale of the land covered by the document and only relationship of debtor and creditor was intended to be brought about by the said transaction and the document was in reality a mortgage by conditional sale) ** AIR 1974 Guj 19 (23) 14 Guj LR 600 (Omission to fix certain date for repayment of the mortgage money is not fatal.) ** (1965) 31 Cut LT 233 (239).

50. AIR 1951 Orissa 362 (370, 373, 378) : ILR (1951) Cut 281 (FB). (But in cases of transfer of occupancy holdings before they were made transferable by Orissa Tenancy (Amendment) Act, 1938, postponement of mutation is inconclusive.)

[See however (1956) 1 Mad LJ 385 (388) (Provision for postponement of transfer of patta till the expiry of the period for repurchase does not necessarily indicate a mortgage and in the circumstances of a case the transaction may be a sale in spite of such a provision]

51. AIR 1968 Orissa 65 (67) (DB) ** AIR 1951 Orissa 362 (371, 374, 378) : ILR (1951) Cut 281 (FB).

52. AIR 1962 Mys 238 (239).

53. (1900) 22 All 149 (161) : 27 Ind App 58 (PC).

54. (1861) 66 ER 403 (407, 408) : 3 Gift 251, Douglas v. Culverwell.

55. (1837) 2 Moo Ind App 1 (21, 22) : 5 Suth WR 117 (PC).

(4) Where though there was a conveyance in fee the acts of the parties showed that they treated the transaction from the first as one of security and that a power of repurchase on the footing of redemption was intended to be reserved, it was held by their Lordships of the Privy Council that the transaction was in the nature of a mortgage.(56)

In the undermentioned cases(57) it was held that the transaction amounted to a mortgage

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56. (1849) 5 Moo Ind App 72 (79, 81) (PC).

57. AIR 1966 SC 902 (904). (Condition of repurchase embodied in the same document — Consideration for transaction only half of the real value of property — Pattanot transferred to the transferee — Kist also paid by the executant and after his death by his son — Consideration for reconveyance to be the same as for the original transaction — **Held,** transaction was a mortgage and not a sale with a condition for retransfer — AIR 1936 Mad 2 (6) **Reversed** on another point.) ** AIR 1999 Madh Pra 86 (88) — 1999 (2) MPLJ 31 (In instant case there was a usufructuary mortgage. Although the mortgage was illegal at its inception for want of registration, a valid mortgage came into existence at the expiry of 12 years period as the mortgage continued to be in possession of the mortgaged property during all that period.) ** 1999 (3) Mad LJ 713 (720) (In instant case there was relation to creditor and debtor between the parties. Though the earlier portion of the document executed by the debtor would show that the purchaser/creditor was entitled to suit property absolutely with all rights the later portion specifically provided that in the event of mortgagor repaying the consideration during the particular period with stamp duty incurred the purchaser would execute the deed of reconveyance in favour of the debtor/seller. the amount to be paid was the same consideration even after 9/10 years. Thus it is a transaction to secure repayment of amount advanced and charged over the suit property as security. Thus the document was held to be a mortgage by conditional sale falling under S. 58(c) and not a sale with a condition to repurchase.) ** 1998 (6) Andh LD 615 (621) (Where the vendee is a regular money lender, the suit premises are located in prime locality but consideration is much below the market price. the mutation was not done. the amount of rent represented interest and the vendor continued to be in possession. the transaction was a mortgage and not outright sale.) ** 1998 AIHC 3205 (3207, Orissa) (Reading of the recitals of the document showed it to be a usufructuary mortgage deed and there was not a syllable to give it an expression of an agreement for sale.) ** AIR 1997 Andh Pra 53 (67) — 1996 (1) Andh WR 655 (In the instant case it was found that the sale deed was in reality executed as a supplement to the anomalous mortgage. It was agreed that the loan would carry interest. Possession of suit property was given to mortgagee. Thus it was usufructuary mortgage. Period of 5 years was agreed. On payment of balance, property would be reconveyed to mortgagor. Thus it was not out and out sale but was usufructuary mortgage. The mortgagee was therefore entitled to redeem mortgage on fulfilment of its terms. AIR 1971 Orissa 58 **Dissented from.**) ** AIR 1997 Mad 105 (120) — 1996 (1) CTC 337 (Certain property worth Rs. 2,000/- was sold at Rs. 250/-. The document contained a condition and recital that on payment of Rs. 250/- within 5 years, a resale shall be executed by purchaser to seller. If the amount is not re paid within 5 years the sale in favour of purchaser would stand confirmed. Also it was stipulated that the purchaser would not create any encumbrance over the property, while it is in his possession. **Held,** that the document was a mortgage by conditional sale and not a sale with a condition for retransfer.) ** 1995 (2) Cur CC 188 (196) (Bom) (The document stipulated reconveyance within 10 years from date of document. such a long period is normally not consistent with the transaction of sale with condition to reconvey. The liability of mortgagor to pay assessment of land was continued. The consideration was also much less than market price. Thus it was a transaction of mortgage with condition to reconvey and not outright sale.) ** AIR 1994 Ker 141 (148, 149) — 1994 (1) Ker LJ 89 (A document was styled as a usufructuary mortgage. An amount of Rs. 1,000/- was borrowed and was handed over as security in the deed. Possession was given to mortgagee. He was to pay Rs. 85/- as "excess profits". Interest was at 12% p.a. Mortgagee was not entitled to alienate. Repayment if not made within stipulated time, mortgagee could bring the property to sale. He was not given right to make improvements. Held that the document was a mortgage deed and not a lease of the building.) (1991) 2 Cur CC 130 (132) (Kant) (The transac-

tion in the instant case was a mortgage by conditional sale and not a sale deed. The mortgage deed conferred a right on the mortgagor to repurchase the land only after expiry of 8 years. The mortgagor was therefore entitled to redeem the mortgage.) ** 1984 All Civ LJ 185 (188) (DB) ** AIR 1973 Guj 190 (192, 193) ** AIR 1973 Madh Pra 15 (16) 1972 MPLJ 1000 ** (1967) 11 Law Rep 767 (773) (Mys) ** AIR 1967 Orissa 191 (193) ILR (1967) Cut 32 (Under terms of document vendee to have full title only after stipulated period — Vendee not entitled to affect transfer of property during the period but to have only its possession and enjoy the usufruct — Vendor paying kist to Government during that period and vendee paying only rent — **Held**, transaction was a mortgage by conditional sale and not a sale.) ** (1965) 2 Mad LJ 480 (DB) (Where the terms of the deed purporting to be a deed of sale showed that the amount of consideration consisted of prior debts and no amount by way of cash was paid, that the property which was conveyed was worth more than the consideration, that the consideration for reconveyance was fixed at an amount less than the consideration by Rs 500, indicating that the parties expected that the enjoyment of the property by the creditors for three years would give them by way of profits much more than the interest that would accrue on the debts during that period **Held**, that these circumstances were more consistent with the transaction being one of mortgage by conditional sale, than an outright sale with an agreement for reconveyance.) ** (1965) 31 Cut LT 233 (236) ** AIR 1964 Orissa 17 (18) (No clause for reconveyance on payment within stipulated period and only redelivery of possession to be made — Term for reimbursement to transferee not restricted to dispossession due to grantor's defective title — Term for redelivery of possession on repayment of consideration without interest — Held all these showed a mortgage and not a sale.) ** AIR 1964 Pat 193 (196) (DB) (Condition of repurchase in ostensible sale deed postponing absolute character of legal title in transferee till the expiry of the stipulated date and rendering void the entire transaction on repayment by transferor — Transaction is a mortgage.) ** AIR 1964 Punj 81 (83) (DB) (Held in view of the inadequate price and the possession continuing with vendor the transaction was not a sale but a mortgage by way of conditional sale.) ** 1961 MPLJ 1298 (1301) (Sale of house for Rs 185 and agreement for resale within 3 years on payment of the same amount with arrears of rent and expenses of repair executed on even date — Possession remaining with vendor — Held a mortgage.) ** ILR (1961) Mys 542 (548) (Sale deed giving executant right to 'free' property, creating charge and giving to vendee permanent right to enjoy property only on default of payment of amount by executant within stipulated period — Transaction held was mortgage and not sale.) ** ILR (1961) Cut 487 (491) (DB) ** AIR 1960 Ker 198 (199) · ILR (1960) Ker 857 (Document styled Kana Theeradharam — Property worth Rs 800 — Possession transferred for consideration of Rs 400 — Property to be returned back on payment of consideration within 3 years — After expiry of three years without any repayment executee to have Kanom rights — Document held was mortgage by conditional sale.) ** (1959) 63 Cal WN 430 (435) (Interest on money ordinarily meant legal profit or recompense on loan of money taken from borrower by lender — This was piece of internal indication that document was meant to be instrument of mortgage.) ** AIR 1959 Madh-Pra 221 (222) (DB) ** AIR 1958 Pat 67 (69) (DB) (The executants executed a baifulwafa deed in respect of a plot of land in favour of A for a period of five years. The executants were, however, given the right to repay the amount loaned to them even before the expiry of the stipulated period. The document ended with a recital that 'in lieu of the said consideration money, the property covered by this deed of conditional sale will stand mortgaged, hypothecated, liable and pledged.' Held, that the transaction was a mortgage by conditional sale.) ** AIR 1957 All 740 (742) (DB) ** AIR 1957 Ker 159 (170) ** 1957 Jab LJ 403 · 1957 MPLJ 196 (199) (Owner in need of loan executing conditional sale — Purchaser though to take possession immediately property not to pass to him till expiry of period fixed for repayment and there was default — **Held** transaction was mortgage and not a sale with a condition of repurchase.) ** AIR 1957 Pat 126 (128) ** AIR 1956 Bom 575 (576) (Document described as 'Mudat Kharedi Khat' (conditional sale deed) — No covenant whereby property could be said to have been conveyed by H to K — Recitals in substance stating that H borrowed Rs 700 from K and that he had in consideration thereof given property belonging to him into the possession of K — Further recital that if the amount of

Rs 700 was not repaid within ten years K on the expiry of those ten years was to be the absolute owner of the property — Held that the transaction intended to be effected by the document was a mortgage, and not a sale) ** 1956 Mad LJ 565 (567) ** (1956) 1 Mad LJ 388 (389) ** AIR 1955 Nsg 272 (275) ILR (1955) Nag 942 (Sale absolute with condition for repurchase — Restrictive covenant binding the vendor not to alienate the property or effect any changes in it — Transaction held amounted to mortgage) ** AIR 1954 Nag 193 (200) (DB) ** AIR 1954 Pat 562 (566) ILR 33 Pat 638 (DB) ** AIR 1954 Trav-Co 142 (144) ILR (1953) Trav-Co 999 (DB) ** AIR 1953 Bhopal 18 (20) (The following circumstances, viz (1) a contemporaneous agreement to reconvey (2) agreement forming the terms of the consideration of the transaction of sale (3) a fairly long period of five years for repayment and reconveyance and (4) possession continued with the defendant transferor clearly indicate the relationship between the parties to be of a debtor and creditor leading to the irresistible conclusion that the intention was to mortgage the property by conditional sale and the rent was intended to cover interest) ** AIR 1952 Mad 11 (12) ILR (1952) Mad 604 (DB) **** AIR 1951 Orissa 362 (372, 373, 378) : ILR (1951) Cut 281 (FB).** (Condition that on repayment within certain time of consideration money buyer to return the land together with the Kabala — On failure of payment buyer to possess and enjoy from generation to generation and after getting his name duly mutated in the Sheriste of Zamindar to use the land in any way — Difference in the operative words of conveyance of ownership used in earlier portion and later portion of the document indicating detraction from full ownership prior to the stipulated time Transaction held to be a mortgage and not a sale) ** AIR 1950 All 430 (431, 432) (Conditional sale of house worth Rs 1200 for Rs 150 — Vendor continuing in possession on payment of rent — Stipulation for reconveyance on repayment within three years contained in same deed — Held that the document was mortgage and not sale) ** ILR (1949) Cut 776 (779) (DB) ** AIR 1949 Pat 508 (510) ILR 28 Pat 286 (DB) (Deed providing that if the vendor paid back consideration from his private fund within certain date he would be entitled to take back property sold — In case vendee objected vendor was to deposit amount in Government Treasury and to take back possession after notice to vendee through Court — Vendee not allowed to transfer property during period of conditional sale In case of vendor's failure to pay back consideration within prescribed period vendee to have full rights in property — Held that it was a mortgage by conditional sale and not an out and out sale with condition of re-purchase) ** AIR 1947 All 334 (336) (DB) (Sale subject to separate deed of agreement executed on same day for reconveyance) ** AIR 1947 Mad 60 (62) ILR (1947) Mad 265 (DB) (Later deed undertaking to reconvey the property to the vendor — Stipulation that vendor should have the right of resale if he produced the consideration out of his own pocket did not conclusively establish that the transaction was a sale and not a mortgage AIR 1916 PC 49, explained Note — Compare AIR 1949 All 335 where such a transaction was held to be a sale with a clause for repurchase) ** AIR 1947 Pat 345 (348) 25 Pat 666 (DB) (Sale deed of village with condition of repurchase — Provision for interest — Restrictions on transferee as to amount he might spend on improvements — Restrictions on use of forest etc — Transaction held mortgage) ** AIR 1947 Pesh 33 (34) (Where there is not only a condition that on payment being made the property should be transferred to the seller, but there is also a recital to the effect that it is on the failure of the seller to pay back the amount after the expiry of a period of fifty years that the sale should become absolute transaction is mortgage) ** AIR 1944 Mad 237 (237) (In a deed of conditional sale it was recited by the transferor, "if we do not pay your amount by the due date, (viz , within five years) we agree to this document being treated as a sale deed " Held that the conveyance was not a sale but a mortgage as it was to operate as a sale after the period of five years if the amount was not paid, and the transferor was entitled to redeem The recital that "after the due date you and your heirs will have absolute powers in respect of the property, we and our heirs will not have any rights" would merely amount to a clog on the equity of redemption) ** AIR 1943 Mad 100 (101) ILR (1943) Mad 195 (DB) (Three documents executed on 19th September 1905 — By first document A selling item 1 to G for Rs 15 000 — By second document G agreeing to reconvey property for same amount after five years but

within ten years of execution — Third document a security bond though relating to item 2 containing provisions governing item 1 as well — First and second documents read with third held created mortgage by conditional sale) ** AIR 1942 Nag 115 (117) ILR (1942) Nag 592 (DB) (Document mentioning that property was sold conditionally for the amount stated therein and put in possession of the transferee — Transferee to enjoy property till five years — Amount not to carry any interest nor the property which was land, any rent — Land revenue to be paid by transferee who was to sow the land himself or by leasing to others — At the agreed time, the transferor to redeem the land by paying the amount and obtain receipt therefor — On default of payment, the conditional sale was to be an absolute sale — **Held,** on construction that the deed was a mortgage) ** AIR 1940 Nag 84 (86, 87) (Where a deed of transfer contained a stipulation that if at any time within three years the transferor was to pay back the amount paid to him in respect of the property transferred with interest after deducting the income which the transferee might derive from the property there should be a reconveyance to the transferor, it was held that the transaction amounted only to a mortgage by conditional sale and not to a sale with a condition for repurchase) ** AIR 1940 Bom 63 (64) (DB) (Consideration received less than the value of the property — Parties referred to as debtor and creditor — Property to be reconveyed to transferor on repayment of consideration within 12 years — Transaction held mortgage by conditional sale) ** AIR 1933 All 443 (445) (DB) ** AIR 1933 Lah 155 (156) (DB) (Mortgagee authorized to construct house according to his liking at his own cost — Deed containing also stipulation that mortgagor would be liable for whole amount — Transaction is mortgage and not an out and out sale) ** AIR 1930 All 283 (285) (DB) (Both the deeds executed and registered on the same day — Both written and attested by same persons — Had they been independent other deed would be without consideration — Hence both presumed to be part and parcel of the same transaction) ** (1928) 110 Ind Cas 392 (393) (All) (Where a lambardar took possession of the lands of other co-sharers by reason of the fact that he paid the revenue on their behalf and the co sharers agreed to pay rent for the lands in their cultivation and to divide the land whenever the controversy about the compensation would be settled and the claim of the lambardar would be satisfied Held, that the transaction amounted to a mortgage by conditional sale) ** AIR 1928 Lah 726 (728) (DB) ** AIR 1927 All 137 (141, 144) 48 All 787 (DB) ** AIR 1926 All 670 (671) (DB) (A stipulation in a sale-deed that on the executant handing over half the price the vendee would hand over half the property Deed, held amounted to mortgage by conditional sale) ** AIR 1925 Cal 862 (863, 864) (DB) (Deed of conveyance followed by an Ekrarnama by which the parties agree that if the vendor pays to the vendee in cash the principal with interest in lump after the expiry of ten years held to be a mortgage) ** AIR 1925 Lah 55 (56) (DB) ** AIR 1925 Oudh 11 (13) (DB) ** AIR 1924 Oudh 417 (417) ** AIR 1924 All 444 (444) : 46 All 173 (DB) ** AIR 1924 Rang 235 (237) ILR 2 Rang 113 (DB) (A deed of sale duly executed and registered contained an agreement for re-purchase but the space intended to insert the amount of re-purchase money was left blank The executant brought a suit for specific performance and rectification of the deed, or in the alternative for its cancellation **Held,** that the vendor was entitled to treat the document as a mortgage by conditional sale as defined in S 58(e), and could therefore redeem the property on payment of the mortgage money under S 60.) ** AIR 1923 All 48 (50) 45 All 72 (DB) ** AIR 1923 Bom 473 (474) 47 Bom 621 (DB) ** AIR 1920 All 270 (274) 42 All 437 (DB) ** AIR 1918 UB 32 (34) : 2 UBR 141. (The mere insertion of the following clause in a mortgage deed — "When five months have elapsed, if the principal and interest be not paid and the property redeemed, let the creditor go with the mortgage-bond to the Town Lots Office and effect a mutation of names and take the property as his absolutely" does not of itself convert the mortgage into a sale on failure of the mortgagor to pay the principal and interest within five months and the right to redeem continues in spite of such failure) ** AIR 1914 Low Bur 243 (244) ** 1905 Pun LR No 107 (DB) ** 1904 Pun Re No 78, p. 263 (281) (DB) ** (1904) 6 Bom LR 630 (632) (DB) ** (1900) 3 Oudh Cas 213 (215) ** (1897) 21 Bom 704 (708) (DB) ** 1891 Bom PJ 16 (DB) ** (1926) 94 Ind Cas 756 (758) (DB) (Mad) ** (1921) 64 Ind Cas 583 (584) (DB) (Cal). (Where the document does not contain any condition for reconveyance but only states that on payment of the money the vendee will give up posses-

while in the cases noted below(**58**) the transaction was held not to be a mortgage

Where a sale and an agreement to reconvey form part of a *single transaction* constituting a mortgage but the sale alone is registered and the agreement is unregistered, no valid mortgage is

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sion and return the deed there is no sale but a mortgage) ** (1913) 20 Ind Cas 666 (667) (Low Bur) ** (1911) 33 All 122 (123 124) (DB) ** (1986) (27) 2 Guj LR 1133 (1139) (Document not mentioning that absolute proprietary rights in the property were transferred in favour of mortgagee Condition of repurchase embodied in same document — Consideration for reconveyance was same as mortgage amount — Relationship of debtor and creditor established — Value of property at relevant time, much more than amount for consideration — Held, document was mortgage by conditional sale)

58. AIR 1984 Orissa 62 (64) (1984) 1 Orissa LR 135 (Held transaction amounted to out and out sale.) ** AIR 2001 Bom 369 (372) 2001 (3) Bom LR 436 (The landowner on receipt of money gave possession of land to opposite party The agreement between them stipulated that the opposite party was to execute reconveyance on payment of the amount by landowner within stipulated period There was no stipulation for payment of interest Held that the transaction amounted to sale with condition to repurchase and not mortgage by conditional sale) ** 1998 (4) Cur CC 409 (412) (414) (Guj) (Simply because there is one document it cannot be said that it must be held to be a mortgage by conditional sale within the meaning of S 58(c) — No such transaction shall be deemed to be a mortgage unless the condition is embodied in the document which affects or purports to affect the sale In instant case the relationship of creditor and debtor is not established and therefore the document could not be interpreted as a mortgage by conditional sale) 1997 (1) Cut Tax Cas 592 (596) (Mad) (In instant case a sale deed for consideration was executed The recitals therein did not show any debtor creditor relationship between the parties Separate agreement for repurchase was also executed Held that the transaction was not mortgage by conditional sale) ** AIR 1993 Kant 208 (220) 1992 (3) Kant LJ 244 (No condition in document as to mortgagor and mortgaged property — No relationship of debtor and creditor — Only condition that vendor could repurchase within two years for same value — Property mutated in name of purchaser and he was put in constructive possession — Transaction was out and out sale with option to repurchase and not mortgage by conditional sale) ** AIR 1992 Madh Pra 22 (27) (In the absence of any word in the sale deed which suggests or puports to suggest that the transferor ostensibly sold the property on condition that in default of payment of the consideration (loan) on a certain date the sale shall become absolute or on consideration that on such payment being made the sale shall become void or that on such payment being made the buyer shall retransfer the property to the seller the document in question cannot by any stretch of imagination be treated as a document of mortgage by conditional sale) ** (1989) 2 Cal HN 121 (128) (No stipulation of payment of interest No stipulation for retransfer — Relationship of debtor and creditor not established Consideration not too inadequate — Fact that possession remained with transferor not proved — Held, it was sale and not mortgage with conditional sale) ** (1988) 1 Kant LJ 478 (482) (Where the document was executed with the object of protecting the other family properties from being sold for the debts and also to satisfy the other debts and relationship of debtor-creditor was also not established the document was of out and out sale) ** AIR 1984 Cal 399 (404) (Sale of surplus lands by trustees of improvement trust in favour of a company — Owner of land a confirming party — Lease deed of land executed by company in favour of owner — Held, transaction was neither loan nor mortgage under S 58(c) but it is sale) ** AIR 1983 All 195 (Where the defendant happened to be a tenant of a portion of disputed property, before the execution of a sale-deed, embodying no condition to reconvey the property by the landlord in favour of the defendant, consequent to which the defendant became full owner of the property thereafter and remained as such till the execution of another sale-deed by the defendant in favour of the plaintiff (Landlord's wife) and where there is absolutely no mention in any sale-deed that relationship of landlord and tenant subsisted among the parties so far as the disputed property was concerned, after execution of those documents, then, by virtue of S 58 Cl (c) of T P Act such a transaction could not be deemed to be a mortgage It was an outright sale) ** AIR 1980 Kant 154 (156) (1980)

1 Kant LJ 216 ** AIR 1974 Mad 311 (312, 313) (1974) 1 Mad LJ 371 (DB) ** AIR 1973 All 234 (235) (By a document the executant conveyed certain property absolutely to the purchaser — No obligation on the part of the vendor but gave him only an option to recover the property on payment of the price the document did not create any relationship of debtor and creditor and neither was there any stipulation of payment of interest nor that the property was given by way of security for any loan, the transaction evidenced by the document was not a mortgage by conditional sale but an outright sale) ** AIR 1973 Gauhati 43 (48) (DB) (Adequacy of consideration, non-existence of debt, short period of one year for reconveyance, possession of property given to purchaser, no stipulation of interest on repayment are all circumstances which lead to the conclusion that the transaction is not a mortgage by conditional sale but sale outright with the condition of repurchase) ** AIR 1972 Raj 250 (251 to 253) 1971 Raj LW 426 ** (1971) 1 Cut WR 689 ** ILR (1967) 2 Ker 69 (71) ** AIR 1966 Andh Pra 252 (256) (DB) (Agreement to sell property — Formal sale deed executed two years later — Purchaser given immediate possession — Agreement of reconveyance executed on same day fixing a short period for exercise of right of reconveyance and also stating that the consideration mentioned in sale deed with interest thereon would be payable for obtaining reconveyance — Consideration for sale not shown to be inadequate — Purchaser not given right to insist on seller repurchasing the property — Held that though the formal sale deed and the agreement for reconveyance were executed on the same day and there was agreement to pay interest on the amount payable for the repurchase the transaction was a sale and not a mortgage by conditional sale) ** ILR (1966) 1 Ker 276 ** AIR 1965 Assam 90 (92) ILR (1963) 15 Assam 496. (Document in the form of absolute sale — Though seller was at the time indebted to purchaser sale consideration not shown to be inadequate — Transferor entitled to get back property if he returned purchase money within three years — Held, that the document was one of sale as the relationship of debtor and creditor did not continue thereafter) ** AIR 1961 Mad 301 (302). (Recital that the vendee shall have the right to alienate the properties even before the expiry of the stipulated period — Other clause stating that on the expiry of the period fixed under the document neither the vendor nor his heirs shall have any manner of right over these properties Transaction held an outright sale and not a mortgage.) ** AIR 1960 Punj 444 · ILR (1960) 2 Punj 741 (Contemporaneous documents embodying sale, reconveyance and lease — Vendor continuing in possession on payment of rent — Consideration comprising of principal amount of debt and interest — Intention of parties to perpetuate relationship of debtor and creditor not deductible — Grantor (mortgagor) evicted for non-payment of rent and allowed time for repurchase to expire — Payment of taxes by grantee — Lapse of considerable time after expiration of time given for re-purchase during which grantee was in possession as ostensible owner — Transaction held to be absolute sale with reservation of repurchase and not mortgage by conditional sale) ** 1959 Andh LT 457 (464) ** AIR 1958 Pat 371 (374) (DB) ** ILR (1957) 9 Assam 109 (115) (DB) ** AIR 1956 Bom 607 (608) ** (1956) 1 Mad LJ 385 (387) (The term 'Vayida crayam, in a deed of sale is used in contradistinction to 'sudhha crayam' and means nothing more than the fact that the document is a sale deed with a condition to repurchase within a fixed period and not absolute sale without any such condition) ** ILR (1955) 2 Cal 214 (218) (DB) ** (1954) Madh BLJ (HCR) 1610 (1616) (DB) ** AIR 1953 Mys 105 (106) ILR (1952) Mys 247 (DB) (Document described as conditional sale — Consideration almost equal to value of property — Period of repayment 4 years — Agreement to reconvey in same deed — Evidence of previous negotiation between parties for sale of property to discharge existing debt — It was held that the document was conditional sale and not mortgage) ** AIR 1952 Punj 181 (183) ** AIR 1949 All 335 (337) (Deed reciting itself as sale-deed) — Consideration and area of property sold mentioned — Possession with all proprietary rights given to transferee — Transferee to pay Government revenue and enjoy profits from generation to generation — Title guaranteed — Agreement whereby transferee agreed to retransfer property to transferor or his heirs whenever in any Jeth entire amount due under transfer was paid in lump sum, provided money for the purpose was not borrowed from creditor — Transaction held not mortgage by conditional sale but out and out sale with condition of repurchase *Note* — Compare AIR 1947 Mad 60 (62) (DB) where it was pointed out that a stipulation that the

vendor should have the right of resale if he produced the consideration out of his own pocket did not conclusively prove the transaction to be a sale and AIR 1916 PC 49 was explained in this connection) ** AIR 1940 All 227 (230) (DB) (Time for redemption only six months) ** AIR 1940 Bom 1 (3, 4) (DB) ** AIR 1933 Cal 381 (383, 384) 60 Cal 167 ** AIR 1931 All 113 (123) (DB) (Case law reviewed and tests summarized ** AIR 1930 Oudh 6 (8) (DB) ** AIR 1929 All 174 (179) ** AIR 1929 Cal 548 (553) (DB) (Vendor claiming back possession after 60 years – **Held** that after a lapse of long time cogent evidence is needed to prove that document is not what it purports to be) ** AIR 1929 Lah 833 (834) (DB) ** AIR 1927 All 204 (205, 206) (DB) ** AIR 1927 Mad 1081 (1082) (Under a document which purported to be a sale deed the transferee was put in possession by a decree of Court on payment of the amounts mentioned in the document and which the transferee had undertaken to pay — No time for redemption was fixed nor was any amount fixed as payable on redemption — **Held** that the transaction did not amount to a mortgage) ** AIR 1926 Bom 107 (110) (DB) ** AIR 1926 Cal 458 (459) (DB) (Consideration money mentioned in the document representing the actual price of the land at the date when the (sic).) ** AIR 1924 All 743 (744) (DB) ** AIR 1917 Mad 368 (369) (DB) (Sale (sic) market value — **Held**, it is a sale) ** AIR 1916 Bom 215 (217) 40 Bom 328 (DB) (A deed of transfer of lands under a sale in lieu of principal and interest due upon a pre existing mortgage, reserving to the vendor the right to repurchase the same on payment of the sale consideration within twenty years, even when read with a lease of the same lands by the vendee to the vendor at an annual rent which was liable to reduction in proportion to any fractional payment of the sale price, amounts to a sale and not a mortgage) ** AIR 1915 Mad 651 (652) (DB) (A mortgagor executed a deed of absolute sale in favour of his mortgagee who was about to sue on his mortgage — Some days later the mortgagee executed an agreement to reconvey the property within eighteen months if the mortgagor paid the money — **Held**, that in the circumstances of the case the transaction amounted to a sale with an agreement to reconvey and not to a mortgage by a conditional sale) ** (1909) 2 Ind Cas 930 (931) (DB) (Cal) (Where a document purported to be a sale out and out and under it the purchaser took possession of the property and on the same day there was an ekrarnamah to the effect that if the purchase money was repaid within four years the purchaser would be bound to give up the property — **Held**, that the deeds did not constitute a mortgage but a sale with a contract for repurchase) ** (1907) 6 Cal LJ 208 (211) (DB) (On the construction of two contemporaneous documents one of which purported to be a deed of sale and the other provided that, on the vendor repaying the purchase money mentioned in the deed of sale, with costs, within a fixed period the vendee would return the land and in case he did not do so, the vendor would deposit the money in Court and take possession — **Held**, that the two documents together did not constitute a mortgage — A certain date of payment is an essential element of a mortgage by conditional sale) ** (1904) 14 Mad LJ 337 (338) (DB) ** (1902) 6 Cal WN 192 (194, 195) (DB) (Where a property is sold and on the same date the purchaser executes an agreement promising to reconvey the land to the vendor if the latter repays the amount of the purchase money with interest at a certain rate within the period of three years, held that the stipulation as to the payment of interest is not conclusive to show that the transaction is not an absolute sale but a mortgage) ** 1899 Pun Re No 20 p 118 (120) (DB) ** (1897) 7 Mad LJ 299 (301) (DB) (The mere circumstance that interest was stipulated for by the parties did not by itself indicate that the document which apparently was a sale was intended to be a mortgage) ** (1882) 6 Bom 674 (679) (DB) (Where after the expiration of the period fixed for redemption, the mortgagor and mortgagee agreed that the mortgagee should continue in absolute possession for a fixed term and then restore the property free from the mortgage lien, agreement held did not amount to a mortgage but conveyance for a term of years) ** (1922) 67 Ind Cas 113 (115) (DB) (Cal) (The words "principal amount" and the clause that if the money be not paid within the time limited the kabala will be regarded as a deed of absolute sale are not by themselves sufficient for holding that the transaction is a mortgage and not an absolute sale) ** (1913) 21 Ind Cas 69 (72) (DB) (Oudh) (A case of pre emption) ** (1913) 21 Ind Cas 19 (20, 21) (DB) (Cal). (A document was described in its earlier portion as a deed of sale out and out —

created by the transaction.(59) The principle is that where a transaction is evidenced by a document which is in effect divided into two parts one of which is registered and other is not then the law looks to what is the real transaction between the parties and demands that the whole document evidencing the transaction must be registered whether it consists of one part of two.(60)

Where the agreement and the sale are independent transactions i e., where the intention was not to create a mortgage but to execute a *sale* and give an agreement to reconvey, the latter agreement need not be registered (61) It has been held that evidence of oral agreement of reconveyance is admissible and is not excluded by S 92 of the Evidence Act (62)

(A) Effect of Proviso.

The amendment of the section by the addition of the proviso to clause (c) has now, to a considerable extent, rendered academical the question as to when and whether a sale and an agreement to reconvey in two different documents, constitute a mortgage by conditional sale The proviso now expressly provides that where the agreement to reconvey is not embodied in the same document which effects or purports to effect the sale the transaction shall not be deemed to be a mortgage(63)

There was no mention of interest the amount was prescribed not as principal but as consideration — The transfree was allowed to have his name registered after expunction of the name of the transferor the transferee and after him his sons and grandsons in succession were to continue peacefully to enjoy the property, and neither the transferor nor his heir was to have any claim to or concern in the property at any time — **Held,** that the document was not one of mortgage but a sale-deed out and out with a condition of re-purchase) ** (1911) 11 Ind Cas 124 (125) (Cal) (The sale-deed and agreement if not between the same parties **cannot be construed as constituting a mortgage.**)

58. **AIR 1926 Bom 497 (506, 507) : 50 Bom 566 (FB).** (AIR 1926 Bom 13) followed AIR 1914 Bom 231. **Overruled.**) ** AIR 1982 All 37 1982 UPLT (NOC) 20 ** **AIR 1914 Mad 639 (639) (FB).** (An unregistered letter cannot be received as evidence to show that a registered sale deed was intended to operate only as mortgage) ** AIR 1962 Mys 44 (46) · ILR (1961) Mys 513 ** AIR 1955 Hyd 179 (183) ILR (1955) Hyd 440 (DB) ** AIR 1950 Hyd 51 (52) ILR (1951) Hyd 189 (DB) ** AIR 1927 Rang 314 (315) ** AIR 1923 Rang 52 (54) 11 Low Bur Rul 456 ** AIR 1921 Bom 442 (443) (DB) ** AIR 1919 Mad 711 (712) (DB).

[**See also** AIR 1956 Bhopal 59 (61) (Fact that agreement is not registered can be used to infer that the transaction was not a mortgage by conditional sale) ** AIR 1927 Rang 132 (133) (When sale deed was executed the vendee verbally agreed to reconvey property if money was repaid within a month — No mortgage) ** AIR 1928 Mad 459 (461, 462) (Sale deed executed Holder of decree against vendor attaching property sold — Suit by decree-holder claiming that there was an oral agreement to reconvey the property between vendor and vendee and hence there was a mortgage — **Held,** no mortgage)]

60. **AIR 1926 Bom 497 (506) : 50 Bom 566 (FB)** ** AIR 1950 Hyd 51 (52) ILR (1951) Hyd 189 (DB) ** AIR 1934 Lah 453 (453 454) ** AIR 1930 Bom 79 (79) : 54 Bom 30 ** AIR 1921 Bom 442 (443) (DB)

61. **AIR 1926 Bom 497 (508) : 50 Bom 566 (FB)** ** AIR 1956 Bhopal 59 (61) ** AIR 1953 Punj 292 (293) (DB) (Registered sale deed conveying house absolutely to vendee — Subsequent unregistered agreement to reconvey house at any time within five years — Transaction does not amount to mortgage by conditional sale but is an absolute sale — Agreement to reconvey though of itself does not require registration still when it is sought to modify the terms of registered sale deed by such agreement requires registration.) ** AIR 1927 Rang 314 (315) ** AIR 1926 Bom 97 (99) 49 Bom 862 (DB) (12 All 387 (PC), followed)

62. **AIR 1953 Nag 337 (338).**

63. **AIR 1966 SC 902 (903).** (**Reversing** AIR 1961 Mad 276 on another point) ** **AIR 1963 SC 1182 (1184)** ** **AIR 1960 SC 301 (304)** ** **AIR 1954 SC 345 (347).** (Under the proviso if the sale and the agreement to repurchase are embodied in separate documents then the

The effect of the proviso is that a transaction in which the stipulation for re-conveyance is contained in a separate document cannot be a mortgage of any kind both because the language of the proviso, and because it cannot fall in any other category of mortgage If the sale and the agreement to repurchase are embodied in separate documents, then the transaction cannot amount to mortgage, whether or not the documents are executed contemporaneously **(64)** The proviso is really of the nature of a rule of evidence**(65)** and has been added to restrict the inference to be drawn in favour of a mortgage only to cases where the condition of repurchase is embodied in one document which effects or purports to effect a sale **(66)** If the sale and agreement to repurchase are

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transaction cannot be a mortgage whether the documents are contemporaneously executed or not) ** ILR (2000) Kant 2173 (2187) 1997 AIHC 135 (139) 1996 (3 Andh LT 257 (Sale of immovable property and agreement to reconvey embodied in separate documents — Transaction not mortgage) ** AIR 1989 Gauhati 39 (40) (1987) 2 Gauhati LR 402 ** (1988) 1 Rajasthan LR 278 (281) ** 1984 Raj LW 32, (334) ** (1983) 1 APLJ (HC) 297 (298 299) 1983 LS (AP) 116 ** 1981 All LJ 1357 1982 All CJ 41 ** (1979) 1 APLJ (HC) 463 (472) ** (1979) 20 (2) Guj LR 354 (360) (Subsequent conduct of parties is immaterial) ** 1979 Ker LT 614 ILR (1979) 2 Ker 51, ** AIR 1981 Cal 5 84 Cal WN 711 (DB) (If there are two separate documents one of sale out and out and another for reconveyance of the purchase property and lease of the property the provisions of the Bengal Money Lenders Act cannot be invoked to hold that it is a mortgage and declaration to that effect cannot be given by the Court If such claim was tenable the proviso to Section 58(c) would be meaningless) ** ILR 1972) Guj 1102 (1123) ** AIR 1968 Orissa 55 (66) (DB) ** AIR 1967 Cal 351 (351) (It may still amount to a loan in substance so as to fall within the definition of S 2(12) of the Bengal Money Lenders Act) ** AIR 1967 Orissa 191 (192) ILR (1967) Cut 32 ** AIR 1967 Pat 415 (416) (Merely because both the documents were executed on the same day will not create the relationship of mortgagor and mortgagee between the parties) ** 1967 Raj LW 218 ILR (1967) 17 Raj 200 ** AIR 1965 Assam 90 (92) ILR (1963) 15 Assam 496 ** AIR 1965 Mys 297 (299) (Where in a sale-deed executed by the plaintiff on 7-5 1955, i e after the Transfer of Property Act became applicable to Part-B States of Mysore, the alleged oral agreement to treat the transaction as mortgage and to reconvey the property on payment of the mortgage money with interest was not embodied in the sale-deed the plaintiff could not get over the bar created by S 58(c) of the T P Act and the transaction could not be considered to be a mortgage by conditional sale Hence, it was not open to him to lead oral evidence contrary to the recitals of the sale-deed.) ** AIR 1964 Orissa 17 (18) ** ILR (1963) Bom 246 (259) (DB) ** AIR 1962 Mys 44 (47) ILR (1961) Mys 513 ** AIR 1962 Pat 53 (55) (DB) ** 1959 Andh LT 457 (459) ** AIR 1958 Madh Pra 295 (296) ILR (1957) Madh Pra 330 (DB) ** ILR (1956) 1 Cal 59 (63) (DB) ** ILR (1955) 2 Cal 214 (218) (DB) ** AIR 1955 Tripura 30 (32) ** AIR 1954 Nag 193 (197) (DB) ** AIR 1953 Nag 337 (338) ** AIR 1952 Mys 56 (56 57) · ILR (1951) Mys 427 (DB) ** AIR 1950 Nag 198 (199) ILR (1950) Nag 719 ** **AIR 1950 Nag 22 (26) : ILR (1949) Nag 933 (DB)**

[**See also** AIR 1955 Hyd 177 (179) ILR (1955) Hyd 380 (DB) (Contention cannot be accepted that proviso should be read as providing only that such a transaction shall not be deemed to be a mortgage by conditional sale with the consequence that the transaction can still be regarded by conditional sale, with the consequence that the transaction can still be regarded as a mortgage falling under S 58 Clause (d) or (e) Such a construction would involve reading into the proviso words which are not there and would moreover stultify the amendment as would leave the previous state of the law practically unchanged) ** AIR 1953 Mad 830 (830) ILR (1953) Mad 1196 (DB) (AIR 1946 Mad 456 (DB) Foll)]

64. 1999 (2) All Rent Cas 328 (332).

65. AIR 1960 Punj 444 (445) ILR (1960) 2 Punj 741 (DB) ** (1946) 48 Pun LR 517 (518) (DB) (Proviso does not apply to Punjab) ** AIR 1936 Sind 209 (210) 30 Sind LR 196 (DB).

66. 1981 All Civ J 622 (623) 1981 Luck LJ 175 ** AIR 1995 Raj 130 (132, 133) (Documents for alleged sale and resale exempted on two different dates cannot be held to be mortgage)

embodied in separate documents then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not.**(67)**

The proviso does not mean that if the conditions are embodied in the same document the transaction will necessarily be a mortgage **(68)** There may arise a rebuttable presumption when

** 1990 Tax LR 310 (314) (All) (There cannot be a mortgage by conditional sale when the agreement of sale and resale is embodied in more than one document) ** (1987) 2 Gauhati LR 402 (406). (Conditions effecting on purporting to effect sale as mortgage not embodied in sale deed — Three separate deeds executed — Transaction is not mortgage by conditional sale) ** ILR (1963) Bom 246 (259) (DB) ** (1959) 63 Cal WN 430 (435) ** AIR 1959 Madh-Pra 221 (222) (DB) ** AIR 1958 Madh-Pra 295 (296) ILR (1957) Madh-Pra 330 (DB) (Sale and agreement to reconvey not embodied in same document — Transaction cannot be regarded as mortgage by conditional sale) ** AIR 1958 Pat 371 (372) (DB) ** AIR 1957 Ker 169 (170) (The fact that a transaction is embodied in one document and not two and its terms are covered by S 58(c) may give rise to the inference that it is a mortgage by conditional sale unless there are express words to indicate the contrary or in a case of ambiguity the attendant circumstances necessarily lead to the opposite conclusion.) ** AIR 1955 Hyd 177 (179) ILR (1955) Hyd 380 (DB) (Its object evidently was to shut out an inquiry whether a sale with a stipulation of retransfer is a mortgage where the stipulation is not embodied in the same document.) ** AIR 1955 Nag 272 (273) : ILR (1955) Nag 942 (DB) ** AIR 1953 Mys 105 (105) · ILR (1952) Mys 247 (DB) ** AIR 1952 All 200 (202, 203 204) (DB) **** AIR 1951 Orissa 362 (370) : ILR (1951) Cut 281 (FB)** ILR (1949) 1 Cut 776 (779) (DB) ** AIR 1949 All 194 (195) (Sale and agreement to reconvey evidenced by separate documents of even date — Transaction is sale in spite of parties' intention — Subsequent transfer of his rights by vendor is not transfer of equity of redemption but only of his right to repurchase — No right of pre-emption can arise in such transfer - Pre emption) ** AIR 1949 Nag 243 (244) ILR (1949) Nag 78 ** AIR 1947 Pat 345 (346) 25 Pat 666 (DB) ** AIR 1946 Mad 456 (457) (DB) ** AIR 1946 Nag 264 (265) : ILR (1946) Nag 278 (DB) ** AIR 1931 Bom 371 (372) (DB).

[See also AIR 1963 All 194 (198) ** AIR 1956 Bhopal 18 (20) (Proviso was not added to section in Bhopal T P Act — It was not necessary that condition of reconveyance should have been embodied in document of sale itself.)]

67. 2000 (1) Cal LJ 129 (139)

68. **AIR 1966 SC 902 (903) : (1966) 2 SCR 918. (Reversing** AIR 1961 Mad 276 on facts) ** **AIR 1960 SC 301 (304) ** AIR 1954 SC 345 (347) ** AIR 1979 Mad 282 : (1979) 2 Mad LJ 170 (FB)** AIR 1978 Mad 75 : 89 Mad LW 364. (A transaction will not be considered to be a mortgage if it is shown (1) that there are express words in the document indicating the character of the document not as a mortgage and (2) that attending circumstances will necessarily lead to the inference that the transaction was meant to be a sale) ** AIR 1975 Mad 282 (283, 284) (1974) 2 Mad LJ 360 (DB). (Where the document though described as a sale deed was on a stamp paper provided by the transferor the consideration was much less than the value of the property, patta was not transferred to the vendee and there was a specific condition that on payment of the principal amount the property would be reconveyed the transaction was a mortgage) ** ILR (1973) 2 All 300 (306) (DB) ** AIR 1968 Orissa 65 (66) (DB) ** AIR 1967 Orissa 191 (192) ILR (1967) Cut 32 ** AIR 1965 Assam 90 (92) ILR (1963) 15 Assam 496 ** AIR 1964 Orissa 17 (18) ** ILR (1963) Bom 246 (259) (DB) ** AIR 1962 Pat 53 (54) (DB) ** AIR 1961 Mad 276 (279) · ILR (1961) Mad 387 (**Reversed** on facts in AIR 1966 SC 902) ** AIR 1958 Pat 371 (372) (DB) ** AIR 1957 Ker 169 (170) ** AIR 1954 Nag 193 (197) (DB) ** AIR 1953 Mad 830 (831) · ILR (1953) Mad 1196 (DB) (When the condition of reconveyance is embodied in the same document it is open to the Court to hold that what purports to be a sale is really a mortgage.) ** AIR 1953 Mys 105 (105) · ILR (1952) Mys 247 (DB) ** AIR 1952 All 200 (202, 203, 204) (DB) ** AIR 1950 Nag 198 (199) · ILR (1950) Nag 719 (*Prima facie*, an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely be-

both the conditions are in the same document **(69)** It will depend upon the intention of the parties as gathered from the document itself and the surrounding circumstances **(70)** In other words, it will be a matter for construction as to which of the two, mortgage or sale, was meant **(71)** If more than one investment is executed contemporaneously then the intention of the parties will be gathered by reading all the instruments together as they will be deemed to constitute one transaction **(72)** But the agreement to reconvey in the deed of sale will indicate the intention to create a mortgage rather than a sale and this will be so even when the proviso applies **(73)**

Usual test to determine are (1) whether debtor creditor relationship is intended (2) whether it is an outright sale; (3) whether consideration is adequate in the case of a sale (4) whether possession is given to the transferee, (5) whether title deeds were handed over (6) whether the language employed is unambiguous without need for extraneous evidence (7) whether the ambiguity neces-

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cause the vendor stipulates that he shall have a right to repurchase ** AIR 1934 Nag 18 (19) ** AIR 1941 Oudh 582 (584) : 17 Luck 198 (DB)

[See AIR 1951 Orissa 362 (370) : ILR (1951) Cut 281 (FB) (Burden is on party to prove **that transaction is not mortgage.)**

[But see AIR 1952 All 716 (745, 746) . ILR (1952) 2 All 200 (FB) (Must be held to be **no longer good law** after the decision of the Supreme Court in 1954 SC 345]

69. AIR 1974 Andh Pra 232 (233) ** ILR (1968) Andh Pra 198 (201)

70. **AIR 1966 SC 902 (903). (Reversing** AIR 1961 Mad 276 on facts) ** **AIR 1960 SC 301 (304).** (Though the circumstance that the condition is incorporated into the sale deed has to be taken into account the value to be attached thereto should vary with the degree of formality attending upon the transaction) ** **AIR 1954 SC 345 (349).** (It was held on construction of the document and taking everything into consideration that the deed was a mortgage by conditional sale under S 58(c)) ** (1977) 44 Cut LT 57 (1977) . Cut WR 310 (313) **(Held** that transaction in instant case was not a mortgage by conditional sale but was an outright sale with a condition to repurchase) ** (1957) 1 Kant LJ 391 ILR (1957) Kant 723 (Where a document further provided that the ostensible vendee will become full owner in consideration was not paid the document was held to be a mortgage by conditional sale and not out and out sale) ** (1970) 76 ITR 354 (All) (If the conditions are in the same document but circumstances outweigh it being considered as an outright sale the document will be a mortgage) ** AIR 1968 Orissa 65 (66) (DB) ** AIR 1967 Orissa 191 (192) ILR (1967) Cut 32 ** AIR 1964 Orissa 17 (18) ** AIR 1964 Punj 81 (82) (DB) ** AIR 1961 Mad 276 (279) ILR (1961) Mad 387 (**Reversed** on facts in AIR 1966 SC 902) ** AIR 1959 Madh Pra 221 (222) (DB) ** AIR 1958 Pat 371 (372) (DB) ** AIR 1957 Ker 169 (170) ** 1957 MPLJ 196 (198) ** AIR 1955 Nag 272 (274) ILR (1955) Nag 942 (DB) ** AIR 1954 Nag 193 (197) (DB) (The cardinal test which is to be applied in all such cases is whether the relation of a debtor and creditor is preserved between the vendor and the vendee) ** AIR 1952 All 200 (202, 203, 204) (DB) (It was held that transaction was an out and out sale and not a mortgage.) ** **AIR 1951 Orissa 362 (370) : ILR (1951) Cut 281 (FB)** ** AIR 1950 Nag 198 (199 200) ILR (1950) Nag 719 ** AIR 1940 All 227 (229) (DB) ** AIR 1938 Oudh 57 (59) 13 Luck 680 (DB) ** AIR 1937 All 724 (726) (The mere fact of one document does not conclude the matter — Court must look to the intention and surrounding circumstances Confirmed in L P A in AIR 1939 All 713)

71. **AIR 1954 SC 345 (347).**

72. AIR 1986 Sikkim 10 (16).

73. AIR 1968 Orissa 65 (66) (DB) ** AIR 1964 Orissa 17 (18) ** ILR (1961) Cut 487 (489) (DB) ** (1959) 63 CWN 430 (435) ** AIR 1959 Madh Pra 221 (222) (DB) ** AIR 1957 Madh Pra 207 (209) ILR (1957) Madh Pra 29 (If the purchasers do not desire that their transaction should be interpreted as a mortgage by conditional sale they must insist on two separate documents If, however they choose to incorporate the condition of repurchase in the same document, they must insist that clear and express words excluding the mortgage are incorporated in the same document Otherwise however ostensible the first part conveying absolute title to the purchaser may be Courts will hold that a mortgage was intended

sitates consideration of contemporaneous circumstances.(74)

The proviso is not retrospective. (See Note 1).

(B) Dekkhan Agriculturists' Relief Act.

Under section 10-A of the Dekkhan Agriculturists' Relief Act, 1879 (since repealed) the Court could determine for the purposes of that Act, the real nature of the transaction notwithstanding the provisions of S 92 of the Evidence Act,(75) and the proviso to S 58(c)(76) of this Act (77)

(C) U. P. Zamindari Abolition and Land Reforms Act (1951).

By virtue of S. 164 of the U P. Zamindari Abolition and Land Reforms Act, the mortgage by a Bhumidar is treated as sale notwithstanding that the deed is registered and contains recital to redeem property by repayment of loan.(78)

34. Mortgage by conditional sale or other kinds of mortgage.

The test whether a particular document is a mortgage by conditonal sale or is some other kind of mortgage is not what the parties have *said* it is, but is rather whether it fulfils those statutory requirements which the Legislature has laid down. The parties can call it by whatever name they like, but that will not make it a mortgage of a particular kind unless it complies with the requirements of such mortgage as defined by the Act.(1)

Where the agreement to reconvey is not embodied in the same document which effects or purports to effect the sale, such a transaction, as seen in Note 33, will not operate as a mortgage by conditional sale under cl. (c). That is the effect of the proviso newly added to cl. (c) Nor can it be regarded as a mortgage falling under cl (d) or (e) (2)

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and they will go to the surrounding circumstances only if there be ambiguity but not otherwise.) ** 1957 MPLJ 196 (198) (Presumption can be rebutted only by words of the deed or by circumstances surrounding the transaction which are clearly incompatible with a mortgage and necessarily leads to the conclusion of sale) ** (1956) 2 Mad LJ 565 (567) ** (1956) 1 Mad LJ 388 (390) ** AIR 1955 Nag 272 (274) ILR (1955) Nag 942 (DB) (It must be left to one who contends that the conveyance was absolute with only an option of repurchase to establish it) ** AIR 1951 Orissa 362 (370) : ILR (1951) Cut 281 (FB) ** ILR (1949) 1 Cut 776 (779) (DB) (Burden lies on the party contending to show that it appears rather to be an out-and-out sale) ** AIR 1940 Nag 84 (86)

[See however AIR 1958 Pat 371 (373) (DB) (Document executed before proviso was added to S 58 (c) — Presumption will not arise in favour of mortgage being by conditional sale - Question will have to be decided on construction of document and intention of parties.)]

74. (1973) 1 APLJ (HC) 361 (377) (DB) ** 1999 (2) Mad LJ 130 (135) ** 1997 (1) Cur Tax Cas 200 (204) (Mad) ** ILR (1966) 1 Ker 216.

75. AIR 1922 Sind 39 (40) : 15 Sind LR 160 (DB).

76. AIR 1936 Sind 209 (210) : 30 Sind LR 196 (DB).

77. NOTE — Under S 85 of the Bombay Agricultural Debtors' Relief Act XXXVIII of 1939, it is provided that on the date on which that Act comes into force the Dekkhan Agriculturists' Relief Act shall be repealed.

78. 1982 All LJ 29 : 1982 All WC 47.

Section 58 — Note 34

1. AIR 1941 All 169 (170) : ILR (1941) All 240

[See also (1932) 16 RD 16 (17) (Mortgage held usufructuary and not simple mortgage as described)]

2. AIR 1955 Hyd 177 (179) ILR (1955) Hyd 380 (DB) ** AIR 1953 Mad 830 (830) ILR (1953) Mad 1196 (AIR 1946 Mad 456 (DB) Foll)

35. Usufructuary mortgage.

The following are the characteristics of a usufructuary mortgage—

(1) that the possession of the mortgaged property is delivered or agreed to be delivered to the mortgagee;(1)

(2) that the mortgagee is to appropriate the rents and profits in lieu of interest or of principal or of both;

(3) that the mortgagor does not incur any personal liability to repay the money, and

(4) that, there being no personal liability to pay, there is no 'forfeiture' and therefore, the remedies by way of foreclosure or sale are not open to the mortgagee (2)

Section 58 — Note 35

1. AIR 1958 Mys 20 (21) ILR (1957) Mys 100 (In the case of a mortgage-deed executed in favour of the lessee during the continuance of the lease the possession which the mortgagee retains even after the termination of the lease cannot be said to be a possession of a usufructuary mortgagee.)

2. **AIR 1947 Lah 40 (45) · ILR (1946) Lah 805 (FB) ** AIR 1940 Lah 401 (403) ILR (1941) Lah 71 (FB) ** AIR 1963 Raj 129 (131, 132) ILR (1963) 13 Raj 334 Amount borrowed on security of shop — Delivery of possession — Agreement to pay interest — Rent payable by mortgagee to be adjusted towards debt — Mortgagor stipulating that property would not be redeemed until entire debt is paid — Mortgage is usufructuary and not anomalous as there was no personal covenant to pay) ** AIR 1956 Pat 1, 2 (3 to 5) (DB)**

[See also AIR 1953 Kutch 8 (10) (Custom (Kutch)) — Vatantar transaction — Nature of — Has all the characteristics of usufructuary mortgage) ** AIR 1953 Kutch 4 (6) (Custom (Kutch) — Vantantar transaction — Amounts to usufructuary mortgage) ** AIR 1927 All 567 (569) ILR 49 All 820 (DB) (Grant of occupancy land for fixed term in consideration of discharging debts — Not a sub-lease within Ss. 24 and 25 Agra Tenancy Act (1901) — Mukarji J Transaction falls within S. 58 T P Act and is not of purely usufructuary mortgage)] ** AIR 1942 Cal 55 (58) (DB) ** AIR 1940 Cal 426 (427) (DB) ** AIR 1918 Mad 1033 (1038) (DB) (Possession essential) ** (1900) 2 Bom LR 201 (202) (DB) (No foreclosure or sale) ** (1907) 4 Low Bur Rul 222 (224) ** (1897) 24 Cal 677 (680) (DB) ** (1892) 16 Bom 172 (177) (DB) (Usufructuary mortgage confers no right to have the property sold) ** (1893) 17 Bom 425 (428) (DB) (Do) ** AIR 1941 Pat 301 (302) (DB) (Do).

[See also AIR 1921 Lah 351 (352) (DB) (Though the deed does not expressly say that the mortgage is one with possession, yet stipulations such as those as to the mortgagee's right to take produce in lieu of interest on a moiety of the mortgage-money to recover compensation for any improvements which may be effected by him, and to cut trees for the purpose of husbandry, can leave no doubt that both the parties contemplated the mortgage to be one with possession) ** AIR 1936 Pat 583 (584) (DB) (A mortgage in the form of a Zarpeshgi of the year 1880 and executed by the mortgagor to secure a sum of Rs. 10,500 provided that the entire rent and profits of the estate were to be appropriated by the mortgagee, and the mortgagee was to enter into possession of the mortgaged property and to hold it as security for the entire peshgi money until the whole advance of Rs. 10,500 shall be paid in one lump sum — The mortgagee covenanted to pay certain specified sums annually to the proper authorities in respect of taxes or/and cesses subject to the condition that if such taxes or cesses were remitted or reduced, the amount by which the provided fixed payments exceeded the new and reduced amount should be paid to the mortgagor A fixed annual sum of Rs. 82 was also to be paid to the mortgagor — There was expressed to be a "fixed and consolidated jama of Rs. 984-8-3", which after deducting therefrom the fixed payments abovementioned and Rs. 31-7-8, as "establishment charges is to leave a sum of Rs. 708-12-0 as the mortgagee's profits on account of the peshgi money" — **Held** that the mention of the "fixed and consolidated jama" was merely a relic of the device by which the sin of usury might be avoided and that the phrase in general had no legal significance and that the contract as a whole was a usufructuary mortgage)]

See the undermentioned cases(3) for applicability of the definition of usufructuary mortgage.

Whether a mortgage is a simple one or a usufructuary mortgage has to be ascertained from the character of the transaction itself and not from what the mortgagees themselves say about it.(4)

For the purpose of application of S 10(v) of the Kerala Land Reforms Act (1963), the document must be a usufructuary mortgage as defined in S 58(d) A document introducing any conditions other than those covered by S 58(d) could not be regarded as usufructuary mortgage but an anomalous of mortgage (5) A document introducing any conditions other than those covered by S. 58(d) cannot be regarded as a usufructuary mortgage but an anamolous mortgage.(6)

(A) Delivery of possession.

Chief requirement of a pure usufructuary mortgage is delivery of possession to the mortgagee and the mortgage money including interest to be realised out of the usufruct of the property and the mortgagee has no other remedy except enjoyment of the property (7)

The word "delivers" does not necessarily mean *delivers immediately* Where the mortgagor is not in a position to give immediate possession, it is sufficient if he gives the *right to possession.*(8) In *Maina Bibi v Chaudhri Vakil Ahmad*(9) their Lordships of the Privy Council observed :

> "The difference between a usufructuary mortgage and an ordinary mortgage is not so much a difference in the kind of security created as in the method of enjoying it In each case, the property of the mortgagor is pledged to secure the debt, and when the amount secured is paid, the property pledged must be returned to the owner The main difference between a usufructuary mortgage and an ordinary mortgage is that in the former *it is part of the initial agreement by which the security is created that the mortgagee shall at once go into possession* of the mortgaged property and apply the proceeds he may derive from the use and occupation of it to discharge the mortgaged debt, while in the case of an ordinary mortgage of the usual sort, it is, in general, *not the initial intention of the parties that the mortgagee should go into possession of the property pledged immediately or at all* — although he is empowered to do so if the interest on the mortgage money be not paid."

It follows that a mortgage will be a usufructuary one where the *initial agreement* is that the mortgagee shall at once go into possession and apply the rents and profits towards the interest or the principal or both It is not a usufructuary mortgage where there is no such agreement.(10) Thus, where a simple mortgage was executed in 1898 and subsequently in 1904 the same property was leased to the mortgagee with a direction to apply the rent towards the interest due under the mort-

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3. 1995 Pat 69 (72) (Where the recital in alleged mortgage deed not strictly fitting in definition of usufructuary mortgage, benefit of S 12 of Bihar Money-Lenders Act), cannot be denied to mortgagor.) ** **(1989) 1 BLJ 338 (347) : (1989) 1 BLJR 214 (FB).** (The definition of 'usufructuary mortgage' in S 58(d) of Transfer of Property Act is not applicable in strictitude to S. 12 of Bihar Money-Lenders Act.)
4. AIR 1958 Mys 20 (21) : ILR (1957) Mys 100
5. **AIR 1994 Ker 371 (376) : 1994 (2) Ker LJ 88 (FB).**
6. **AIR 1994 Ker 371 (376) : 1994 (2) Ker LJ 88 (FB).**
7. **AIR 1973 Raj 173 (183, 184) : 1972 Raj LW 310 (FB).** (If mortgagee is entitled to recover any part of the mortgaged money it will amount to an anomalous mortgage.)
8. (1912) 16 Oudh Cas 56 (60, 61).

   [See also (1911) 10 Ind Cas 190 (192) (Oudh) (Mortgagor who is not in possession can make a mortgage with possession.)]
9. **AIR 1925 PC 63 (65) : 47 All 250 : 52 Ind App 145.**
10. AIR 1963 Raj 100 (103) ILR (1963) 13 Raj 54 (Document evidencing transaction of loan — Stipulation to repay loan with interest within certain period — Mortgagee entitled to enter into possession of property given as security on default — Mortgage is a simple mortgage and not a usufructuary mortgage) ** AIR 1961 Punj 477 (480) ** AIR 1958 Mys 20 (21) ILR (1957) Mys 100 ** AIR 1936 Pat 211 (216) : 14 Pat 560 (DB) ** AIR 1930 All 175 (176) (Mortgagee was to enter into possession on failure of repayment by the

gage, it was held that the mortgage did not get converted into a usufructuary mortgage **(11)** Nor will the mere fact that possession was given to the mortgagee over the mortgaged property necessarily show that the mortgage was a usufructuary one **(12)** Where while lessee is in possession of part of the property, the lessor sells the entire property and the purchaser mortgages the whole property with the lessee the transaction which is a simple mortgage is not converted into a usufructuary mortgage.**(13)** So also where two documents are executed on same day one a simple mortgage under which amount is to be paid within three years and the other a lease for five years in favour of a member of the mortgagee's family the transactio is not a usufructuary mortgagee **(14)** A mortgage purporting to be a usufructuary mortgage does not cease to be so by reason of the fact that instead of actually takking possession on the date of the mortgage the mortgagee leases it back to the mortgagor for the period of the mortgage **(15)** It does not become a simple mortgage on that ac

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stipulated date, an event which may or may not have happened — No initial agreement to deliver possession — Mortgage held simple and not usufructuary) ** (1879) 2 All 527 (533) (DB)

[**See also** AIR 1968 Pat 222 (225) ILR 46 Pat 1202 (DB) ** ILR (1956) Trav Co 1130 (1133) (DB) (In a case where there is a simple mortgage deed when a party claims that the mortgaged properties were handed over as per an oral agreement with the direction that the income was to be adjusted towards interest, the burden is heavily on him to prove the same) ** AIR 1956 Tripura 6 (8) (A registered deed of simple mortgage in its inception cannot be converted into a usufructuary mortgage by subsequent oral agreement altering the mode of payment of interest and by delivering possession to the mortgagee)

11. AIR 1916 Mad 974 (974)

[**See also** AIR 1961 Assam 70 (73) ILR (1961) 13 Assam 101 (DB) (Lessee executing simple mortgage on his interest — Subsequent possession given to mortgagee under a separate agreement does not make the mortgage a usufructuary mortgage) ** AIR 1958 Mys 20 (21) ILR (1957) Mys 100 (Mortgage in favour of lessees — Mortgagee retaining possession after termination of lease — No induction in document to show that possession had in fact been delivered or promised to be delivered — Mere provision in deed that rent payable by mortgagee is to be adjusted towards interest payable to him does not make it a usufructuary mortgage) ** AIR 1956 All 150 (150) (Loan of Rs. 500 on foot of pronote — Subsequent oral agreement under which creditor entered into possession of debtor's fields till liquidation of debt — **Transaction is not mortgage**)]

12. ILR (1956) Cut 650 (662) (DB) (Possession given but no provision for appropriation of rents and profits — Deed held not usufructuary mortgage) ** ILR (1953) Patiala 570 (576, 577) (DB) ** **AIR 1944 All 198 (199) : ILR (1944) All 588.**

13. **AIR 1972 Delhi 146 (147) : ILR (1972) 1 Delhi 755 (FB).**

14. 1967 All LJ 996 (998)

15. AIR 1976 Guj 50 (56) 20 Guj LR 36 (DB) ** AIR 1966 Guj 59 (61) ILR (1965) Guj 378 ** AIR 1964 All 370 (371) (Usufructuary mortgage of a house — Mortgagor continuing to reside in it under a rent note executed simultaneously is a tenant and as such liable to pay rent — Agreement of tenancy is independent of mortgage transaction — Money paid by mortgagor is not interest on loan but rent) ** AIR 1964 Madh Pra 129 (132) (DB) ** AIR 1963 MP 265 (269, 270) (DB) ** AIR 1961 J & K 85 (87, 88) (DB) ** AIR 1959 J & K 103 (105) (Though mortgage with possession and lease back forms part of same transaction the mortgage cannot be treated as a simple mortgage) ** AIR 1957 Ker 109 (112) ** 1956 BLJR 125 (126) (Usufructuary mortgage and lease back — Rent payable held represented interest on mortgage money — Relationship of landlord and tenant not created) ** AIR 1951 Trav-Co 154 (154) (DB) ** AIR 1944 All 221 (222) ILR (1944) All 346 (DB). (Usufructuary mortgage — Mortgagor execting quabuliyat of even date and continuing possession — No lease deed executed by mortgagee — Mortgagee held entitled to decree

count.(16) In such a case a suit by mortgagee on the rent note and recovery for possession is

for compensation for use and occupation.) ** AIR 1940 Mad 946 (948, 949) (DB) ** AIR 1931 Lah 498 (499) (DB) (Mortgagors allowed to be in cultivating possession.) ** AIR 1927 All 552 (553, 555) 49 All 658 (DB) ** (1898) 20 All 401 (407) (DB) ** (1897) 19 All 496 (498) (DB)

[**See also** AIR 1967 Mys 41 (43) (DB) (Circumstances when reveal that in leasing back property mortgagee intended no more than to resort to a device to secure payment of interest by mortgagor on mortgage money, lease is not separate transaction but forms part of mortgage transaction.) ** AIR 1963 Raj 69 (72) ILR (1962) 12 Raj 947 (Mortgage of house with possession — Mortgagor executing quabuliyat on same date — Rent stipulated equal to monthly interest on mortgage money — Transactions held were independent — Suit for arrears of rent and eviction on basis of rent note — **Held**, maintainable AIR 1955 Pat 357, AIR 1960 Pat 106 and AIR 1961 Pat 133, **Dissented from.**) ** AIR 1961 Pat 133 (134) (DB) (Usufructuary mortgage and lease back on monthly rent by executing unregistered kirayanama by mortgagor — Documents of same date — No stipulation as to rate of interest in mortgage deed — Mortgage deed and the kiryanama are two different transactions — Suit for arrears of rent on basis of kiryanama — Maintainable.) ** AIR 1959 Ker 155 (156) ILR (1959) Ker 11 (DB) (When a usufructuary mortgage is accompanied by a lease back and they form distinct transactions, the mortgagor is entitled to redeem on payment of the principal mortgage amount alone, leaving the mortgagee to seek other remedies for the rent, if any, due to him under the lease AIR 1952 Trav-Co 92, Foll.) ** AIR 1958 Madh Pra 319 (320) (Usufructuary mortgage — Lease back to mortgagor — Without prejudice to relationship of mortgagor and mortgagee a new relationship of landlord and tenant is also created — Suit for rent is maintainable AIR 1957 Pat 24, Commented upon.) ** AIR 1958 Punj 140 (141) ILR (1958) Punj 427 (Mortgage with possession and lease back to mortgagor — Relation of landlord and tenant is created although mortgagee intends to secure an income equal to interest at certain rate — AIR 1955 Pat 857, **Dissented from.**) ** AIR 1957 Pat 24 (27). (**Overruled** on another point in AIR 1971 SC 310) ** AIR 1957 Punj 57 (58) ILR (1957) Punj 331 (Relation of landlord and tenant comes into existence.) ** AIR 1955 Pat 357 (359) (DB) **Held no longer good law** in view of AIR 1971 SC 310 as stated in AIR 1976 Pat 212) ** (1907) 4 Low Bur Rul 222 (224) (Case before T P Act was extended to Burma.) ** AIR 1930 Lah 386 (387) (DB) (The mortgagor cannot say that no relationship of landlord and tenant existed and the mortgage was not really usufructuary.)]

[**See however** AIR 1968 Pat 222 (225) ILR 46 Pat 1202 (DB) (But where the lease and mortgage are parts of the same transaction and intention of the parties to the transaction is that the mortgagee should not get possession of the mortgaged properties but would only get interest on the amounts advanced by him at the stipulated rate every month and the document and the deed of lease back are nothing but merely devices to ensure regular payment of the interest the transaction cannot be held to be a usufructuary mortgage.)]

16. AIR 1966 Guj 59 (61) · ILR (1965) Guj 378 ** AIR 1964 Madh Pra 129 (132) (DB) ** AIR 1961 J & K 85 (87, 88) (DB) ** AIR 1959 J & K 103 (105). (Mortgage entitling mortgagee to have possession and enjoy property himself or to lease it out — Lease back of property to mortgagor - Even if both mortgage and lease back form part of same transaction it cannot be treated as a simple mortgage and hence mortgagee has no right to possession.) ** AIR 1959 Ker 112 (116) (DB). (Rent accrued is not interest which automatically becomes charge on property to be paid as part of mortgage money 20 All 401, **Dissented from.**) ** AIR 1957 Ker 109 (112) ** AIR 1956 Mad 434 (441) ILR (1956) Mad 983 (DB) ** AIR 1953 Trav-Co 63 (64) ILR (1952) Trav-Co 696 (DB) ** AIR 1935 Mad 813 (814). (Mortgagor in such case is merely a lessee.) ** AIR 1948 All 312 (314) ILR (1948) All 269 (DB) (Claim for rent reserved under lease is not claim for interest due on mortgage — (Per Malik, J.) ** AIR 1944 All 221 (222) . ILR (1944) All 346 (DB) ** AIR 1940 Mad 946 (948, 949)) (DB) (Though the mortgage and the lease back can and must in a case of this kind be taken to form part of the same transaction, effect must be given to each according to its terms and the Court cannot, by reading the two together spell out a transaction, totally different in character and incidents.) ** AIR 1943 Mad 220 (221) (Do.)

maintainable.(17) But where the mortgagee leases back the property on the same date to the mortgagor allowing him to remain in possession in lieu of rent the mortgagee cannot sue for possession if rent is in arrears, but his remedy is to sue for mortgage dues (18) Oral evidence is not admissible to show that the document was intended only to a simple mortgage as it will be contradicting the terms of the written document (19) Similarly, a mortgage does not cease to be a usufructuary mortgage by reason of the fact that actual *physical* possession is not delivered It is sufficient if the mortgagor delivers such possession as the nature of the property is capable of (20) He may, instead of giving actual possesson, direct the tenants of the mortgaged property to pay rent to the mortgagee.(21) Where a usufructuary mortgage is of a share of a common holding, the mortgagee is entitled to joint possession (22) Where the mortgagee is already in possession of the mortgaged property, it is not necessary that possession should actually be delivered at the time of creation of additional possessory mortgages on the same property in favour of the same mortgagee (23)

If the lessee becomes the mortgagee of the property under usufructuary mortgage the tenancy rights are suspended during subsistence of the mortgage unless tenancy is surrendered.(24)

The lessee's interest is inferior to that of usufructuary mortgage Therefore, on lessee becoming mortgagee in possession, his interest as lessee merger in the superior interest of the possessing mortgagee. In the absence of contract to the contrary there will be an implied surrender of the lease hold right.(25)

It is however observed by Madras High Court(26) that though in law there is no merger when a tenant becomes mortgagee in possession whether there was implied surrender of tenant's rights when the usufrucuary mortgage was executed in his favour, would largely depend upon what was the intention of parties at the time of execution of mortgage deed and the actual terms and condi-

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[See AIR 1952 Trav-Co 92 (95) (DB) (Usufructuary mortgage and lease back to mortgagor held did not form part of same transaction — Recital in mortgage deed and lease deed that amount of rent represented interst on mortgage money — Mortgagee held could not replying on this recital, treat transaction as simple mortgage)]

[But see AIR 1952 TC 391 (393) (DB) (Mortgage with possession and lease back — Amount of rent was towards interest due — This held indicated that parties intended mortgage and lease to form a simple hypothecation and not as distinct and separate transaction — Case under S 3 of Travancore Debt Relief Act (2 of 1116) similar to S 58(d) of T P Act.)]

17. AIR 1979 All 8 (12) (1979) 1 Ren CR 114 ** AIR 1976 Pat 212 1976 BLJR 139

18. AIR 1972 Pat 295 : 1972 BLJR 871.

19. AIR 1933 PC 178 (180) : 60 Ind App 273 ** AIR 1937 All 478 (479) (DB) (AIR 1933 PC 178, Foll.)

20. ILR (1967) Andh Pra 1341 (1346) ** AIR 1933 Oudh 35 (36) 8 Luck 190 (DB)

21. AIR 1943 Sind 59 (61) ILR (1942) Kant 452 (DB) (Mortgage of zamindari land — Direction by mortgagor to cultivators to give zamindari share to mortgagee is giving of possession) ** AIR 1932 Mad 768 (769) (DB) ** AIR 1915 Mad 382 (383) (DB) (Diggu Bhoghiam.)

[See also AIR 1928 Oudh 405 (405) (Where rent is increased by the mortgagor as lambardar, the mortgagee will be entitled to it.)]

22. (1936) 38 Pun LR 566 567).

23. AIR 1961 Guj 129 (130)

24. AIR 1977 NOC 119 : 1976 All WC 404.

25. (1990) 1 Kant LC 90 (93) ** ILR (1987) Kant 3867 (3872)

26. (1988) 1 Rent LR 651 (655) (DB) (Mad).

tions of the mortgage transaction. Thus, where from the recitals of the deed, it was clear that the possession was handed over pursuant to the deed and the mortgagee could enjoy the property in the manner as he liked, and it was also provided that on payment of mortgage money the mortgagee would hand over the possession to the mortgagor, it was clear that the relationship of mortgagor and mortgagee had been created by putting an end to the relationship of landlord and tenant in the absence of positive recitals to continue the relationship of landlord and tenant **(27)** Tenanted premises if is mortgaged by landlord by way of usufructuary mortgage the usufructuary mortgagee thereunder would be entitled to receive rents and profits accruing from such property in his own right and on his own account. Therefore the expression 'landlord' is S. 13(1) of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, includes an usufructuary mortgagee.**(28)**

See also the undermentioned case, **(29)** to the same effect

The words "or expressly or by implication binds himself to delivery possession" were inserted in the section by the amending Act of 1929 in order to negative the view that in the absence of actual delivery of possession, the mortgage was not a usufructuary one **(30)**

A usufructuary mortgagee is entitled in fact to the exclusive possession of the property mortgaged and has the right to exclude others, including the owner, from its possession.**(31)**

A usufructuary mortgagee cannot deny title of his mortgagor, nor can he set up adverse possession unless he actually leaves the holding and re-enters under a different status.**(32)** If he does not get possession, he may sue for possession**(33)** or for damages for breach of the contract to give possesson.**(34)** or for recovery of the mortgage money under S 68(d) **(35)**

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27. 2001 (3) Mad LJ 183 (187).

28. **AIR 1993 SC 1712 (1717) : 1993 AIR SCW 1599 : (1993) 3 SCR 351.** (AIR 1973 Guj 131 (FB) **No good law in view of AIR 1979 SC 1745.**)

29. **AIR 1988 Kant 285 (293) : (1988) 2 Kant LJ 8 (FB).** (Usufructuary mortgagee cannot be equated with agent or guardian or a receiver. He is a 'landlord' within meaning of Rent Control Act and is entitled to claim possession of premises for personal occupation — AIR 1981 Kant 190. **Overruled.**)

30. AIR 1952 Mad 856 (858) ** AIR 1950 Ajmer 59 (60) ** AIR 1942 Oudh 172 (174) 17 Luck 362 (Under the present definition it is sufficient if he binds himself to deliver possession.)

31. **AIR 1938 All 577 (584) : ILR (1938) All 904 (SB).** (The rights of usufructuary mortgagee are immovable property.)

[**See also** (1910) 8 Ind Cas 130 (131) (DB) (Usufructuary mortgagee obtaining merely a decree for sale does not lose his right to possession until sale.)]

32. 2000 (1) Mad LW 425 (436).

33. AIR 1953 Hyd 231 (232) ILR (1953) Hyd 331 (DB) ** AIR 1942 Oudh 172 (174) · 17 Luck 362 ** **(1881) 4 All 14 (16) (DB).**

34. AIR 1964 Mad 201 (202). (Possession not delivered — Mortgagee entitled to interest equated to damages and charge upon mortgaged property for breach of covenant to delivery possession.) ** AIR 1953 Hyd 231 (232) : ILR (1953) Hyd 331 (DB) ** AIR 1921 Lah 351 (352) (DB) ** (1882) 4 All 281 (283) (DB) ** (1882) 4 All 245 (247, 248) (DB)

[**See also AIR 1945 All 202 (204) : ILR (1945) All 676 (FB).** (Breach occurs once and for all at the time when the mortgagee is first entitled to recover possession.)]

35. **AIR 1919 Mad 1164 (1165) : ILR 41 Mad 259 (FB)** ** AIR 1968 Pat 222 (230, 231) ILR 46 Pat 1202 (DB) ** AIR 1961 Punj 477 (480) (Usufructuary mortgage — Possession taken back by mortgagor — Mortgagee entitled to sue for money.) ** AIR 1958 Mys 32 (33) . ILR (1957) Mys 125 ** AIR 1957 Raj 120 (121) . ILR (1956) 6 Raj 1070 (DB) ** AIR 1956 Raj 312 (314) (DB) ** AIR 1953 Hyd 231 (232) ILR (1953) Hyd 331 (DB) ** AIR 1952 Mad 856 ** (1912) 17 Ind Cas 362 (362)

As to whether a mortgagee who does not get possession as stipulated can sue for sale, see Note 17 on S. 68

There cannot be two different usufructuary mortgages on the same land at the same time **(36)**

A usufructuary mortgagee who is empowered to take possession and appropriate the rents and profits in lieu of his debt is not *bound* to take possession He has merely a *power* to do so and if he chooses to forgo the benefit it would have no effect as between him and the mortgagor to recover his debt.**(37)** The only effect would be when some subsequent incumbrancer comes in and the usufructuary mortgagee has notice thereof and the latter permits the mortgagor to receive the rents and profits, he exposes himself to the claim of the subsequent incumbrancer **(38)**

Until delivery of possession, the mortgagor's possession is not *ipso facto* unlawful (see S 65A, Note 3) Where at the time of a usufructuary mortgage the property is in the possession of a third person the mortgagor is entitled to sue for possession of the property in order to be able to fulfil his obligation under the law of delivering possession of the property to the mortgagee **(39)** Where after delivery of possession to the mortgagee he is deprived of possession by third person, the right to sue for possession would then be vested in the mortgagee and the mortgagor will not be entitled to sue for possession **(40-41)** A suit by mortgagor after redemption of mortgage, for possession of portion of mortgaged property wrongly sold by the mortgagee would not be barred by res judicata when the mortgagor was not a party in the earlier suit in which decree in favour of purchaser and against the mortgagee was passed.**(42)**

The mortgagor must authorise the mortgagee to retain possession *until* payment of the mortgage-money **(43)** If mortgaee is authorised to retain possession of the mortgage holding not only till the payment of the mortgage money but till payment of something more such a transaction is not a usufructuary mortgage, if compensation for or value of improvements made by the mortgagee is also payable by the mortgagor **(44)** Where the mortgagee is authorised to retain possession for a *certain period* only, the mortgage is not a usufructuary one **(45)**

So also, stipulation authorising the mortgagee to retain possession not only till the mortgage

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36. AIR 1958 Pat 79

37. (1909) 32 Mad 281 (283) (DB)

38. **(1841) 2 Moo Ind App 487 (600, 501) (PC) ** (1903) 26 Mad 662 (668, 669) (SB).**

[**See also** (1901) 23 All 338 (344) (DB) (Mortgagee leasing the property to mortgagor — Relations of landlord and tenant are created.)]

39. AIR 1939 Mad 887 (888)

40-41. AIR 1939 Mad 887 (888).

[**See** AIR 1927 All 567 (569) ILR 49 All 820 (DB) (Per Mukerji, J)

42. 1983 All LJ 1206 (1209).

43. **AIR 1963 SC 1041 (1042)** ** AIR 1955 Pat 505 (509) (DB) (**Reversed** on another point in AIR 1964 SC 1295) ** (1955) 21 Cut LT 459 (461) (DB) ** AIR 1954 Trav-Co 7 (9) ILR (1952) Trav-Co 438 (DB) (Under a deed the different branches of the tarwad had to pay particular amounts to A as value of improvements due to him and he was allowed to be in possession of the properties till he was paid those amounts If the amount payable by each branch was not paid within 4 years the right to recover possession of the property allotted to the share of that branch was to be forfeited and A was to acquire full right to the same — It was held that the deed amounted to a usufructuary mortgage in favour of A) ** AIR 1940 Cal 486 (487) ILR (1940) 2 Cal 573 (DB) ** AIR 1929 Pat 603 (608) 8 Pat 16 (DB)

44. **ILR (1974) 1 Ker 201 : 1974 Ker LT 879 (DB).**

45. AIR 1955 Pat 505 (507, 508) (**Reversed** on another point in AIR 1964 SC 1295) ** AIR 1929 Pat 605 (608) : 8 Pat 16 (DB).

money is paid, but for something more than that makes the transaction otherwise than a usufructuary mortgage.(46)

It is possible to have composite mortgage or anamolous mortgage For example, it may be a mortgage usufructuary by conditional sale In such a case, the property is put in possesson of mortgagee as usufructuary for a fixed period and if the debt is not discharged at the expiry of the period, he can become owner under conditional sale. In such a case, the mortgagee can elect to treat it as usufructuary mortgage.(47)

(B) Appropriation of rents and profits.

The second characteristic of a usufructuary mortgage is that the mortgagor authorises the mortgagee to receive the rents and profits.(48)

(a) in lieu of interest or

(b) in payment of the mortgage-money, or

(c) partly in lieu of interest or

(d) partly in payment of the mortgage money It is not necessary for the validity of a usufructuary mortgage that some amount should remain outstanding as principal.(49)

Where the rents and profits are not to be taken in *lieu* of interest or principal but are to be set *off* against the interest *agreed upon* and in a case of deficit the mortgagor is to be personally liable therefor, the mortgage is not a usufructuary one (50) Even where in usufructuary mortgage there is a term empowering the mortgagees in case their possession was disturbed to realise the money through sale of other property of the mortgagor the usufructuary character is not changed.(51)

The two classes referred to in items (b) and (d) are *self-redeeming*. A common instance of this kind of mortgage is the *lekha mukhi* in the Punjab in which the mortgagor undertakes no personal liability and, while he is competent at any time to claim redemption on payment of the amount, the mortgagee is not entitled to sue for his debt.(52) Where under a deed transferee takes possession of land agreeing to render land fit for cultivation, improve the existing wells, cultivate lands, take all the usufruct for 12 years without premium or rent and redeliver the land after the term it is a self-redeeming mortgage (53) The class referred to in item (a) above is not self-redeeming The mortgagee is entitled to appropriate the rents and profits in lieu of the interest and is entitled to retain possession until such time as the mortgagor chooses to redeem on payment of the principal sum. This form of mortgage has been in vogue in India for a very long time(54) and is analogous to what

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46. ILR (1974) 1 Ker 201 : 1974 Ker LT 879 (DB).

47. (1991) 3 Bom CR 105 (108).

48. AIR 1938 All 564 (566) : ILR (1938) All 781 (DB).

49. AIR 1950 Ajmer 59 (60).

50. AIR 1952 Trav-Co 391 (392) (Case under S 3 of Travancore Debt Relief Act (2 of 1116) ** AIR 1923 Mad 71 (71, 72) (DB).

51. 1969 All LJ 1049 (1025) (DB).

52. **AIR 1940 Lah 401 (404) : ILR (1944) Lah 71 (FB).** (The mortgagee is bound to keep accounts of the produce and, as such as principal and interest have been paid up therefrom, to surrender the property to mortgagor) ** AIR 1931 Lah 498 (499) (DB) ** AIR 1919 Lah 20 (21) : 1 Lah 89 ** 1881 Pun Re No. 90, p. 194 (198) (DB).

Also see Note 37-A

53. (1979) 2 Kant LJ 282 : ILR (1979) 2 Kant 1897 (DB).

54. **AIR 1940 Lah 401 (404) : ILR (1941) Lah 71 (FB)** ** AIR 1925 Pat 288 (289) (DB) ** AIR 1917 Pat 14 (14) (DB) ** 1870 Pun Re No. 15, p 51 (52) (DB) ** 1870 Pun Re No. 81, p 208 (209) (DB) ** (1868) 3 Mad HCR 363 (365) (DB) ** (1865) 2 Mad HCR 382 (383) (DB).

[See also (1870) 2 NWPHCR 9 (10) (DB).]

is known as a "Welsh mortgage" in England, as to which see the undermentioned cases.(55) The mortgagee in such cases takes the chance of the rents and profits being greater or less than the interest. A mortgaged to B 12 villages of which he gave possession and stated in the mortgage deed . "until I pay the amount Rs 5,600 on account of principal, the mortgagee shall continue in possession and occupation". Their Lordships of the Privy Council said "under such a mortgage the mortgagee takes his chance of the rents and profits being greater or less than the interest which might have been reserved by the bond, and the mortgagor is entitled to redeem on re-payment of the mortgage-money"(56) Where the mortgagee is put in possession of the mortgaged property in lieu of interest and it has not been found that he has ever been dispossessed, he is not entitled to any interest but is entitled to the principal only (57) Where the mortgage is security only for the principal and the mortgagee is to have the profits in lieu of interest which is not payable otherwise, the mortgagee is not entitled to interest if he fails to take possession from the mortgagor (58)

The fact that the document does not make any *express* provision for the appropriation of the usufruct for interest or principal does not make it any the less a usufructuary mortgage, if the necessary inference from the terms of the document is that it is to be appropriated to the one or the other (59) Where there is no stipulation to pay interest but possession is given, it must be taken as an implied part of the mortgage contract that the usufruct must be taken in lieu of interest (60) Even if the mortgage deed does not stipulate for payment of interest by the mortgagor as the mortgage was usufructuary mortgage and as the mortgagee was not placed into possession of the mortgaged property, the mortgagor is liable to pay mortgage debt together with damages @ 12% (61)

The document in instant case is styled as a usufructuary mortgage Possession was surrendered to mortgage against loan of Rs 25/- The term of mortgage was only one year The mortgage was to take yield from the land and adjust it towards interest, held that the transaction was a mortgage liable to be redeemed and not a lease (62)

See also the undermentioned case (63)

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55. AIR 1921 Mad 183 (192) 44 Mad 301 (DB) ** (1889) 12 Mad 109 (112) (DB) ** (1749-50) 27 ER 1106 (1109) 1 Ves Sen 402 *Longuet v Seawen* ** (1687) 23 ER 602 (602) 1 Vern 476, *Fulthrope v Foster* ** (1745) 26 ER 962 (963) 3 Atk 278 *Lawley v Hooper* (In Welsh mortgages there is no covenant to repay the money) ** (1832) 34 RR 301 (302) Younge 610 : 2 LJ (NS) Ex Eq 17, *Teulon v Curtis*.

56. **(1902) 24 All 521 (531) : 29 Ind App 148 (PC).**

57. AIR 1926 Cal 1239 (1239) (DB)

58. AIR 1921 Bom 28 (29) 45 Bom 523 (DB) (17 Bom 425 Foll) ** (1892) 17 Bom 425 (428) (DB).

Also see S 60 Note 10 and S 68, Note 6

59. **AIR 1921 Mad 12 (16, 17) : 43 Mad 589 (FB).**

[**See also** 1954 Andh LT (Civil) 35 (40) (**Held**, that though the deed of usufructuary mortgage did not say whether the usufruct should be appropriated towards principal or interest, the recital therein clearly indicated that the intention of the parties was that it should be appropriated only towards the principal.)]

[**See however** (1949) 53 Cal WN 96 (98) (Assam) (In the absence of a plain expression that the rents and profits of the land were to be appropriated towards interest the intention of the parties that they were to be so appropriated could not be taken into account)]

60. AIR 1973 Mad 242 (244) 85 Mad LW 543 ** (1904) 6 Bom LR 630 (632) (DB)

61. 1996 (2) Andh LD 910 (912).

62. AIR 2001 Ker 210 (220) : 2001 (2) Ren CR 115.

63. 1968 Ker LT 449 (It is not correct to equate the holder of a life estate to a possessory

Where the mortgagor was given a choice of suing for mortgage money as also for any other monetary claim arising out of accounting made under the terms of deed, it renders the mortgage non-usufructuary.(64)

The words "or any part of such rents and profits" were added in 1929 so as to cover cases where the mortgagee retains part of the rents and profits in discharge of the debt, and pays the balance to the mortgagor Such cases were regarded before the amendment as anomalous mortgages.(65)

(C) Absence of personal liability.

There is no *personal liability* on the part of the mortgagor to repay the mortgage-money to the mortgagee, in a usufructuary mortgage (66) Consequently, the mortgagee cannot sue the mortgagor personally for the recovery of the debt (67) It has been held in some cases that on this ground

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· mortgagee A possessory mortgagee is bound in law to account to the mortgagor for the loss sustained during the period he was in possession Whereas life estate holders who are themselves donors have reserved to themselves the right of enjoyment of the property they are not accountable for the profit appropriated by them) ** 1954 Andh LT (Civil) 35 (It was held that though the deed of usufructuary mortgage did not say whether the usufruct should be appropriated towards principal or interest, the recital therein clearly indicated that the intention of parties was that it should be appropriated only towards principal)

64. 1982 Pat LJR 446 (449) (DB).

65. AIR 1952 Punj 181 (183) ** 1931 Mad WN 595 (599).

66. 1982 Pat LJR 446 (449) ** AIR 1963 Guj 280 (282) ** AIR 1959 MP 178 (179) ** AIR 1957 Pat 575 (578) ILR 36 Pat 323 (DB) (**Overruled** on another point in AIR 1958 Pat 630 (FB) ** AIR 1956 Pat 312 (313) (DB) ** AIR 1952 Kutch 65 (66) ** AIR 1945 Lah 282 (284) (DB) ** AIR 1939 Lah 235 (236) (DB) ** AIR 1936 Pesh 48 (51) (DB) ** AIR 1914 Mad 317 (318) (DB) ** (1903) 5 Bom LR 119 (121) (DB) (Personal covenant by mortgagor to pay principal and interest — Mortgage not usufructuary) ** AIR 1928 Lah 355 (356) (DB) ** AIR 1915 Cal 376 (377) (DB) (Where a mortgage deed provided — "When I or my heirs shall pay Rs 250, the amount covered by this deed. on 30th Magh of 1311 F S or of any other year after the expiration of the deed. . . I shall take back this deed and enter upon possession " — **Held**, that there was no covenant to pay the money and the mortgagee could not give up possession and sue for the sale of the property) ** (1901) 3 Bom LR 156 (157) (DB)

[**See also** AIR 1952 Assam 19 (21) ILR (1950) 2 Assam 444 ** AIR 1950 Assam 18 (20) : ILR (1949) 1 Assam 167 (DB) (Mortgage with possession containing stipulation for repayment within specified time — It is not out and and out usufructuary mortgage but anomalous mortgage.)

67. AIR 1968 Assam 10 (11) ** (1956)-1 Mad LJ 385 (387) (In this case, however, longer period was fixed by vendee in order to enable vendor to repurchase property if possible after making up the funds) ** AIR 1945 Lah 282 (284) (DB) ** AIR 1938 All 564 (566) ILR (1938) All 781 (DB) ** (1900) 2 Bom LR 201 (202) (DB) (If mortgagee has failed to obtain possession he can obtain a persnoal decree) ** (1875) 24 Suth WR 426 (426) (DB) (Where by the terms of a zuripeshgee lease deed, the only lien which plaintiff has acquired over the property is to retain possession as lessee until the money lent is paid off, he has no right to bring a suit for the recovery of the money by the sale of property) ** (1870) 14 Suth WR 29 (30) (DB) ** (1866) 6 Suth WR 283 (284) (DB) (There may be a contract to the contrary between mortgagor and mortgagee and in such case mortgagor can be sued personally)

[**See also** (1870) 13 Suth WR 445 (446) (DB) (Where a lease gave the lessee the right to continue in possession of the land until the money which was due to him was liquidated, the relation between the parties is not that of mere lessee and lessor, but that of mortgagee and mortgagor, but the lessee is not entitled to have the property sold.) ** (1873) 21 Suth WR

there is no "debt" at all in such a case **(68)** It is submitted that this view is not correct **(69)** It cannot, however, be attached as a 'debt' under O. 21, R 46 of the Code of Civil Procedure as the terms of that rule, which provides for attachment by prohibition the debtor from making *payment* and the creditor from recovering the debt, are obviously inapplicable to a case where no payment by the mortgagor is contemplated at all **(70)** the proper procedure would be to attach it under O 21, R 54 as immovable property.**(71)** There is a difference of opinion as to whether the existence of a covenant to pay prevents a mortgage from being a usufructuary mortgage One view is that the existence of a mere covenant to pay unaccompanied by a *hypothecation* of property (i e by a grant of the power of sale) does not change the characer of what would otherwise be a usufructuary mortgage, **(72)** so as to enable the mortgagee to sue for sale **(73)** A contary view namely that such a covenant renders the mortgage an *anomalous one has been held in the undermentioned cases* **(74)**

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37 (38) (DB) (Zuripeshgee lease) ** (1887) 11 Bom 475 (478 (DB) (Mortgage land sold by revenue authorities for arrears of Government assessment due upon other land of mortgagor — Mortgagee can recover debt from mortgagor personally)]

Also see Note 41.

68. AIR 1940 Lah 401 (405) : ILR (1941) Lah 74 (FB) ** AIR 1945 Lah 282 (284 (DB)

[**See also** AIR 1941 Oudh 479 (481) 16 Luck 789 (DB) (Case of mortgage by conditional sale **AIR 1940 Lah 401 (FB)** Applied NOTE — There is no covenant to pay in a mortgage **by conditional sale — See Note 31.**)]

69. See AIR 1960 Pat 196 (198) (DB) ** (1949) 53 Cal WN (1 DR) 62 (64 65) ** (1949) 53 Cal WN (1 DR) 15 (17) ** AIR 1938 All 564 (566) ILR (1938) All 781 (DB)

70. AIR 1960 Pat 196 (198) (DB) ** AIR 1928 Mad 648 (650 651) (Usufructuary mortgage — *Held*, on construction of the deed of mortgage that there was no covenant to pay mortgage amount — No debt ** AIR 1916 Mad 434 (435 436) 39 Mad 180 (DB) (Usufructuary mortgage containing also a covenant to pay — *Held* debt could be attached under O 21, R 46.) ** (1911) 35 Bom 288 (292) (DB)

See the A I R Commentaries on the Code of Civil Procedure 10th 1985 Edn O 21, R 46, Note 4

71. AIR 1960 Pat 196 (198) (DB ** (1911) 35 Bom 288 (292, 293) (DB) ** (1962) 1 Mad LJ 397 (398)

72. AIR 1938 All 418 (421) : ILR (1938) All 714 (SB) ** (1989) 1 BLJ 338 (343) : (1989) 1 BLJ 214 (FB). (Mere insertion of a term of personal covenant to pay the mortgage amount in an otherwise usufructuary mortgage deed would not convert it into anomalous mortgage) ** (1955) 21 Cut LT 459 (461) (DB) (Stipulation that if loan be not paid on the date fixed mortgagee to continue in possession and enjoy the lands till mortgagor pays off the amount — Mortgage held usufructuary) ** AIR 1951 Trav Co (54 (55) (DB ** AIR 1942 All 326 (327) ILR (1942) All 368 (DB) ** AIR 1921 Mad 183 (192) 44 Mad 361 (DB) ** (1908) 10 Bom LR 615 (617) (DB)

Also see S 68, Note 17.

73. AIR 1938 All 418 (420, 421) : ILR (1938) All 714 (FB) ** AIR 1942 All 326 (327) ILR (1942) All 368 (DB) ** AIR 1933 Lah 151 (151) (DB) ** (1908) 10 Bom LR 615 (617) (DB) (28 All 157 Foll) ** (1905) 28 All 157 (160) (DB) (Madras view disapproved)

Also see Section 67, Note 1 5 and S. 68, Note 17

[But see AIR 1932 Lah 164 (167) : 13 Lah 259 (DB).]

74. AIR 1953 Mad 13 (14) ILR (1952) Mad 993 (DB) ** 1988 TLNJ 207 (213) (DB) (Mad) (No personal covenant in the mortgage deed — Mortgage otherwise usufructuary mortgage cannot be termed as anomalous mortgage) ** AIR 1952 Assam 19 (21) ILR (1950) 2 Assam 444 (DB) ** AIR 1942 Cal 55 (58) (DB) (12 Mad 109, 14 Mad 232 26 Mad 662

It has been held that a usufructuary mortgage in which there is a covenant to pay is a "debt" which can be attached under O. 21, R. 46 of the Civil Procedure Code.**(75)**

A usufructuary mortgage does not create a debt as contemplated by S 7 of the Punjab Relief of Indebtedness Act (1934) Therefore, the mortgagor in such mortgage is not entitled to claim that the rate of interest be confined to maximum of 7½.**(76)**

(D) Time limit for redemption.

It is not necessary in a usufructuary mortgage to fix any period of redemption A possessory mortgage providing that the mortgagee is to obtain possession of the property in lieu of a fixed sum with a condition that redemption is to take place *whenever the mortgage-money is paid* is a good usufructuary mortgage **(77)** The fixing of such time is not inconsistent with the nature of a usufructuary mortgage **(78)** In fact S 62 shows that such a term is contemplated. But the fixing of a term is not equivalent to a covenant to pay at the end of the term **(79)**

Under a deed a person has obtained possession of land from its owner on conditions that he will render the land fit for cultivation, improve existing well, take all the usufruct for a period of 12 years without paying premium or rent to owner and redelivery the land after the stipulated period. Held, that the document could be construed as a self-redeeming mortgage.**(80)**

Mortgagees whose mortgages are not with possession cannot resist a suit for possession by a purchaser of the equity of redemption.**(81)**

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27 Mad 526. Rel on, 28 All 157. **Diss. from.**) ** AIR 1935 Lah 103 (104) · 16 Lah 612 (DB). ("Usually a personal covenant to pay is held to have the effect of implying a right of sale" — Sale was, however, not asked for in this case.)

[**See also** AIR 1962 Mad 308 (308) (Usufructuary mortgage prescribing specific period for redemption — Recital to pay principal after expiry of period amounts to personal covenant to pay — Mortgagee can bring suit for sale.)]

75. AIR 1960 Pat 196 (198, 199) (DB) ** AIR 1942 Pesh 66 (68) ** AIR 1916 Mad 434 (435, 436) : 39 Mad 389 (DB)..

(NOTE — Also see A I R Commentaries on the Civil Procedure Code 10th (1985), Edn., O 21, R. 46, Note 4.)

76. (1978) 2 Rent LR 464 (468) (Punj)

77. **AIR 1928 Oudh 1 (5) : 3 Luck 1 (FB).** (NOTE — Possession appears to be in lieu of interest.)

78. **(1902) 26 Bom 252 (258) (DB)** ** AIR 1981 Pat 172 (176) 1981 BLJR 361 (DB) ** AIR 1940 Cal 436 (438) (DB) ** (1955) 21 Cut LT 459 (462) (DB) ** AIR 1940 Cal 426 (427) (DB) ** AIR 1939 Lah 235 (236) (DB) ** AIR 1938 Pat 388 (389) (DB) (Question whether document was lease or usufructuary mortgage — Fact that period was fixed does not preclude conclusion that it was usufructuary mortgage) ** AIR 1934 Pat 217 (220) (DB) ** AIR 1921 Mad 183 (191, 192) 44 Mad 301 (DB) ** AIR 1921 Mad 517 (517) (DB) (No redemption within five years or after 20 years.) ** (1908) 32 Bom 569 (571) (DB) (Deed providing that mortgagee was to take possession of lands for 199 years and to apply its profits in liquidation of the debt — Deed described as Valatdan patta — **Held,** it was a mortgage and not lease and hence could be redeemed.) ** (1913) 16 Oudh Cas 56 (62).

[**See also** AIR 1940 Cal 437 (438) (Mortgagee in possession to enjoy usufruct in lieu of interest — In case mortgage nor redeemed within stipulated period, mortgagee to enjoy usufruct till payment.) ** AIR 1933 Mad 672 (672) (DB).]

Also see S 62, Note 8

[**But see** AIR 1922 Pat 167 (169) : 1 Pat 350 (DB).]

79. AIR 1921 Mad 183 (192) : 44 Mad 301 (DB).

80. (1979) 2 Kant LJ 282 (285) ILR (1979) 2 Kant 1897 (DB). (W. P. 9347 of 1976) (Kant), **Reversed.**)

81. **AIR 1929 PC 288 (289).**

The addition of a condition that on default, the transaction should be treated as a sale does not, in an ordinary possessory mortgage, convert it into an anomalous mortgage **(82)** So also the additional covenants that the mortgagor would pay rent of the mortgaged land, that if, on any occasion the mortgagee had to pay arrears of rent he may recover the same from the mortgagor with interest, that if the mortgagor had already made a transfer or created a charge on the property the mortgagee can realise his amount from other property of the mortgagor, etc , are not sufficient to change the character of the mortgage as a usufructuary one **(83)** Liability to pay land revenue being a paramount charge on the property a direction in the deed to pay the revenue does not militate against the fullness of the grant as usufructuary mortgage **(84)** So also a further stipulation giving the mortgagee a right to sue for the mortgage money and sell the mortgage property in case of disclosure of any encumbrance on the property has been held not to change the character of the mortgage.**(85)** A mortgage is a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced/to be advanced by way of loan On the other hand lease is a transfer of right to enjoy a property and is not a transfer of interest in a property **(86)**

(E) Distinction between usufructuary mortgage and lease.

Landlord mortgaged the house with the tenant and the terms of the mortgage deed in the instant case conclusively shows that there was implied surrender of the tenants rights **(87)**

In the instant case there was a registered mortgage deed, according to which the possession of the mortgaged shop was given to mortgagee by the plaintiff The defendant alleged that the mortgage was a sham transaction and in fact he was a tenant of the plaintiff There was no evidence to create any doubt about genuineness and authenticity of the mortgage deed The plea of tenancy was found not maintainable and the plaintiff was entitled to redemption of mortgage **(88)**

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82. AIR 1925 Mad 366 (366) ** AIR 1985 Madh Pra 1 (3) 1984 MPLJ 518 (Where the terms of mortgage deed stated that the amount secured was to be redeemed with n a stipulated period, the provision therein that upon failure to redeem within stipulated time the mortgage shall be treated as a sale would not have the effect of converting the mortgage from usufructuary to an anomalous one when possession was delivered to mortgagee and it was clear from the deed that it was usufructuary mortgage.)

[**See also** 1981 All LJ (NOC) 102 (The mortgage deed authorised mortgage to retain possession of mortgaged property until payment of mortgage money by a certain date and until that date the mortgagee was authorised to receive rents and profits accruing from property and appropriate same towards interest on mortgage money The deed also contained a second condition that if mortgagor did not pay the mortgage amount on due date the deed shall be deemed to be a deed of absolute sale It was held that such a transaction was extensively a usufructuary mortgage and not a sale)]

83. AIR 1942 Cal 522 (523) · ILR (1942) 2 Cal 28 (DB) (A covenant to indemnify the usufructuary mortgagee in case of his dispossession does not affect the nature of the mortgage.) ** AIR 1940 Cal 281 (282) (DB) ** AIR 1940 Cal 436 (437 (DB) (Provision that in case of dispossession, mortgagee was entitled to principal and interest at certain rate is an indemnity clause and does not alter the nature of mortgage) ** AIR 1940 Cal 426 (428) (FB) (Do) ** AIR 1940 Cal 544 (544) (DB) (Provision that in case of dispossession mortgagee could sue for money with interest and in execution sell the mortgaged and other properties — Nature of transaction not changed) ** AIR 1937 Pat 94 (95) (Provision that in case of mortgagee's dispossession principal may be realized in any way and for that purpose the property is mortgaged — Usufructuary nature not altered.)

84. 1967 Ker LT 596 · ILR (1967) 2 Ker 190

85. AIR 1940 Cal 437 (438).

86. ILR (1999) Kant 4634 (4646).

87. AIR 1979 SC 280 (281) : 1997 AIR SCW 27 : 1996 (8) SCC 97.

88. 1999 AIHC 1055 (1057) : 1998 (119) Pun LR 68

A document was styled as a usufructuary mortgage. An amount of Rs. 1000/- was borrowed and a property was handed over as security in the deed. Possession was given to mortgagee He was to pay Rs 851 as excess profits" Interest was at 12% p.a Mortgagee was not entitled to alienate, re-payment if not made within stipulated time, mortgagee could bring the property to sale He was not given right to make improvements Held, that the document was a mortgage deed and not a lease of the building.**(89)**

If a tenant is already in possession and he becomes a mortgagee of that property and if that mortgage is redeemed then, he would re-acquire the status of tenant Putting an end to the tenancy rights by resorting to the contract that on redemption of mortgage tenancy shall cease, would be in breach of the provisions of Rent Control Laws, such contract cannot be enforced same would be the position vis-a-vis S 83 of the T P Act, Section 83 cannot have overriding effect on Rent Control Act.**(90)**

On construing the various terms of the document in instant case it was found to be usufructuary mortgage and the provisions of the Kerala Land Reforms Act (1 of 1964) would not be applicable to the transaction The mortgagor was held entitled to possession of the land on payment of certain sum for the improvements made by the mortgagee. The mortgagor's application under S 51(2) of the Kerala Agriculturists Debt Relief Act (11 of 1970) was allowed **(91)**

Where the deed showed that there was already a building in the property and that property was given as possessory mortgage and the deed also stated that if the amount was not given, it would be treated as charge on that property and also other properties of the mortgagor, and the mortgagee was also made liable for any waste committed in the property, the deed would be mortgage deed and not lease deed.**(92)**

See also Section 105, Note 67.

36. Zuripeshgi lease.

A *zuripeshgi* lease is a lease for a premium, usually, however it amounts to a mortgage **(1)** whether it amounts to a mortgage depends upon the question whether the premium is advanced as a loan and whether the land is intended to be security for such loan **(2)** If the original premium is not an advance which is re-payable, but is satisfied by the lease, the transaction is only a lease Again, if there is no idea of giving any security for the loan the transaction would be a lease and not

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89. AIR 1994 Ker 141 (148, 149) : (1994) 1 Ker LT 89

90. 1997 (1) MPLJ 412 (414, 419)

91. **1995 Supp (3) SCC 198 (199).**

92. AIR 2002 Ker 313 (325) : 2002 (2) Ker LT 589.

Section 58 — Note 36

1. AIR 1933 All 929 (930) (DB) (Zuripeshgi leases have been held to be usufructuary mortgages in ordinary circumstances) ** AIR 1924 Pat 580 (581) 3 Pat 465 (DB) ** AIR 1921 Nag 161 (162) ** (1875) 24 Suth WR 275 (278) (DB) (The Zuripeshgi lease in suit was regarded as a mortgage) ** (1869) 6 Beng LR 563n (564n) (DB) ** (1868) 3 Agra 146 (146) (DB) ** (1867) 2 Agra 122 (122) (DB) ** 1864 Suth WR Gap No 260 (261) (DB). (Accounts of collection are to be given by the lessees as mortgagees as required by law.) ** (1864) 1 Suth WR 7 (9) (DB).

2. **AIR 1959 SC 1303 (1309, 1310) : 38 Pat 702** ** AIR 1935 Pat 360 (364) (DB) ** AIR 1928 Pat 410 (411, 412) 7 Pat 690 (DB) ** AIR 1925 Pat 118 (119) 3 Pat 266 (DB) ** AIR 1918 Pat 385 (386) (DB) (It is impossible to lay down any general rule as to the effect of a zuripeshgi transaction — Every case must depend upon its own facts) ** AIR 1917 Pat 14 (14) (DB) ** (1903) 16 CPLR 49 (51) ** (1899) 12 CPLR 96 (100) ** (1898) 2 Cal WN 758 (759) (DB).

Also see Section 105, Note 67.

a mortgage **(3)** The test, in other words is whether there is a secured debt and a right of redemption.**(4)** Once you get a debt with the security of land for its re-payment, it is a mortgage by whatever name it is called.**(5)** The usual form of a mortgage by *zuripeshgi* lease is a loan re-payable on the day the lease should expire, and the rent is either wholly the interest or partly interest and partly to be appropriated to the principal, the lessee to continue in possession *till the loan should be paid* In *Bengal Indigo Co v Roghobir Das*,**(6)** under documents styled *zuripeshgi ticca patowa*

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3. **AIR 1959 SC 1303 (1309, 1310) : 38 Pat 702 ** (1883) 7 Mad 203 (206) (FB).** Reference under Stamp Act ** AIR 1939 Pat 265 (266, 267) ** AIR 1938 Pat 35 (36, 37) (DB) ** AIR 1919 Mad 322 (324) : 41 Mad 959 (DB) : Swamibhogam for 20 years executed by A in favour of B reciting that the amount paid by B with interest shall be realized by enjoyment of the Swamibhogam and B should pay A certain sum and paddy every year and should deliver land to A after 20 years — If the sum advanced was paid by A at the end of 8 years B was to give up possession and deed would stand cancelled — Transaction **Held, mortgage, not lease.)**

Also see S. 105, Note 67.

4. **AIR 1959 SC 1303 (1309, 1310) : 38 Pat 702 **** (1954) 33 Pat 955 (959) (DB) ** AIR 1947 Pat 78 (80) (DB) (Thika lease — Possession of thikadar neither as security for repayment of advance nor to continue after expiry of period of thika till re-payment — Transaction held lease and not mortgage **Overruled** on another point in AIR (1949) Pat 278 (FB)) ** AIR 1941 Pat 296 (298) (DB) (A document which is a kabuliyat with a provision for payment of rent in advance in a lump sum and which provides for the lessee remaining in possession for a fixed period of years in consideration of the advance paid and for payment of a rent at fixed rate after the period fixed if the lessee wished to retain the premises after the period can in no sense be described as a mortgage of any sort it is merely a lease and the lessee is in possession only as a tenant and not as a mortgagee) ** AIR 1938 Pat 35 (36) (DB) ** (1882) 6 Bom 674 (680) (DB) (*Zuripeshgi* leases are placed on the footing of usufructary mortgages only when there is a power of redemption redemption reserved to the lessor expressly or by implication) ** AIR 1925 Pat 319 (320) **(DB) ** AIR 1923 Pat 122 (128) : 2 Pat 217 (DB)**

[**See also** 1950 All LJ 453 (454) (In the case of a real zuripeshgi lease the lessor is entitled to recover possession after the expiry of the fixed period without payment of anything In the case of the lease disguised as a mortgage the sum originally borrowed or whatever may be found to be due on accounting must be paid back before the lessee is asked to quit (1931-12 Lah 161, Relied on)] ** AIR 1937 Oudh 146 (148) (12 Luck 161) (The difference between a *zuripeshgi* lease and usufructuary mortgage is that in the latter the mortgagee is authorised to retain possession until the debt is satisfied while under the former the lessee is to retain possession for a definite time only — Every *zuripeshgi* lease cannot be regarded as mortgage — In the present case there was no intention to create relationship of debtor and creditor — No right of redemption was reserved but lessee was to quit without receiving any payment at expiry of the term of lease — **Held,** that there was no mortgage)

5. **AIR 1959 SC 1302 (1309, 1310) : 38 Pat 702 ** AIR 1958 SC 941 (943) : 37 Pat 1168 **** ILR (1954) 33 Pat 955 (959) (DB) (There could be no complication by the use of words as "zuripeshgi thika" in the deed and in providing for payment of rent to the mortgagor) ** ILR (1949) 1 Cal 487 (494) (DB) ** AIR 1941 All 56 (59, 60) : ILR (1941) All 17 (DB) ** AIR 1938 Pat 388 (389) (DB) ** AIR 1928 Pat 410 (412) : 7 Pat 690 (DB) (Per Kulwant Sahay J.) ** AIR 1924 Pat 580 (582) : 3 Pat 465 (DB) ** AIR 1919 Mad 322 (324) : 41 Mad 959 (DB) ** (1881) 3 All 1 (5) (DB) ** 1936 RD 461 (463) (DB) ** (1933) 17 RD **270 (271, 272) (DB)**

[**See also** 1961 Ker LT 970 (971) ** (1879) 2 Mad 187 (191) (DB) (A mortgaging land to B — The agreement was that B was to remain in possession for 8 years — Out of the rent a part was to be appropriated towards interest and part paid to A — **Held,** that B's possession was as mortgagee and not as tenant.)]

Also see S. 105, Note 67.

6. **(1897) 24 Cal 272 (279, 280) : 23 Ind App 158 (PC).**

pottahs, the tenants advanced at the commencement, to the lessor, a certain sum of money for the liquidation of debts due to his creditors the tenants being entitled to recover payment by retaining out of the rents payable by them, a yearly instalment of the sum advanced with interest at the rate of 6 annas per mensem.

The leases contained an express obligation by the tenants to quit occupation at their expiry Their Lordships of the Privy Council observed :

> "The leases in question were not mere contracts for the cultivation of the land let, but that they were also intended to constitute and did constitute, real and valid security to the tenant for the pricipal sums which he had advanced, and interest thereon The tenants possession under them was, in part at least, not that of cultivators only, but that of creditors operating re-payment of the debt due to them, by means of their security."

Illustrations

(1) Where *A* received from *B* Rs 250 not by way of advance or loan but as a deposit by way of security for the due payment of the rent, and executed in favour of *B* what was termed as a *zuripeshgi*, it was held that this was only a lease and not a mortgage(7).

(2) *A* received a sum of money from *B*, and executed a *zuripeshgi* lease to *B* reciting that out of the rent, *B* was to appropriate a certain portion to the liquidation of the debt and to pay the balance of the rent to *A*. It was held that this was a mortgagee(8).

(3) Where *A*, an occupancy tenant, granted a *zuripeshgi* lease to *B*, by which *B* was to pay a part of the rent to the zamindar and was to set off the remaining part of the rent towards the money due from *A* to *B*, the transaction was held to be only a lease and not a mortgage(9)

See also the undermentioned cases(10).

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7. (1869) 12 Suth WR 214 (215) (DB).

8. AIR 1926 Pat 77 (79) (DB) ** AIR 1917 Pat 14 (14) (DB) ** (1864) 1 Suth WR 52 (53) (DB).

   [See also (1864) 1 Suth WR 144 (144) (DB) (In a case of mortgage by zuripeshgee lease, ordinarily a rent is reserved to the mortgagor If the rent reserved is not paid, as agreed the mortgagor is allowed to debit that rent in his accounts to the mortgagee)]

9. (1933) 17 RD 526 (528) (DB).

10. AIR 1953 Madh Bha 9 (12) ILR (1953) MB 104 (Mortgage with possession — Mortgagee to remain in possession for 12 years and appropriate income determined at a certain amount towards discharge of debt — Debtor binding himself to pay mortgage debt with interest in case debt was not discharged — It was held that it was an anomalous mortgage and not a zuri-i-peshgi lease) ** AIR 1952 Pat 312 (314) (A mortgage deed is always executed by a mortgagor Where, therefore, a person on payment of a Zuripeshgi amount takes settlement of a land by executing a registered Kabuliyat and agrees to pay annual rent, the Kabuliyat does not confer on such person the status of a mortgagee and the landlord cannot get possession of the land on paying the Zuripeshgi amount to him.) ** AIR 1943 Pesh 15 (17) (DB) (A deed in the form of Mustaki (lease) mortgage whereby the transferor purports to mortgage temporarily a garden stipulating that the transferee shall remain in possession for 7 years and that 'on expiry of the said period the whole mortgage sum of the mortgagee will be considered to have been paid up and the property being thus redeemed will come into possession of the owner without payment of any money, held to be a lease and not a mortgage 25 All 115 (PC), AIR 1928 Mad 35 and AIR 1923 Pat 122, Rel on) ** AIR 1938 Pat 35 (36) (DB) (A debt and right of redemption imply mortgage) ** AIR 1915 Cal 769 (770) (DB) (The term "zuripeshgi" is an ambiguous one and the fact that no interest was provided for and a premium merely was paid at the inception of the lease may give rise to an inference that there was a lease and not a usufructuary mortgage) ** (1905) 10 CWN 351 (353, 354) (DB) (**Held**, on the terms of the lease, that it was a cultivating lease and not usufructuary mortgage lease and that the lessee had by 12 years' continuous possession, acquired a right of occupancy in the land) ** (1875) 7 NWPHCR 56 (57)

In a *zuripeshgi* lease, can the lease and the mortgage be regarded as separate transactions? Apart from *zuripeshgi* lease, the same document may grant a lease and also a mortgage from the loan advanced by the lessee to the lessor. They will be separable transactions. *A* gave a lease to *B* for a coal mine for 999 years. He also mortgaged by the same document the lands to *B* for a loan advanced by *B*. The deed further provided that *B* who had, under the lease, to pay a royalty to *A* could appropriate the royalty towards the mortgage debt. Subsequently, the leasehold interest and the mortgage interest became vested in different persons. The mortgaged property was ordered to be sold subject to the lease thus regarding the two as separable transactions(**11**).

37. Kanom and otti.

Whether a *kanom* tenure is a mortgage must be decided with reference to the object for which the tenure is created.

> "In some cases it may be a mere lease, a sum being advanced as security for the rent or for proper cultivation, to be repaid on the expiry of the time. In other cases, and most frequently, it is created as a lease by way of mortgage to secure a loan advanced to the *jenmi* (proprietor). Rent is payable in the case of every *kanom*, but all *kanoms* partake to a certain extent of the incidents of a usufructuary mortgage.... . If when viewed scientifically it cannot be wholly regarded as a mortgage, it cannot certainly be regarded wholly as a lease, as undoubtedly the land enures as security, if not for the principal, at least for the interest of the loan advanced(**1**)."

It has been generally held that a *Kanom* in its mortgage aspect is a usufructuary mortgage(**2**). Usually there is no covenant to pay and hence a suit for recovery of the money or for sale of the *kanom* property is not maintainable(**3**).

(DB). (A borrowing money from B and agreeing to give possession for fixed term — Profits to go towards interest — Possession not given — **Held**, B cannot sue for sale of the property.) ** (1873) 19 Suth WR 160 (161) (DB). (Zuripeshgi lease for fixed period — Lessee to repay money advanced, by him by taking rent reserved on lease during its pendency — **Held**, mortgage, not lease.) ** (1870) 8 Suth WR 310 (311) (DB). (A advancing Rs. 1400 to B and taking zuripeshgi lease for nine years at annual rent of Rs. 160 to be applied to the repayment of advance — **Held**, usufructuary mortgage.)

11. AIR 1934 PC 119 (122, 123).

Section 58 — Note 37

1. AIR 1952 Trav-Co 333 (339) (FB). (Main features of distinction between kanom and an ordinary usfructary mortgage pointed out.) ** **AIR 1951 Mad 187 (189). ILR (1952) Mad 92 (FB).** A kanom partakes of the nature of a morggage with possession and a lease.) ** **(1881) 3 Mad 382 (383) (FB).**

[See also AIR 1970 Ker 16 : 1969 Ker LT 62 (FB) ** 1961 Ker LT 970 (971). (Distinction between kanom and mortgage pointed out.) ** 1959 Ker LT 1299 (1300). (Transaction held what it purported to be, namely, kanapattom and not mere possessory mortgage.) ** (1954) 1 Mad LJ 439 (442). (The kanom partakes of the nature of both a mortgage and a lease.) ** (1954) 67 Mad LW 274 (277). (The decisions of this Court have ever since proceeded on the basis that the (kanom partakes of the nature of both a mortgage and a lease.) ** AIR 1954 Trav-Co 392 (393) (DB). (Giving of the name 'possessory mortgage' to a document which otherwise satisfies the requirements of a kanom and which is itself a renewal of an earlier demise which is a kanom cannot operate to convert the transaction into a possessory mortgage.)]

2. AIR 1952 Trav-Co 333 (339) (FB) ** AIR 1953 Trav-Co 273 (273, 274) ** (1899) 22 Mad 350 (351) (DB).

[See also (1883) 6 Mad 325 (326) (DB). (Kanom is ordinarily a mortgage.) 3 Mad 382 **(FB). Relied on.)]**

3. (1899) 22 Mad 350 (351) (DB).

Also see S. 98, Note 7.

In every *kanom* the *kanomdar* has an inherent right to hold for 12 years according to the custom of the country; but this right can be excluded by the *jenmi* by an express agreement(**4**). Further, under the tenure the *kanomdar* is entitled not only to hold it for the period of 12 years generally but also to hold it so long as the *kanom* amount remains unpaid(**5**). A covenant for renewal is a *kanom* lease would be available only for one renewal at the end of 12 years from the date of execution of the deed and not for similar renewals in perpetuity at the end of every cycle of 12 years from the said date(**6**) He does not forfeit the right to hold for 12 years by his default to pay his *parapad*, i e , the net rent(**7**) As to whether he would forfeit his right to hold if he denies the jenami's title, the cases are conflicting(**8**). Where a document described as *kanom kuzhikanom* contains all the terms that are generally found in a kanom deed, the fact that parties agreed to one or more terms that are not ordinarily found in a *kanom* deed does not make it any less a *kanom*(**9**) If the intention is to create a debtor and creditor relationship it is a mortgage Provision to pay "Onakazhecha" does not make the transaction less a usufructurary mortgage if it is otherwise so(**10**).

A transaction of "otti" as understood in Travancore area involves as a matter of its legal incidents, a right to sue for mortgage money, a right to bring to sell the mortgaged property, a right to possess and enjoy the property and a right to redeem Non-mention of such incidents however is not of any consequence "Kuzhikanam" in the State of Travancore meant only a right to compensation for plantations made on the land. It does not involve a covenant to pay rent and therefore cannot be said to constitute itself into a tenancy. "Otti" and "Kuzhikanam" are only possessory mortgages with the recognition of a right to compensation for the mortgagee's plantations on the land(**11**).

Property was under lease. In the year 1943 the same Ottis and Kuzhikanam were executed in respect of tht property in favour of the lessee Mortgage was more durable than lease during that period. Mortgage amount was also not negligible compared to area of land covered There was no

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4. AIR 1962 Ker 27 (28) (He also has the right to make improvements by way of plantations and claim compensation for such improvements (**Held Overruled** by 7 Trav LR 44 (FB) as interpreted in AIR 1973 Ker 55) ** AIR 1953 Trav-Co 273 (273) ** 1950 Trav-Co LR 137 (138, 139) (DB) ** (1891) 14 Mad 76 (77) (DB) (Kanom providing that there should be surrender of the property "if at any time the property should be necessary" for the jenmi — **Held**, that there must be special exigency for redemption before 12 years **Overruled** in 26 Mad 727 (FB) which held that no special exigency need be shown) ** (1887) 10 Mad 192 (193) (DB) ** (1879) 2 Mad 193 (193) (DB) ** (1862-63) 1 Mad HCR 296 (297) (DB) (Right to twelve years' enjoyment is not repealed by the non-payment to rent)

   [**See also** (1902) 25 Mad 452 (453) (DB) (In Malabar a tenant under Kanom kulikanom lease cannot be redeemed or ejected before twelve years but the lease does not determine on the expiration of twelve years.)]

   Also see S. 60, Note 5.

5. 1949 Trav-Co LR 50 (54) (DB).

6. AIR 1955 Trav-Co 161 (161) : ILR (1954) Trav-Co 1098 (DB).

7. **1951 Mad 187 (189) : ILR (1952) Mad 92 (FB)** ** (1863) 1 Mad HCR 113n (113n) (DB) ** (1862-63) 1 Mad HCR 112 (112) (DB).

8. AIR 1916 Mad 652 (654) (DB) (No) ** (1904) 27 Mad 26 (27) (DB) (No) ** (1865) 2 Mad HCR 109 (110) (DB) (Yes makes no difference that this is done for the first time by the kanomdar in his answer to a suit by the jenmi) ** (1865) 2 Mad HCR 161 (161) (DB) (Otti-holder — Yes) ** (1863) 1 Mad HCR 445 (446) (DB) (Yes)

9. AIR 1950 Mad 612 (613).

10. 1966 Ker LT 655.

11. 1968 Ker LT 11 1968 Ker LJ 403 (**Held, Overruled** by 7 Trav LR 44 (FB) as stated in AIR 1973 Ker 55 (FB))

stipulation in Ottu or Kuzhikanam to pay rent Held that the document in question was mortgage and not lease(12).

See also the undermentioned cases(13).

A deed of *ottu* is neither a simple mortgage nor a usufructuary mortgage as defined in the Transfer of Property Act It properly comes under the category of anomalous mortgages All the elements of a hypothecation bond are present in an *ottu* transaction and in addition possession of the property secured is given to the mortgagee so that he may take the profits in lieu of interest(14)

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12. **AIR 2000 SC 904 (907) : 2000 AIR SCW 495 : 2000 (2) SCC 422.**

13. **AIR 1967 SC 876 (878).** (Though kanom, kuzhikanam and a usufructuary mortgage have many common features they are distinct types of transactions Former differs from mortgage in that it is a lease and therefore the transfer of a right to enjoy the property and is not a transfer of an interest in the property like a mortgagee In determining the character of the transaction the name given by the parties is a relevant though not a decisive consideration When the parties have described the transaction as a kuzhi-kanom it is a valuable indication of the intention of the parties that the transaction is not to be a usufructuary mortgage) ** **AIR 1970 Ker 16 : 1969 Ker LT 62 (FB).** (Even a document described as a Kanvadharam may be a mortgage and not a lease (Kanom) Where 'Marupat' is executed in favour of the executant the transaction cannot be said to be a lease) ** **AIR 1968 Ker 38 (40, 41) 1967 Ker LT 646 (FB).** (Where in a document styled 'Itaivasom Panayam' a right of sale was conferred on the transferee to realise the amount advanced neither of these two factors are conclusive that the transaction is purely a mortgage and not a lease — **Overruled** on another point in 1975 Ker LT 1 (FB)) ** 1968 Ker LR 309 (Having regard to the comparative status of the parties small ratio borne by consideration secured to the value of the property provision for Onakazcha and absence of any provision for recovery of consideration otherwise than by redemption would amount to a lease though described as "Kozhuverkapanayam") ** AIR 1970 Ker 267 1969 Ker LT 22 (Where purpose is to make over land to another for making improvements after protecting the holding with stone walls to plant coconut and other fruit bearing trees to take income and after paying small rent for adjusting interest of the ottiyartham showed that it was a tenancy which implied conferment of a right of sale but not a mortgage) ** 1967 Ker LJ 835 (838) (**Held** on a consideration of the provisions of the document that the intention of the parties was to create an arrangement for enjoyment and not one for securing the amount advanced) ** AIR 1963 Ker 309 (311) ILR (1962) 2 Ker 614 (DB) (In adjudging whether a transaction is a mortgage or kanom Courts will have to look into the terms of the document to ascertain the intention of the parties If the intention is to create a debtor and creditor relationship and there is a debt with the security of a land for its redemption then the arrangement is a morgage by whatever name it is called) ** ILR (1961) 2 Ker 667 (670) (While relationship between the parties under a mortgage is that of debtor and creditor in the case of a kanom it is that of landlord and tenant) ** ILR (1961) 2 Ker 589 (596) (Both in kanom and possessory mortgage the transferee is put in possession of the property But a kanom is a lease, the transfer being for the enjoyment of the transferee and the possessory mortgage is a loan the transfer being for securing its repayment Test for determining whether transaction is a kanom or possessory mortgage stated) ** AIR 1957 Trav Co 239 (240) (The important aspects of a Kanom are (i) that the income from the property will generally have no proportion to the interest which the kanom tenant has to realise for the amount advanced by him, a low pattom being usually fixed as payable to the Jenmi and (ii) the right of the tenant to be in possession of the property for a period of not less than 12 years One other test is that there must be a covenant for renewal of payment or renewal fees for the transaction to be a Kanom) ** AIR 1952 Mad 176 (177) (In order to know whether a particular document amounts to a kanom it is not improper to see whether it provides for liability to pay renewal fee.)

14. AIR 1962 Ker 27 (27) (Provision for payment of michavaram by mortgagee to mortgagor

The expression "Ottikuzhikanam" cannot be conclusive in determining the nature of the transaction and may be held to be a redeemable mortgage(15).

Document styled as "Othitharan" providing for planting of fruit trees, digging well, construction of new house indicates an intention that the property was leased for enjoyment as a lease(16)

37A. Lekha mukhi mortgage.

"The *lekha mukhi* is a kind of running mortgage, in which the proprietor's share of the produce is made over to the creditor, who pays the revenue and keeps a running account of the receipts and disbursements. *Lekha mukhi* mortgages may be created in two ways : one, where the proprietor has obtained a loan from the lekha mukhidar, and makes over a well or a share in a well to his management, the other where an estate is made over to the *lekha mukhidar* as an agent rather than as a creditor. The accounts are kept in the same manner in either case. The *lekha mukhidar* collects the crops and credits the proprietor with their value debiting the Government revenue the costs of repairs, working expenses; in fact all charges usually defrayed by the proprietor His fee consists of the *muhassali 2 topas per karwar*, and he also charges interest, if the proprietor gets into his debt"

The above is an account of a *lekha mukhi* mortgage in the Punjab as given by Ghose in his Law of Mortgage, Fifth Edition, page 109. The above account has been quoted with approval by the Lahore High Court in *Dittu Mal v. Ilahi Baksh*(1).

It has been held that a *lekha mukhi* mortgage is a usufructuary mortgage, the land being made over to the mortgagee, and he having to look to its produce for the payment of the mortgage debt, the mortgagor undertaking no personal liability and there being no provision in the deed entitling the mortgagee to sue for the debt(2). See also Note 35

37B. Chitham mortgage.

Chitham is a kind of anomalous mortgage(1) The difference between *Chitham* and a simple mortgage is that in *Chitham* on failure to pay the mortgage amount on due date, the mortgagee becomes entitled to recover possession and to enjoy the usufruct, either in lieu of interest or otherwise as might have been agreed between the parties till the mortgagor chooses to redeem(2) A *chitham* being in its nature an anomalous mortgage, the question whether it contains a personal liability to pay has to be determined with reference to the terms of the deed itself(3). A provision in

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in an otti does not convert it into a lease **Held Overruled** by 7 Trav LR 44 (FB) as interpreted in AIR 1973 Ker 55) ** AIR 1958 Mad 117 (120) (DB) (**Overruled** in AIR 1962 Mad 21.) ** AIR 1955 Trav-Co 207 (207).

[**See also** AIR 1957 Ker 109 (112) (By a mere intention, unexpressed in any document, the parties to an otti cannot convert it into a simple mortgage.)]

15. **1975 Ker LT 1 : ILR (1975) 1 Ker 166 (FB).** (1973 Ker LT 772 and AIR 1968 Ker 38 (FB) **Overruled;** S. A No 348 of 1968, D/- 3-11-1970 (Ker), **Reversed.**)

16. 1970 Ker LT 469 (DB). (**Overruled** in 1975 Ker LT 1 (FB).)

Section 58 — Note 37A

1. AIR 1927 Lah 828 (829) (DB).
2. AIR 1919 Lah 20 (20, 21) . 1 Lah 89 (91) ** 1881 Pun Re No 90 p 194 (197, 198) (DB)

Section 58 — Note 37B

1. AIR 1952 Kutch 65 (66)
2. AIR 1952 Kutch 65 (66) ** AIR 1951 Kutch 1 (2). (In such a case the custom is that the debtor can redeem the property on payment of the amount due on the date when possession was taken. This is purely usufructuary and income is enjoyed by the mortgagee in lieu of interest.)

   [**See also** AIR 1951 Kutch 4 (4) (Chitham mortgates are not defined anywhere)]
3. AIR 1952 Kutch 65 (66).

a *chitham* mortgage that in case of default to pay within the stipulated time the mortgagee is entitled to remain in possession as a vatantar mortgagee till redemption by the mortgagor negatives, by implication, a personal liability. It cannot be construed to give an option to the mortgagee either to take vatantar or to sue for recovery of mortgage money(4). A *chitham* mortgagee can also take possession and convert the *chitham* into a vatantar mortgage when the debtor has gone away. The difference in the case of this kind of vatantar is that the mortgagee has to keep an account of the income and on his return the mortgagor can call for the account and the mortgagee must return the excess of the income received by him over the interest(5).

37C. Vatantar mortgage.

This kind of mortgage is prevalent in Kutch. Section 645 of the Digest of Local Customs which is regarded as authoritative and binding in Kutch says that in a vatantar transaction, a person lends money on (security) of immovable property, the property remains in possession of the lender, the lender uses the property or enjoys its rent or profits in lieu of interest; the property is returned to the borrower on payment of the principal amount borrowed. These characteristics of a vatantar prima facie show that it is a mortgage transaction. Vatantar is thus a transfer of interest, as distinguished from ownership in specific immovable property as security for loan and is not a transaction called mortgage by conditional sale as property is not ostensibly sold. Further, a vatantar has all the principal characteristics of a usufructuary mortgage and thus amounts to a usufructuary mortgage(1). Though in some vatantar transactions time limit called *bandhi* is provided, it is not universal and cannot, therefore, be regarded as characteristic of the transaction. It is merely a covenant entered into by the parties to these particular transactions and cannot convert it into an anomalous mortgage(2).

37D. Pukhta Maurusi Tenant.

The mortgagor was a Pukhta Maurasi tenant and in the deed of mortgage specifically stated that whatever rights he was having in the land were mortgaged and the same would be the rights of the mortgagee. Thus tenancy rights came to be mortgaged by the mortgage deed. The mortgagee would thus acquire tenancy rights as Puktha Maurusi(1).

38. English mortgage.

Until 1925 (when the English Law of Property Act was passed) the usual form of a mortgage in England was the transfer by assignment of the mortgagor's interest in the property with a proviso for re-assignment upon payment of the mortgage-money by a particular date. After the date had passed, the mortgagor's rights *at law* had determined and the mortgagee was in law the absolute owner of the property. But in *equity* the mortgagor still retained a right to redeem and, upon payment of the debt and interest, to have the property reconveyed to him. This was called the *equity of redemption*. It was, however, only an *equitable right* and did not prevent *legal* interest of the mortgagor passing despite his retention of the equity of redemption(1). The equity of redemption was an

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4. AIR 1952 Kutch 65 (66).
5. AIR 1951 Kutch 1 (2).

Section 58 — Note 37C

1. AIR 1953 Kutch 4 (5, 6).

   [See also AIR 1953 Kutch 8 (10) (Vatantar has all the characteristics of a usufructuary mortgage.) ** AIR 1951 Kutch 1 (2)
2. AIR 1953 Kutch 4 (6).

Section 58 — Note 37-D

1. AIR 1999 SC 3071 (3074) : 1999 AIR SCW 3010 : 1999 (6) SCC 656.

Section 58 — Note 38

1. AIR 1939 PC 14 (17) : 66 Ind App 50 ** AIR 1940 Cal 429 (432) ILR (1940) 1 Cal 197 ** (1884) 10 Cal 97 (101) (DB).

estate in land which could be devised, granted, etc., and whereof there may be seisin. The person entitled to the equity was considered in equity the owner of the land, though the legal estate vested in the mortgagee(2). In fact the mortgagor in England had only an *equitable* interest in the property both *before* and *after* the date for payment had elapsed : before, because he had a *contractual* right to have the property reconveyed, and this contract created an equitable interest in the property; after, because, in equity, time was not the essence of the transaction(3), the contract of mortgage being, in equity, considered merely a loan of money secured by a pledge of the estate(4). In each case, therefore, he had an *equitable* estate though in the former case he had a *right* and not merely an *equity of* redemption(5).

Before the passing of this Act, a mortgage in the English form of properties situated in the *mofussil* between parties of whom one was a Hindu, was always treated as only a mortgage by conditional sale(6). Where both the parties were Englishmen, all the incidents of an English mortgage were held applicable(7). After the passing of the Act, a mortgage in the English form could be created in the *mofussil* as well as in the Presidency Towns, no matter to what community the parties belonged. It has, however, been held in the undermentioned case(8) that the rule that where one of the parties is a Hindu and the property is situated in the *mofussil* the mortgage, though in an English form, should be treated as a mortgage by conditional sale, is still applicable It is submitted that this view does not appear to be correct.

The three essentials of an "English mortgage" were stated in *Narayana v Venkataramana*(9) to be as follows :

(1) The mortgagor should bind himself to repay the mortgage-money on a certain day.

(2) The property mortgaged should be transferred "absolutely" to the mortgagee

(3) The 'absolute' transfer should be made subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon repayment of the mortgage-money, on the date on which the mortgagor bound himself to repay the same(10).

Where all the three essentials are present, the transaction would be an English mortgage, and

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[See also 1979 Tax LR 1668 (1672) (All) (In the case of an English mortgage there is transfer of ownership to the mortgagee so long as mortgage subsists In the event the mortgagor pays the amount by the date fixed the mortgagee is bound to reconvey the property but as long as mortgage subsists the mortgagor has no right left except a right to redeem)]

2. (1738) 26 ER 377 (379) 1 ATK 603 Casborne v Scarfe ** (1881) 50 LJ QB 473 (478) 6 QBD 345, Heath v. Pugh.

3. **AIR 1939 PC 14 (19) : ILR (1939) Kar (PC) 78 : ILR (1939) 1 Cal 283 : 66 Ind App 50.**

4. (1802) 32 ER 108 (111) : 6 RR 124 : 7 Ves 265, Seton v. Slade.

5. **AIR 1939 PC 14 (19) : 66 Ind App 50.**

6. (1886) 12 Cal 614 (616) (DB) ** (1870) 5 Begn LR 389 (393) (DB)

7. (1881) 7 Cal 394 (398) (DB).

8. AIR 1918 Mad 373 (376) (DB).

9. **(1902) 25 Mad 220 (235) (FB).**

10. **AIR 1939 Rang 321 (322) . 1939 Rang LR 403 (FB)** ** AIR 1962 Andh Pra 274 (294) (DB) (**Held** that document executed by limited company mortgaging its assets to debenture trustees satisfied the above three conditions) ** AIR 1936 Cal 646 (648) ILR (1937) 1 Cal 359 ** AIR 1936 Pat 211 (214) : 14 Pat 560 (DB) ** AIR 1935 Cal 659 (661) (DB) ** AIR 1975 Cal 77 (78) (DB)

the mere fact that the mortgagor undertakes to pay taxes, etc., will not change its character(**11**). But where on a construction of the document it is found that one or other of the said essentials is absent, then the mortgage is not an English mortgage(**12**).

(A) Personal liability.

In an English mortgage, the debtor remains personally liable to pay the debt. A covenant to pay is an essential ingredient of such a mortgage(**13**). Where the intention is to create an English mortgage, this covenant will, in fact, be presumed for every mortgage implies a loan, and every loan implies a debt for which the mortgagor's personal estate is liable. The absence of a covenant is, however, a strong indication of the intention of the parties. The fair criterion by which the Court is to decide whether a deed of sale containing an agreement to reconvey is a mortgage or not is whether the remedies are mutual and reciprocal. If not, it is merely a conditional sale and not a mortgage(**14**). Where a sale of property was made in lieu of money charged thereon with a clause for redemption if the money was paid in ten years, there being no covenant to pay it, it was held that the transaction was merely a conditional sale and not a mortgage(**15**).

The personal covenant must be to repay the money on a *certain date*. The object is that it should be known with certainty when the mortgagor may redeem or the mortgagee proceed to foreclose or sell an object which is not defeated by providing for earlier payments of interest(**16**). Where it could not be said that the mortgagor had bound themselves to repay the mortgage money on a certain date, inasmuch as the Ekrarnama speaks of repayment within a period of 8 years, the document was not English mortgage(**17**). An option as regards earlier payment or an extension of time for repayment is a matter of grace and does not affect the undertaking to repay on a certain date(**18**).

(B) Absolute transfer.

It has been held by their Lordships of the Privy Council in *Ramkinkar v. Satya Charan* (**19**), that S. 58, Cl. (e) cannot be construed as declaring an English mortgage to be an absolute transfer of the property, but as merely declaring that such a mortgage *would be absolute were it not for the*

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11. AIR 1946 Bom 499 (505) (Absolute transfer — Stipulations in mortgage as to mortgagor's retaining possession of property until default was committed and being liable to pay rates and taxes — Stipulations do not detract from absolute nature of transfer.) ** AIR 1942 Mad 628 (630); ILR (1942) Mad 851 (DB) (Mortgage containing all features of English mortgage — Clause changing date of payment in certain event and providing for payment by mortgagor of costs of insurance etc. — Provisions do not alter the character of the mortgage.) ** AIR 1936 Cal 646 (648, 649); ILR (1937) 1 Cal 359.

12. AIR 1935 Cal 659 (662, 663) (DB) (Leasehold property — Covenant for payment of rent and royalty by mortgagor — Mortgagee not to ask for money within certain period if mortgagor pays interest regularly — Mortgagor entitled to remain in possession and to carry on colliery business therein — Mortgage held not an English mortgage.)

13. AIR 1957 Pat 575 (578); 36 Pat 323 (DB) (**Overruled** on another point in AIR 1958 Pat 630 (FB).) ** (1906) 4 Cal LJ 510 (513) (DB).

14. (1840) 48 RR 322 (324); 9 LJ (NS) Ch. 70, Williams v. Owen (Goodman v. Grierson (1813) 12 RR 82, Followed.) ** (1813) 12 RR 82 (85, 86); 2 Ball & B 274, Goodman v. Grierson.

[**See also** (1733) 1 ER 934 (938); 2 Bro PC 265, Tasburgh v. Ecklin.]

15. (1813) 12 RR 82 (85, 86); 2 Ball & B 274, Goodman v. Grierson.

16. AIR 1936 Pat 211 (219) : 14 Pat 560 (DB).

17. AIR 1989 Gauhati 71 (74).

18. AIR 1942 Mad 628 (630); ILR (1942) Mad 851 (DB) ** AIR 1936 Pat 211 (214, 219); 14 Pat 560 (DB).

19. AIR 1939 PC 14 (19) : 66 Ind App 50.

proviso for retransfer. The clause, according to their Lordships, does not determine what legal effect follows from the particular form of words; it merely prescribes the form of words necessary to constitute what is known as an English mortgage. The clause deals with *form*, not with *substance*. The substantial rights are dealt with in Ss 58(a) and 60. Whatever form is used *nothing more than an interest is transferred and that interest is subject to a right of redemption*(**20**).

The distinction between law and equity in England does not apply in this country(**21**), and, unlike a mortgagor in England, the mortgagor under an English mortgage under the Act retains a *legal* interest both before and after the date fixed for payment Before that date he has an interest in the land which is legal because what was transferred was only an *interest* in the property After that date he has the legal right of redemption given to him by S 60 In each case therefore he retains a *legal* interest in the property(**22**).

The question for decision in *Ramkinker's* case(**23**), referred to above, was whether when a lessee for 999 years, mortgaged, by way of an English mortgage, his leasehold interest to *X*, there was a privity of *estate* created between *X* and the lessor so as to make *X* liable for the burdens of the lease If the mortgage operated as a transfer of *all the interest* of the mortgagor, such a privity would be created. Otherwise not. In view of the principles stated above, their Lordships held that X was not liable by privity of estate for the burdens of the lease.

The "absolute" transfer must be made by operative words, the same as in an absolute conveyance such as "convey," "assign," "demise," etc , and not by the word "mortgage." Where the instrument said "I hereby mortgage and assign" the estate, etc , it was held that the use of the word "assign" was sufficient to satisfy the second requisite of an English mortgage(**24**). The expression "grant, convey or transfer" followed by an absolute and indefeasible estate to inheritance in possession was, in the undermentioned case(**25**), held sufficient to satisfy the second requirement. See also the undermentioned case(**26**).

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20. (1965) 69 Cal WN 593 (609) (AIR 1939 PC 14 Ref) ** AIR 1932 Cal 775 (782) : 59 Cal 1314 (DB) ** AIR 1918 Mad 373 (376) (DB) ** AIR 1916 Low Bur 103 (103) : 8 Low Bur Rul 413 (DB).

[**See also** AIR 1936 Cal 646 (648) : ILR (1937) 1 Cal 359.]

21. AIR 1916 Low Bur 103 (103) : 8 Low Bur Rul 413 (DB).

22. **AIR 1939 PC 14 (19) : 66 Ind App 50.**

23. **AIR 1939 PC 14 (19) : 66 Ind App 50.** (The contrary view taken in AIR 1927 Cal 725, following Williams v Bosanquet, (1819) 21 RR 585 (590), is not good law)

[**See however** AIR 1939 Pat 146 (148) (Where a lessee mortgages his interest by an English mortgage, the whole of his interest passes to the mortgagee and the mortgagee is liable to pay the rent reserved by the lease, by a privity of contract between him and the lessor. Note — This case must be treated as impliedly **Overruled** by AIR 1939 PC 14.)]

Also see Section 76, Note 8

24. **(1902) 25 Mad 220 (235) (FB).**

25. AIR 1936 Pat 211 (218) : 14 Pat 560 (DB).

26. AIR 1988 Cal 247 (251) (1987) 1 Cal HN 402 (Where the recitals in the deed go to show that by executing the deed the mortgagor granted conveyed transferred, assured and assigned upto the purchaser his undivided 1/9th share in suit property together with all deeds and documents relating to the property and deed further showed that the property granted, transferred etc to the use of purchaser absolutely and forever and that the purchaser thereafter should peaceably and quietly enjoy and possess the property, it was a deed of English Mortgage.)

The claim of the Sales Tax Deptt to proceed against the property over which an English mortgage has been created is subject to the rights of the mortgagee(27).

(C) Proviso for reconveyance.

The proviso must be for reconveyance of the property upon repayment of the mortgage-money *as agreed*, i.e., on the *"certain stipulated or fixed* Where the proviso for reconveyance was "upon repayment, to the mortgagee, of all sums due to him by the mortgagors the mortgagee shall reconvey the said property to the mortgagors" it was held that the third condition of an English mortgage was not satisfied as the covenant to reconvey did not depend upon payment being made *at the stipulated* time(28).

(D) Possession of property.

The mortgagee acquires the right to take possession as soon as the mortgage is executed, whether a right of entry is expressly covenanted for or not(29). A mortgagee under English mortgage is entitled to immediate possession and is also entitled to retain possession until he is repaid(30). In England if the mortgagee allows the mortgagor to remain in possession the latter is at *law* merely a tenant at sufferance(31); but in equity, being the owner he can take the rents and profits for his own use and is not liable to account to the mortgagee The same will be the case in this country also The mortgagor in possession will be entitled to rents and profits until the mortgagee chooses to go into possession(32). The mortgagee does not forfeit his right to payment by allowing the mortgagor to take the rents and profits.

Under the English law the property, in an English mortgage vests in the mortgagee together with the right to *collect rents* arising out of the property The rents are treated as forming part of the property mortgaged, and the reason why such rents are taken into account in reduction of the mortgage is this The mortgagee is bound to reconvey the mortgaged property on payment of the mortgage dues As the property mortgaged includes rents accruing therefrom, the mortgagee must reconvey also rents as have come into his hands, on the mortgage dues being paid up The same result is effected by an account being taken and by the rents received being applied towards the reduction of the mortgagor's dues The fact that the rents collected by the mortgagee have to be accounted for by the mortgagee does not detract from the proposition that the right to the rents is in the mortgagee(33).

39. Equitable mortgage.

An equitable mortgage in English law is of much wider import than it is under this Act(1). In

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27. 1972 Rev LR 82 (84) : 30 STC 581 (Punj)

28. (1902) 25 Mad 220 (236) (FB).

29. AIR 1954 Bom 81 (81) ILR (1953) Bom 1153 ** AIR 1946 Bom 499 (505) (A stipulation in the deed that the mortgagor would, until he committed default in payment of the principal or interest as stipulated, remain in possession and would pay the rates and taxes as and when they accrued due in respect of the property will not detract from the absolute nature of the transfer) ** AIR 1936 Pat 211 (220) 14 Pat 560 (DB) ** AIR 1932 Pat 360 (362) (DB) ** AIR 1919 Cal 908 (912) 45 Cal 653 ** (1866) 6 Suth WR 269 (274) (DB)

[See also AIR 1925 Cal 77 (79) (DB) (The fact that the mortgagee obtained possession by proceedings which subsequently proved to be a nullity, could not stand in his way)]

30. AIR 1969 Mys 280 (289) : 40 Com Cas 406.

31. (1895) 64 LJQB 10 (2) : 71 LT 775. Scobie v. Collins.

32. AIR 1954 Bom 81 (81) ILR (1953) Bom 1153 ** AIR 1938 Pat 539 (543) : 17 Pat 726 (DB) (AIR 1936 Pat 211, Followed.) ** AIR 1936 Pat 211 (220, 221) 14 Pat 560 (DB)

33. AIR 1940 Cal 429 (432) ILR (1941) 1 Cal 197 ((1872) 14 Eq 32 Wilson v Wilson Rel on)

Section 58 — Note 39

1. AIR 1933 Mad 293 (295) : 56 Mad 546 (DB)

England a deposit of title deeds for the advance of a loan was regarded as giving rise to an implied agreement to mortgage the estate referred to in the title deeds(2). On the principle that equity treats that as done which ought to be done, the agreement made the depositary, in equity, a mortgagee(3) and the mortgage was known as an equitable mortgage. The recognition of such a mortgage was really by way of an exception to the Statute of Frauds which required a mortgage to be in writing It was disapproved in many cases(4) though held to have been firmly established, and consequently was held not one to be explained, beyond what was actually established(5). The exception was recognised because it was regarded that the granting of an interest in the land was more than a mere oral contract and was in the nature of part performance which took the case out of the Statute of Frauds(6). But a mortgage by deposit of title deeds, being a mortgage only in equity was held not to prevail over a legal mortgage, unless the holder of the legal mortgage did, or omitted to do something which prevented him, in equity, from asserting his paramount rights(7).

The law of India knows nothing of the distinction between legal and equitable property in the sense in which it was understood where equity was administered by the Court of Chancery in England(8). Nevertheless the principle of English law that a deposit of title deeds as a security for a loan would create a lien on the lands(9), was applied in this country as being in accordance with

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2. (1829) 34 ER 513 (514) : 19 Ves 255, Ex parte Wright.

   [See also (1901) 70 LJ Ch 562 (568) 85 LT 45, Harrold v Plenty (Deposit of certificate of shares as security for money amounts to equitable mortgage.)]

3. (1836) 4 LJ Bk 58 (59) 4 Deac & C 259 2 Mont & Ayr 214 Ex parte Bignold In re Postle ** (1786) 29 ER 1133 (1133, 1134) 1 Cox 211 1 RR 20 Edge v Worthington

   [See also 1961 Ker LT 434 (442) (English Courts have worked out the concept of an equitable mortgage by regarding it as a mortgage that has not been perfected an executory assurance which the Courts of equity will as between the parties treat as an actual assurance.) ** AIR 1927 Bom 167 (171) (DB).]

4. (1812) 34 ER 496 19 Ves 209 Ex parte Whitbread ** (1808) 33 ER 653 (654) 9 RR 359, Ex parte Mountfort ** (1889) 148 ER 1131 (1136) 3 Y & J 150 Boson v Williams ** (1823) 37 ER 1105 (1107) T & R 274, Mountford v Scott ** (1810) 34 ER 142 (143) 1 Rose 268, Ex parte Coombe ** (1819) 146 ER 878 (880) 6 Price 495, Williams v Medlicot

5. (1806) 33 ER 73 (76) : 12 Ves 192, Norris v. Wilkinson.

6. (1886) 56 LJQB 353 (354) 18 QBD 380, In re Beetham, Ex parte Broderick

7. **AIR 1965 SC 430 (432) ** AIR 1923 PC 211 (213) : 51 Cal 186 . 1 Rang 637 : 50 Ind App 283 ** AIR 1916 Lah 39 (42) : 1916 Pun Re No. 31 (DB)**

8. **AIR 1923 PC 211 (213) : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283 ** (1904) 31 Cal 57 (72) : 30 Ind App 238 (PC)** AIR 1932 Cal 589 (593) 59 Cal 781 (DB) ** (1906) 33 Cal 410 (421, 422) (DB) ** (1890) 14 Bom 269 (273) (DB) ** (1870) 7 Bom HCR (OC) 45 (60, 61) (DB) (A lien created by verbal contract and deposit of title deeds of immovable property in the Island of Bombay by a Hindu in favour of a Hindu upheld)

   [See also ILR (1961) 1 Ker 493 1961 Ker LT 434 (442) (Though S 58 (f) is derived from English law of equitable mortgage the Courts in construing the provision are not bound by the principles of equity laid down in English decision)]

   Also see S. 5, Note 6; S. 48, Note 10 and S. 54, Note 23.

9. **(1863) 9 Moo Ind App 303 (321) (PC) ** AIR 1960 Mad 529 (531) ** AIR 1939 Rang 321 (322) : 1939 Rang LR 403 (FB) ** 1880 Pun Re No 113 page 276 (280) (DB)** (Mere possession by creditor of title deeds does not constitute a mortgage – Their deposit must be shown to be as security for debt — If the deposit and the advance of money are made at one time that is sufficient proof, but where the debt is prior to the deposit other evidence is required) ** (1788) 30 ER 6 (7) 2 Cox 12, Hankey v Vernon ** (1790) 30 ER 113 (115) 2 Cox 243 2 RR 39, Ex parte Bulteel ** (1813) 35 ER 249 (250) 2 V & B 79 2 Rose 138 13 RR 32, Ex parte Kensington ** (1786) 29 ER 1133 (1133) 1 Cox

justice, equity and good conscience(**10**). After the passing of this Act, a mortgage deposit of title deeds stadns on the same footing as other mortgages(**11**), and for purpose of priority it takes effect against any mortgage deed subsequently executed and and registered which relates to the same property(**12**). In the undermentioned case(**13**) it was argued before the Privy Council that an equitable mortgage was not a mortgage within the meaning of the Act Their Lordships rejected the argument and held that in view of S 59, a deposit of title deeds as security for a loan was a mortgage in the sense of the Act In another case *Papiah v. Naganatha*(**14**) it was argued before the Privy Council that the Act did not recognise a mortgage by deposit of title deeds and that the onus should be on the person setting it up to prove that such a mortgage can be made The contention was rejected by their Lordships and it was observed that the Transfer of Property Act far from containing any general prohibition of mortgages by deposit of title deeds expressly exempts them, when made in specified places from the formalities prescribed for the due execution of the mortgages and that the *onus* is strongly upon the person setting up the invalidity of such mortgages to prove it. Section 58(f) now makes it quite clear that it is a mortgage like any of the other mortgages There is a transfer of interest in the propery mortgaged to the mortgagee The question thereforeof at the subsequent purchaser having bought the property subject to mortgage by deposit of title deeds bona fide with or without notice is at no relevance The subsequent purchaser cannot avoid the mortgage by leading evidence to show that he made all reasonable enquiries to find out if the property was subject to mortgage by deposit of title deeds or not(**15**).

A guarantor is also a debtor and hence entitled to create a mortgage by deposit of title deeds(**16**).

It has been held in the Punjab that an equitable mortgage has the same legal effect as any other mortgage(**17**).

The essentials of a mortgage by deposit of title deeds under the section are(**18**)

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211 1 RR 20 Edge v Worthington ** (1812) 34 ER 493 (494) 19 Ves 202 Ex parte Warner ** (1810) 34 ER 88 (89) 17 Ves 227 11 RR 66. Ex parte Langston

10. **(1863) 9 Moo Ind App 303 (320) (PC)** ** Air 1960 Mad 529 (531) ** (1875) 1 Bom 237 (241) ** AIR 1916 Low Bur 20 (21) 8 Low Bur Rul 450 (Case before T P Act was extended to Burma) ** (1909) 5 Low Bur Rul 93 94) (DB) (Do) ** AIR 1920 Low Bur 22 (22) (DB). (Do)

[**See also** (1869) 1 NWPHCR 166 (168) (DB) (A bona fide vendee by subsequent sale takes free of the lien.)]

11. **AIR 1965 SC 1591 (1593).** (**Reversed** AIR 1958 Pat 472 on another point) ** **AIR 1965 SC 430 (435)** ** AIR 1960 Mad 529 (531) ** AIR 1926 Cal 204 (209) (DB) ** (1906) 33 Cal 410 (421, 422) (DB)

[**See also** AIR 1943 Sind 36 (38) ILR (1942) Kar 479 (DB) (There is nothing in an equitable mortgage, which is contrary to the law or even to justice equity or good conscience An equitable mortgage plays a useful almost necessary part in the transaction of business in an advanced commercial community There is no need to frown on an equitable mortgage or to have any bias against it or to strain the law against it or to regard it as a practice which in the interests of the community should be discouraged or discontinued)]

12. **AIR 1965 SC 430 (432, 433).**

13. **AIR 1923 PC 211 (215) : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283.**

14. **AIR 1931 PC 239 (242) : 59 Cal 439 : 58 Ind App 333.**

15. **AIR 1985 Delhi 83 (87) : (1984) 26 Delhi LT 377.**

16. **AIR 2001 Ker 107 (110) : 2001 (1) Ker LT 303.**

17. **AIR 1930 Lah 920 (922, 927) : 11 Lah 564 (DB).**

18. **AIR 1965 SC 430 (435).** (Three requisites for such mortgage are (i) Debt (ii) deposit of title deeds. (iii) an intention that deeds shall be security for the debt) ** (1991) 70 Com Cas 840 (842) (Andh Pra) ** 1983 Guj LH 603 (607) 1983 (2) 24 Guj LR 1025 (DB) **

(1) There must be a *delivery* of *documents of title* of immovable property.

(2) Such delivery must be made to a *creditor* or his agent.

(3) Such delivery must be made *with intent to create a security* thereon.

Possession of property does not go with the creation of equitable mortgage i.e. mortgage by deposit of title deeds(**19**).

(A) Delivery of documents of title.

There must be a *delivery* of the documents of title to the creditor. Otherwise there can be no equitable mortgage(**20**). By a document executed by the defendants they undertook to pay certain amounts to the plaintiff on certain specified dates and also agreed to deposit title deeds. However, the title deeds were not in fact deposited with the plaintiff. In the circumstances it was not mortgage by deposit of title deeds It was only a bond which did not require registration(**21**). Where A and B were in possession of title deeds for a purpose unconnected with any loan, and A merely orally communicated to B asking him to hold the title deeds as trustee for a creditor of A, it was held that the creditor did not thereby become an equitable mortgagee. The very principle of part performance on which equitable mortgage rests was held to have no application to the case(**22**). In the undermentioned case(**23**), the facts were peculiar. X was entitled to three properties. The title deeds of one property were deposited with A as security for a loan. Then X borrowed from B and deposited the title deeds of the other two properties at the same time giving a direction to A to deliver the title deeds of the first property to B when his mortgage was satisfied. It was held that an equitable mortgage was created in favour of *B on all the three* properties. Where the title deeds are *already with the creditor* for a purpose unconnected with any loan, and the debtor writes to the creditor that he may retain the deeds as security for the loan, a delivery must be deemed to have been made and an equitable mortgage is therefore created by such deposit(**24**). Delivery of possession of the title deeds need not be actual physical delivery. Constructive delivery of possession is sufficient to create a valid equitable mortgage(**25**). Where the defendant seeking loan from bank for construction of

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AIR 1981 Cal 404 (409) (DB) ** (1965) 1 Mad LJ 179 (180) · ILR (1965) 2 Mad 441 ** AIR 1961 Pat 158 (161) ** AIR 1960 Mad 529 (531) ** AIR 1936 Lah 251 (254) (DB) ** AIR 1935 Lah 821 (823) (DB) ** AIR 1929 Rang 65 (66) 7 Rang 28 (DB) ** AIR 1926 Mad 743 (743, 744) ** AIR 1925 Mad 723 (724) 48 Mad 454 (DB) ** AIR 1914 Bom 15 (16) : 38 Bom 372 (DB)

19. 2001 (4) ICC 677 (681) (Cal).

20. ILR (1966) 2 All 840 (844) (DB) ** 1961 Ker LT 434 (443) (As an exception is made in the case of mortgage by deposit of title deeds from the general rule which requires a registered instrument in dealing with immovable property law insists upon delivery of the title deeds This is required not merely for providing tangible evidence of the transfer but also for the purpose of putting any person intending to deal with the property on notice of the transfer.)

21. 2000 (1) Andh LD 504 (508).

22. (1886) 56 LJQB 353 (355) 18 QBD 380, In re Beetham; Ex parte Broderick

23. (1863) 55 ER 351 (352) · 3 NR 285 · 33 Beav 218, Daw v Terrel

24. (1976) 89 Mad LW 523 (529, 534) · (1976) 2 Mad LJ 191 (DB) ** AIR 1969 Delhi 120 (123, 124) (DB) (Deposit can be both actual and constructive) ** AIR 1968 Delhi 244 (248) (DB) ** 1964 Ker LJ 748 (751) ** (1856) 44 ER 485 (490) , 8 De GM & G 506, Fenwick v. Potts ** (1871) 16 Suth WR 203 (205) (DB).

25. AIR 1965 SC 430 (436). (If the creditor is already in possession of the title deed it would by hypertechnical to insist upon the formality of the creditor delivering the title deeds to the debtor and the debtor redelivering them to creditor In such cases it is enough if the parties agree to treat the documents in the possession of the creditor or his agents as delivery for the purpose of the transaction) ** (1979) 1 APLJ (HC) 195 (200) , 1979 LS (AP) 91 (DB)

building deposited original title deeds and sale deeds relating to the plot in question, it amounted to creation of equitable mortgage(**26**).

Again, what is delivered must be a *document of title* If the documents deposited show no kind of title in the depositor, no mortgage is created(**27**). A bare agreement such as a letter with regard to deposit of title deeds does not by itself create a mortgage, and is not required to be stamped(**28**). Where X deposits title deeds of Blackacre assuring the depository that they are the title deeds of Whitecare but to which is reality they do not relate, this would not create an equitable mortgage on Whiteacre(**29**). However, any document which show evidence of title would be sufficient to create a mortgage by deposit of title deeds They need not in themselves be the title deeds(**30**).

It is not necessary that the documents of title deposited should show a *good title* in the depositor(**31**). Where A deposited all the title deeds of a property except that under which he had obtained the property and subsequently deposited this last deed with another person, it was held that the prior depository had a valid title against the latter(**32**). It is not also necessary that the documents deposited should connect the mortgagor with some predecessor of his who had acquired the property originally. It is sufficient if the documents deposited show the mortgagor s title to the property(**33**).

It is further not necessary that the *whole* or even the *most material* of the documents of title to the property should be deposited It is sufficient if the deeds deposited *bona fide* relate to the property or are material evidence of title and are shown to have been deposited with the intention of creating a security thereon(**34**). In some cases it has been held that documents which are merely

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** AIR 1973 Andh Pra 245 (248) (1972) 2 Andh WR 202 (DB) ** ILR (1965) 2 Mad 441 (444) ** 1964 Ker LJ 748 (751)

26. AIR 2001 Delhi 58 (61) : 2000 (88) DLT 673.

27. 1961 Ker LT 434 (443) ** AIR 1932 Cal 589 (593) 59 Cal 781 (DB) (Deposit of probate and redemption certificate relating to the property standing in the name of grandfather of the mortgagor held sufficient) ** (1911) 9 Ind Cas 309 (310) (DB) (Mad)

28. (1975) 88 Mad LW 256 (257)

29. (1857) 53 ER 274 (277, 278) : 5 WR (Eng) 775, Jones v Williams.

30. 1984 Tax LR (NOC) 34 (Kant).

31. AIR 1981 Cal 404 (410) (DB) ** AIR 1960 Mad 529 (531) (But by depositing a deed which shows no title at all holding back others showing title does not create an equitable mortgage) ** (1947) 52 Mys HCR 134 (138) (DB) (A 'document of title' within the meaning of S 58(f), T P Act, need not be a document disclosing title in the depositor The expression only means a document relating to or pertaining to title Every document which is a link in the chain of title is 'a document of title' for purposes of S 58(f))

32. (1857) 53 ER 343 (346) : 24 Beav 223, Roberts v. Croft

33. 1984 Tax LR (NOC) 34 (Kant) ** AIR 1932 Cal 589 (593) 59 Cal 781 (DB)

34. **AIR 1938 Rang 149 (150) · 1938 Rang LR 316 (FB).** (AIR 1933 Rang 299 **Overruled** and AIR 1929 Rang 65, Approved) ** AIR 1974 Mad 16 (21) (1973) 1 Mad LJ 334 (DB) ** AIR 1960 Mad 529 (531) ** AIR 1959 Cal 213 (214) ** AIR 1939 Rang 185 (185) ** AIR 1938 Mad 865 (874) (DB) ** AIR 1932 Cal 589 (592) 59 Cal 781 (DB) ** AIR 1930 Lah 920 (922) · 11 Lah 564 (DB) (Sale deed in favour of the mortgagor deposited — Sanads granted by the Government to the predecessors-in-title of the mortgagors not necessary) ** AIR 1929 Rang 65 (66) 7 Rang 28 (DB) ** AIR 1928 Pat 304 (311) 7 Pat 520 (DB) ** AIR 1917 Pat 268 (271, 272) 2 Pat LJ 293 (DB) ** (1856) 61 ER 1024 (1025 1026) . 26 LJ Ch 18 Lacon v Allen ** (1800) 170 ER 553 (554) 3 Esp 102 Richards v Borrett ** (1819) 146 ER 850 (866, 867) 20 RR 671 6 Price 411 Casberd v Attorney General

evidence of title are not documents of title Thus, a copy of a jamabandi record(35) has been held not to be a document of title In the undermentioned case(36) it has been held that a document cannot be considered a document of title unless it is clear that a better document is not available In *Ex parte Weathere*(37) the Lord Chancellor (Lord Eldon) said :

> "It is very well though it has not been long settled, that if there has been a delivery of deeds that in this Court, amounts to an equitable mortgage: and the possession of the deeds is, if no other purpose is shown, evidence of an agreement that the estate itself shall be a security It has never yet been decided how far it is necessary to deliver *all* the title deeds, or, whether that would not be taken to be a sufficient deposit, which could be taken upon looking at the instruments to amount to evidence, that the estate was meant to be a security."

A, to enable B to complete the purchase of some property for which he had contracted, lent him $200 on the security of the premises The contract for purchase was afterwards completed The vendor gave to B a receipt for the purchase-money and to this a plan of the property was attached No conveyance of the property was executed by the vendor to B It was held that the deposit of the receipt created an equitable mortgage in favour of A(38). A relinquished in favour of his father B his share in property X and B, in consideration thereof gave A property Y There was no deed for this latter transfer. A deposited a copy of the deed of relinquishment (which referred to the gift by B & Y property Y to A) with C in respect of a loan It was held that the said document was a document of title and was sufficient to create an equitable mortgage(39).

When the original document is lost or not forthcoming, equitable mortgage can be created by depositing certified copy of the document(40).

The mortgagor had mortgaged the property in favour of mortgagee and deposited the partnership agreement encumbrance certificate and registration extract of sale-deed and a letter informing the mortgagee that the original sale-deed was lost However the mortgagee failed to enquire of the person who was alleged to have lost the original sale-deed Subsequently the mortgagor had created an equitable mortgage in respect of same property in favour of the plaintiff in the instant case and delivered him the original sale-deed of property and further making him aware of the subsisting prior equitable mortgage In such circumstances, it was held that since the mortgagee in the first instance honestly believed that the original sale-deed was lost, then merely because the mortgagee failed to enquire of the person alleged to have lost the document the failure not amounting to gross neglect, and the mortgage was created by depositing extract of registration of sale-deed, it cannot be said that the mortgage in favour of mortgagee in first instance, was not a valid mortgage under S 58(f) of T. P. Act(41).

It has, however, been held in the undermentioned cases(42) that the doctrine of equitable mortgage requires the mortgagor to deprive himself of the possession of the documents which *create* his title so as to render him unable to deal with the property upon the assertion that the title is still with him It is submitted that this view is not correct

> [**But see** 1961 Ker LT 434 (443) (21 MLJ 454 and AIR 1933 Rang 299 Rel on AIR 1938 Rang 149 (FB) and AIR 1925 Mad 723 and AIR 1932 Cal 589 and AIR 1938 Mad 865. **Dissented from.**)]

35. AIR 1937 Lah 926 (928) (DB) ** AIR 1936 Lah 251 (255) (DB) ** AIR 1935 Lah 957 (957) 17 Lah 612 (DB) ** AIR 1935 Lah 721 (724) 16 Lah 1113 (DB) (The nature of a jamabandi after all is nothing more than a Government record prepared for the purposes of collection of revenue Such a record is no doubt by statute declared to be presumptive evidence of title but it cannot be said to be a document of title in any way whatsoever)
36. AIR 1936 Lah 251 (255) (DB) (Clear evidence that no better document is available is necessary.)
37. (1805) 32 ER 1141 (1142) : 11 Ves 398.
38. (1835) 4 LJ (NS) Ch 172 (174) 41 RR 208, Goodwin v Waghorn
39. AIR 1930 Lah 731 (733) : 11 Lah 694 (DB).
40. 2001 (2) Ker LJ 363 (366).
41. AIR 1982 Andh Pra 274 (277) : (1982) 1 Andh LT 157.
42. 1961 Ker LT 434 (443) ** AIR 1936 Lah 251 (255) (DB) ** AIR 1935 Lah 10 (12)

If it is to be held that with a copy of title deed a mortgage can be created then there is no doubt that it may lead to fraudulent transactions with many copies one can create many mortgages with many different people without the knowledge of one of the mortgages with other persons(**43**). However it has been held by Kerala High Court(**44**) that where the mortgagor's intention to create equitable mortgage was established in clear and unamibious terms, the deposit of registration copy of title deeds and no original documents would not mean that equitable mortgage is not created. So also where duplicate partition deed registered along with the original is deposited bona fide by one of the executants of the partition deed, to whom only a duplicate was given as his titled deed and not the original deposit of original need be insisted only as a rule of prudence and caution and not as a legal requirement for the purpose of validly creating an equitable mortgage(**45**).

The following are further illustrations of documents of title

(1) ***Patta*** **of lands in the** ***mofussil*****(46).**

(2) A mortgage is a document of title of the mortgagee(**47**).

(3) An expired lease is a document of title to the lease-hold when the lessee obtains a renewal **of the lease(48).**

(4) **Share certificate(49).**

(5) Record by Revenue Surveyor reciting an oral sale and revenue tax receipts(**50**).

(5a) Where the possession of vendee is on basis of agreement for sale the possessory title is **good security(51).**

(6) "Sold notes" by firms from whom machinery of a factory was purchased, the drafts for the purchase price, and receipts by the firms for the amounts paid insurance certificates **are all documents of title of the factory(52).**

(7) Original probate of a Will accompanied by a certified copy of a redemption certificate relating to the property, the original having been lost creates a good equitable mort**gage(53).**

The following are illustrations of documents which are *not* documents of title

(1) **Map of property and unimportant letters(54).**

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43. (1990) 2 Mad LJ 260 (263).

44. AIR 1990 Ker 157 (164) ** AIR 1996 Ker 32 (35) 1996 (2) Bank LJ 83

45. 1996 (3) Bank LJ 151 (154) (Ker)

46. AIR 1931 Mad 613 (615) (Patta is not the title but the evidence of title. The weight otherwise due to patta would depend on the circumstances of the case. Case law referred.) ** AIR 1925 Mad 723 (725) : 48 Mad 454 (DB).

47. AIR 1936 Rang 366 (366)

48. AIR 1935 Rang 51 (57).

49. (1911) 11 Ind Cas 783 (784) (DB) (Low Bur).

50. AIR 1938 Rang 149 (150) : 1938 Rang LR 316 (FB).

[**But see** 1949 Bur LR (HC) 553 (559) (Land Revenue receipts for a holding are not documents of title.) ** AIR 1932 Rang 185 (187) (Tax receipt is not document of title.)]

51. AIR 1981 Cal 404 (410) (DB).

52. AIR 1939 Lah 398 (403) (DB) (Machinery which has been permanently attached to the earth and has been continuously worked for several years is immovable property and can be **mortgaged by deposit of documents of title.)**

53. AIR 1932 Cal 589 (593) : 59 Cal 781 (DB).

54. AIR 1939 Lah 398 (401) (DB) ** AIR 1937 Lah 926 (928) (DB) (A copy of a plan submitted to the Municipality for sanction to build on the site.) ** AIR 1932 Rang 185 (187). **(Copy of map relating to immovable property.)]**

(2) A mortgage isi not a document of title of the mortgagor(**55**).

(3) Where the original title deed is not available, a copy thereof may be a good document of title but not where the original is in existence and its production is within the power of the mortgagor(**56**).

(4) A document of title of *movable property* such as a machinery cannot be construed as a document of title of immovable property merely because the movable property has by subsequent fixture to the immovable property became immovable property(**57**).

(5) A mutation entry is not a document of title(**58**).

(6) A treasury certificate that certain sums of money were deposited in the Imperial Bank of India as the purchase price of certain land is not a document of title(**59**).

(7) A life insurance policy(**60**). See also the undermentioned case(**61**).

It is not necessary that the debtor himself should deposit the title deeds with the creditor The deposit can be made by the debtor or an agent duly authorised for that purpose(**62**).

Where a mortgagor instructs the mortgagee to take delivery of the title deeds from a prior mortgagee on making payment to him amount due and the second mortgagee takes delivery of the documents of title and requirements of deposit are fully complied with(**63**).

Where the oral evidence of the plaintiff and his witnesses did not establish creation of mortgage by deposit of title deeds and there was no pleading regarding the place where the title deeds were deposited, the decree against mortgage property was set aside. However, personal decree against the defendant was maintained(**64**).

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55. AIR 1963 Punj 205 (206) ** AIR 1926 Mad 743 (743).

56. AIR 1935 Lah 10 (11) ** AIR 1935 Lah 721 (722) 16 Lah 1113 (DB) ** AIR 1935 Lah 640 (640) (DB). (Where an award has been filed in Court and a decree has been passed and the debtor failing to get the original award deposits a certified copy of the award as evidence of his title to the property mortgaged by him, the deposit creates a valid equitable mortgage) ** AIR 1933 Lah 972 (976) (DB) (Do) (**Overruled** on another point by AIR 1947 Lah 324 (FB)) ** AIR 1932 Cal 356 (365) 59 Cal 586 (DB) (Copies that were not substantial document of title to property) ** AIR 1932 Cal 589 (593) 59 Cal 781 (DB).

57. AIR 1938 Lah 255 (258) (DB).

58. AIR 1935 Lah 957 (957) (DB).

59. AIR 1935 Lah 957 (957) (DB).

60. AIR 1981 Cal 5 (8) 84 Cal WN 711 (DB) (Where on its face the transaction is an out and out sale and not a mortgage, it is not open to Court to make investigation and grant a declaration that it is merely a loan subject to a charge over the property The object in adding the Proviso would stand thereby frustrated) ** (1950) 54 Cal WN 710 (712) (A Security on a life policy cannot be created by deposits.)

61. AIR 1983 (NOC) 38 (All) (Where the memorandum of renewal was a document, only by way of an acknowledgment of liability under an existing loan or an existing mortgage, the loan being witnessed by a promissory note and the mortgage being by deposit of title deeds, the mere fact that it was written on a stamp paper of nominal amount, would not convert it into an instrument of mortgage) ** 1949 Bur LR (HC) 553 (555) (A counterfoil for alienee from the Register of Reports of Alienations of Land, Lower Burma, which is only an acknowledgment by the Thugyi of a report of alienation having been received by him cannot be regarded as a document of title to the immovable property)

62. AIR 1960 Mad 529 (531).

63. AIR 1969 Delhi 120 (123, 124) (DB)

64. 2002 (2) Mad LJ 731 (734).

(B) Scope of the security is the scope of the title.

A delivery of title deeds as security *prima facie* creates an equitable mortgage upon the *whole* of the property comprised therein(65). But this presumption may be controlled by an understanding to the contrary. In *Pranjivandas v. Chan Ma Phee*(66) their Lordships of the Privy Council said :

> "The law upon this subject is beyond any doubt :
>
> (1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title(67).
>
> (2) Where, however, titles are handed over accompanied by a bargain that bargain must rule
>
> (3) Lastly, when the bargain is a written bargain, it and it alone, must determine what is the scope and extent of the security(68).

Their Lordships referred to the leading case of *Shaw v Foster*(69) where Lord Cairns observed :

> "Although it is the well established rule of equity that a deposit of a document of title without more without writing, or without word of mouth, will create a equity a charge upon the property, I apprehend that that rule will not apply where you have the deposit accompanied with an actual written charge In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone it must be governed."

It was accordingly held in *Pranjivandas's case*(70), referred to above that where a deposit of title deeds of several properties was made but on the back of the promissory note executed for the loan there was a note as to security : "grant of a *house* in 14th Street, Rangoon," the property mortgaged was only the house and not the other properties. In *Wydle v Radford*(71) where a title deed relating to two properties was deposited as security for a loan but the memorandum accompanying it mentioned one of such properties alone as pledged, the depositary was held not entitled to claim an equitable mortgage over the other property

It has been held that where a person puts up a superstructure on a plot of land of which he is a tenant and subsequently purchases the land from the landlord the title-deeds though relating to land alone would clearly cover the superstructure also and the deposit thereof would create an equitable mortgage of the entire property consisting of the ground and the superstructure thereon(72).

(C) Delivery must be made to a creditor or his agent.

The delivery must be made to the *creditor* or his *agent*(73). A deposit with the *debtor's* wife(74) or delivery to an attorney to prepare a legal mortgage(75) is not sufficient But a deposit with the *debtor's* solicitor may be sufficient as he will thereby be constituted agent and trustee for the credi-

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65. See Halsbury, Laws of England, Vol. 21, page 82

66. AIR 1916 PC 115 (116) : 43 Cal 895 : 43 Ind App 122 : 8 Low Bur Rul 458.

67. Also see AIR 1925 Rang 250 (251) (DB) ** AIR 1938 Lah 255 (258) (DB) ** AIR 1961 Pat 158 (161) (DB).

68. See also AIR 1923 PC 50 (53) : 50 Ind App 77.

69. (1872) 42 LJ Ch 49 (57) : 27 LT 281

70. AIR 1916 PC 115 (116, 117) : 43 Ind App 122.

71. (1863) 33 LJ Ch 51 (53) : 9 LT 471.

72. AIR 1978 Andh Pra 257 (262) (1977) 2 Andh WR 480 (DB) ** AIR 1942 Mad 369 (370) (Plea that since title deeds deposited related only to land equitable mortgage was of land and not of house standing thereon is not question of law but of fact)

73. AIR 1960 Mad 529 (531) ** AIR 1937 Rang 154 (157) 1937 Rang LJ 303 (DB)

74. See Halsbury, Laws of England, Vol 21, p 82 ** AIR 1960 Mad 529 (531)

75. AIR 1960 Mad 529 (531).

tor(**76**). Where a person was acting as attorney for both the parties and delivery of the document was made to him through his assistant but there was no proof that the delivery was made to him as agent of the creditor, it was held that there was no valid equitable mortgage(**77**).

The words '*creditor* or his agent' show that there must be a *debt* before a deposit of deeds can constitute a mortgage(**78**). Read with cl (a) it is clear that such debt might be an *existing* or a *future debt*. It follows that a mortgage by deposit of title deeds may be made not only for an existing debt or for a present advance but also to secure future advances or a general balance that might be due on an account The mortgage will operate for such future advances also(**79**). Where at the time the deeds are handed over there is no antecedent or existing debt nor any agreement for any future advance, the handing over will not constitute an equitable mortgage(**80**). A debtor may execute a promissory note to the creditor and at the same time deposit title deeds by way of security(**81**).

Where a deposit of title deeds is made to secure a particular debt, it may, by agreement of parties, be subsequently extended to cover a *further advance* not contemplated at the time of the deposit If the further advance is agreed to be secured by the documents already deposited, the lien will extend to such advance also. It is not necessary that the documents should, for such further advance, be put back in the hands of the mortgagor and re-deposited as security for the original as well as for such further advance(**82**). Where the title deeds already in the possession of the creditor are agreed to be held by him as a security for a further advance, there is a constructive delivery of the deed which is sufficient to create an equitable mortgage(**83**).

A executed two promissory notes for Rs 350 and Rs 2,000 respectively to B and also deposited title deeds by way of equitable mortgage Subsequently, he executed a single promissory note for Rs. 3,000, being the amount then due on the promissory notes, the deeds already deposited remaining with B. It was held that the retention of the deeds by B was enough to raise a presumption that the parties intended that they should be retained as security for the amount of the last note(**84**).

But there must be clear proof that the further advance was made on the security of the deposit(**85**). For this purpose it is necessary that there should be evidence that such was the intention(**86**). If there was such an intention gathered from written instruments or other circumstances,

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76. See Halsbury, laws of England, Vol. 21, p. 82.

77. AIR 1932 Cal 823 (825) (DB).

78. AIR 1965 SC 430 (432).

79. AIR 1960 Mad 529 (531) ** (1813) 35 ER 249 (250) 2 V & B 79 13 RR 32. Ex parte Kensington.

80. (1886) 10 Bom 634 (645)

81. AIR 1958 Mad 132 (133) ILR (1958) Mad 15 (DB) ** AIR 1925 Cal 485 (491) (DB)

82. AIR 1960 Mad 529 (531) ** AIR 1936 Cal 412 (413) (DB) ** (1813) 35 ER 249 (250) : 2 Ves & B 79 : 13 RR 32, Ex parte Kensington.

83. 1963 Mys LJ (Sup) 121 (123) (DB) ** AIR 1937 Rang 154 (156) 1937 Rang LR 303 (DB) ** AIR 1929 Rang 107 (108) ** AIR 1928 Sind 179 (186) 23 Sind LR 97 (DB) ** (1898) 25 Cal 611 (614, 615).

84. (1908) 4 Low Bur Rul 371 (373) ** AIR 1985 Delhi 83 (90) : (1984) 26 Delhi LT 377 (Raising of subsequent loan by issuing promissory note for consolidated amount comprising earlier loan raised by creating equitable mortgage and subsequent loan — Receipt referring to a such an account of equitable mortgage created earlier Creditor claiming as to advancing of subsequent loan on security of title deeds deposited earlier with him — **Held, there was mortgage of deposit of title deeds.**)

85. (1812) 34 ER 496 (496) 19 Ves 209, Ex parte Whitbread

86. (1810) 34 ER 88 (89) 17 Ves 227 11 RR 66, Ex parte Langston ** (1812) 34 ER 496 (496) 19 Ves 209 11 RR 66, Ex exparte Whitbread

the deposit will extent to the subsequent advances also(**87**). It has been held that even an uncontradicted testimony on oath is sufficient for this purpose, the reason being that it is not probable that a person having made an advance upon a security, which he holds, should make further advances without security(**88**).

(D) The delivery must be with intent to create security.

The mere fact that title deeds are handed over by A to B does not establish a mortgage(**89**). It must be in pursuance of an *agreement* to give them as *security* for the loan advanced(**90**). Existence of such intention is the essence of the transaction of equitable mortgage, such intention, if exists is a question of fact(**91**). Thus, the mere fact that the title deeds of the debtor are found to be with the creditor without any explanation or connection being established between the loan and the title deeds will not constitute a mortgage(**92**), though in some cases(**93**) it has been held that in such cases a presumption would be raised that the documents were deposited as security for the loan But these cases cannot now be considered good law in view of the recent decision of the Supreme Court in *K J. Nathan v Maruthi Rao*(**94**) that the intention that the deeds shall be security for the debt is

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87. **(1834) 3 LJ Bey 92 (93). In re Morgan: Ex parte Sanders**

88. (1810) 34 ER 88 (89) 17 Ves 227 11 RR 66 Ex parte Langston ** AIR 1960 Cal 351 (354) (DB) (The whole question in each case is a question of fact, whether the intention has **been proved by evidence and circumstances.)**

89. AIR 1927 Bom 167 (168 169) (DB) (In Bombay sending of title deeds is not an indication of intention to create a mortgage by deposit of deeds) ** (1864) 55 ER 1066 (1067) **36 Beav 27, Wardle v. Oakley.**

[See also (1893) 17 Mad 85 (86) (DB) (Instrument stating "on deposit of title deeds named herein below for value received by me I promise to pay three months after date Rs 160 to X or order" — Question before Court whether this was negotiable instrument — **Held,** it was so — A loan was made and deeds were deposited as collateral security — Intention was not to qualify the operation of note as negotiable instrument or to regard the pledge **primary transaction and the note only a collateral security)]**

90. **AIR 1965 SC 1591 (1593)** (**Reversing** AIR 1958 Pat 472 ** **AIR 1968 Mad 223 (224) : ILR (1968) 2 Mad 284 (FB).** (Existence of intention is a matter for inference from facts — Existence of intention may be established by written documents alone or coupled with oral evidence or by oral evidence alone Question whether oral evidence is admissible to explain or establish a deposit of title deeds would depend on whether the writing itself has constituted the bargain between parties Oral proof cannot be substituted for the written evidence of any agreement which the parties have put into writing) ** (1979) 1 APLJ (HC) 195 (200) 1979 LS (AP) 91 (DB) ** (1978) 82 Cal WN 92 (98) ILR (1977) 2 Cal 385 (DB) (Deposit only for audit purpose not enough) ** ILR (1966) 2 All 840 (844) (DB) ** ILR (1963) 2 Ker 60 (61) (DB) ** AIR 1961 Pat 158 (161) (DB) ** AIR 1960 Cal 351 (354) (DB) (Whole question in each case is one of fact whether intention has been proved by evidence and circumstances) ** AIR 1958 Pat 472 (474) (DB) (**Reversed** on another point in AIR 1965 SC 1591) ** ILR (1958) Ker 538 (544) (There must be intention to create security for loan — Intention may be express or implied and may be gathered from circumstances) ** **AIR 1944 PC 22 (23) : ILR (1944) Kar (PC) 73.** (**Held,** on facts that there was an intention to create security and therefore valid mortgage was created) ** **AIR 1923 PC 87 (88) : 1 Rang 545** ** AIR 1939 Rang 185 (186) ** AIR 1932 Cal 823 (825) (DB) ** **AIR 1927 Pat 41 (42) (DB) ** (1897) 24 Cal 348 (349).**

91. AIR 2002 Mad 378.

92. AIR 1977 Cal 343 (345) (DB) ** AIR 1914 Bom 15 (16) 38 Bom 372 (DB) ** (1912) 17 Ind Cas 722 (724) (Bom) ** (1851) 51 ER 119 (120) 20 LJ Ch 465 Chapman v Chapman

93. AIR 1955 Bom 454 (457) ILR (1955) Bom 962 ** (1810) 34 ER 88 (89) 11 RR 66, Ex party Langson ** (1808) 33 ER 653 (654) 9 RR 359, Ex parte Mountfort

94. **AIR 1965 SC 430 (435, 436).**

[See also (1965) 1 Mad LJ 179 (181) ILR (1965) 2 Mad 441]

a question of fact which has to be decided in each case as any other fact and there is no presumption of law that the originated, or at least of the manner in which that possession originated, so that you may enter a contract, will not be enough to create an equitable security(95). While deciding the question whether parties created equitable mortgage by deposit of title deeds, the intention of the parties alone is the prime factor to be considered. The term "document of title" would apply not only to a document by which the mortgagor derives title to the property to be mortgaged but also applies to any document which provides some, if not conclusive, evidence that the mortgagor has title to the property.

The conduct of the party seeking loan facilities from a Bank clearly indicated his intention to create an equitable mortgage. Therefore, deposit of a copy of original document by him with the Bank would amount to valid mortgage(96). Where the party agreed to abide by the terms of sanction of cash credit facility as prescribed by the Bank in the instrument and it also created in favour of Bank first equitable mortgage on the leasehold rights over the land and the existing structure and the entire construction that might be put up, it was clear that the intention of the parties was not simply to record factum of deposit and delivery of title deeds which took place earlier but the intention as to create mortgage itself(97). A and B constituted the partners of a firm. B was, under the agreement of partnership, bound to redeem certain partnership property mortgaged with C. A advanced money to clear off the mortgage and obtained the title deeds of the property from the mortgagee "as the manager of the firm." It was held that the transaction was not a mortgage by B to A but was merely a partnership transaction(98). Title deeds were handed over to an attorney to mere deposit of title deeds constitutes a mortgage. So also the mere possession of documents of title without evidence of the contract upon which the possession prepare a legal mortgage deed. It was held it did not constitute an equitable mortgage(99). But if they are so handed over and there is also an intention to give an immediate security, an equitable mortgage will be created(100). In *Keys v. Williams*(101) where, in order to prevent immediate proceedings against the debtor the title deeds were handed over by him to the creditor's attorney for the purpose of preparing a mortgage of the property, it was held that an equitable mortgage was created. The Chief Baron said :

> "The doctrine of equitable mortgages has been said to be an invasion of Statute of Frauds; and no doubt there was great difficulty in knowing how to deal with deposits of deed by way of security after the passing of that Statute. But in my opinion that Statute was never meant to affect the transaction of a man borrowing money and depositing his title deeds as a pledge of payment.
> If *before* the money was advanced the deeds had been deposited with a view to prepare a *future* mortgage, such a transaction could not be considered as an equitable mortgage by deposit; but it is otherwise where there is a present advance and the deeds are deposited under a promise to forbear suing, although they may be deposited only for the purpose of preparing a future mortgage. In such a case the deeds are given in part of the security, and become pledged from the very nature of the transaction(102)."

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95. (1872) 42 LJ Ch 210 (216) : 27 LT 804, Dixon v. Muckleston.

    [See also AIR 1937 Rang 69 (71) : 14 Rang 522 (DB) (Oral evidence is admissible to prove the circumstances under which the documents came to be in the possession of the alleged mortgagee.)]

96. 1995 (2) Bank Cases 178 (183).

97. **AIR 1974 Guj 153 (165) (SB).**

98. **AIR 1923 PC 87 (88) : 1 Rang 545.**

99. (1790) 30 ER 113 (115) : 2 RR 39, Ex parte Bulteel ** (1806) 33 ER 73 (76) : 12 Ves 192, Norris v. Wilkinson.

100. (1826) 25 RR 16 (19), Hockley v Bantock ** (1786) 29 ER 1133 (1134) : 1 RR 20, Edge v Worthington ** (1859) 44 ER 1405 (1420) : 29 LJ Ch 97, Lloyd v Attowood.

101. (1838) 160 ER 612 (614) : 7 LJ Ex Eq 59

102. See also (1893) 18 Mad 29 (30) (DB) (There was no antecedent debt to secure which the

Where there is a deposit and a written agreement to execute a legal mortgage of the property it is quite clear that it is an equitable mortgage(**103**). In the undermentioned case(**104**) it was held that if the document contains all the provisions which are normally found in a mortgage deed, then the mere fact that the document also contains the bargain with regard to deposit of title deeds would not make it an agreement for the deposit of title deeds.

Where a deposit is made at *the same time that the money is advanced* there is little to be supplied with reference to the nature of the agreement. It is obvious that the purpose of the deposit must be to secure the repayment of the money The connection is, however, not so direct between a debt *antecedently* due and a subsequently deposit Nor is the inference so plain It must be shown that the deposit was made for securing re-payment of the loan(**105**). Even where to secure an advance which is partly paid the mortgagor deposits title deeds it is good security for the part advanced(**106**). Where deeds were deposited for the purpose of obtaining credit, it was held in the undermentioned case(**107**) that the depositoary had no lien on them for what was due to him in respect of monies perviously advanced

When the documents are in custody of the Bank, the necessary and inescapable inference that could be drawn is that the person had deposited his documents of title as security for realisation of debt obtained from Bank and it is not necessary that he should sign on the document(**108**). Where by executing a deed, the party agreed to abide by the terms of sanction of credit facilities as prescribed by the Bank and also created in favour of Bank equitable mortgage on the lease-hold rights over the land and the existing ownership structure which was in progress of construction, and the entire construction which might be put up from time to time on the lease hold land, it was mortgage by deposit of title deeds and not only memorandum of deposit of tile deeds(**109**).

A mortgage by deposit of title deeds can be effected even for securing the re-payment of a debt which is otherwise barred. In such a case the money becomes due on the date the mortgage is created by the deposit of title deeds and the limitation has to be counted from the date of the mortgage(**110**).

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title-deeds were deposited — Intention from inception was to effect a legal mortgage — A legal mortgage was prepared and accepted — It was, however, invalid under S 59 — **Held**, deposit of title-deeds could not be fallen back upon **Overruled** on another point in 32 Mad 410 (FB) ** (1876, 1877) 1 Bom 237 (241) (Deeds deposited to enable a legal mortgage to be executed — It is an equitable mortgage until the legal mortgage is executed) ** (1886) 10 Bom 634 (644) (A agreeing to pay Rs 10 000 to B — B depositing on 2nd April 1883 title-deeds for preparation of mortgage-deed — B asking for money — A not prepared to pay until deed was prepared Deed executed on 6th April 1883 — Money paid immediately before execution — A stating that he had advanced money on the security of title-deeds on the same day — Mortgage deed not registered though it was known to require registration — **Held**, no equitable mortgage was created as there was no debt or advance when the title-deeds were deposited nor were they intended to stand as security — The mortgage deed held was intended to be the security)

103. (1846) 67 ER 919 (923) 15 LJ Ch 336 10 Jur 751 5 Hare 281, Lister v Turner

104. **AIR 1954 Bom 462 (463) : ILR (1955) Bom 121 (SB).**

105. (1805) 33 ER 73 (76) 12 Ves Jun 192, Norris v Wilkinson ** (1886) 10 Bom 634 (644)

106. AIR 1965 Mad 266 (273) ILR (1964) 1 Mad 1012 ** ILR (1976) Cut 200 (209)

107. (1823) 37 ER 1105 (1107) : Turn & R 274, Mountford v. Scott

108. (1989) 1 Andh LT 217 (219).

109. **AIR 1994 Guj 153 (SB).**

110. AIR 1978 Cal 111 (115) : 81 Cal WN 929 (DB).

(E) Registration.

In England, a memorandum usually accompanies the deposit of title deeds by way of security and the mortgagee will ordinarily be entitled to claim to have such a memorandum executed(**111**). Under this Section no memorandum need accompany a deposit in order to create a mortgage, though such a memorandum is not prohibited. The reason is that the mortgage is created not by the *writing* but by the *deposit*(**112**). When the debtor deposits with the creditor title deeds of his property with an intent to create a security the *law implies* a contract between the parties to create a mortgage and no registered instrument is required under S 59(**113**). The moment title deeds are deposited with the intention to create a mortgage it becomes a mortgage under S. 58(f) and takes effect from the date of deposit(**114**) and it is not necessary to create a charge separately(**115**). The question, however, arises whether if such a memorandum is executed it should be registered in order to create a valid mortgage. This again depends upon the question : *Did the document constitute the bargain between the parties or was it merely the record of an already completed transaction?* In the former case the memorandum itself constitutes the mortgage and must be registered(**116**). In the latter

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111. (1855) 52 ER 738 (739) 24 LJ Ch 789 20 Beav 607, Sporle v Whayman

[**See also** (1886) 55 LJ Ch 576 (577) · 54 LT 696 34 WR (Eng) 600 31 Ch D 582, **National Provincial Bank of England v. Games.**]

112. AIR 1950 SC 272 (273, 274) ** AIR 1968 Mad 223 (224) : ILR (1968) 2 Mad 284 (FB) ** ILR (1966) 2 All 840 (844) 1966 All LJ 1098 (DB) ** AIR 1961 Pat 158 (161) (DB) ** AIR 1960 Mad 529 (532) ** AIR 1958 Pat 472 (474) (DB) (**Reversed** on another point in AIR 1965 SC 1591) ** AIR 1940 Lah 285 (287) (DB) ** AIR 1923 Mad 262 (265) (DB) ** AIR 1917 Mad 799 (801) (DB).**

113 AIR 1965 SC 1591 (1593) ** AIR 1958 Pat 472. (Reversed on another point) ** ILR (1966) 2 All 840 (851) (DB) (Where a debtor deposits with the creditor the title-deeds of his property with intent to create the security, the law implies a contract between the parties to create a mortgage.)

114. AIR 1969 Andh Pra 338 : (1969) 1 Andh WR 490

115. AIR 1970 All 644 (647) : 1970 All LJ 864 (SB).

116. AIR 1965 SC 1591 (1593). (Held, in instant case that the document was not intended to be the integral part of the transaction and therefore did not require registration AIR 1958 Pat 472, **Reversed.) ** AIR 1950 SC 272 (273, 274)** ** AIR 1985 Delhi 83 (89) : (1984) 26 Delhi LT 377. (Where the memorandum written on the same date on which loan was raised mentioned the amount of loan, rate of interest and details of property in respect of which equitable mortgage was stated to have been already created, the memorandum required registration.) ** (1979) 49 Com Cas 296 (311) ILR (1979) 1 Ker 710 ** AIR 1971 Andh Pra 359 (360 to 362) . (1970) 2 Andh WR 161 (DB, ** AIR 1971 Andh Pra 287 (289, 290) (1971) 1 Andh WR 31 (DB) ** AIR 1969 Delhi 120 (125) (DB) ** ILR (1966) 2 All 840 (851) (DB) (But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain and the document will be sole evidence of its terms In such a case the deposit and the document both form integral part of the transaction and are essential ingredients in the creation of the mortgage It therefore requires registration under S 7 of the Registration Act provided the value of the property is more than rupees one hundred) ** AIR 1966 Raj 219 (220) : ILR (1966) 16 Raj 635 ** AIR 1962 Mad 258 (259) ** AIR 1961 Pat 158 (161) (DB) ** AIR 1961 Punj 81 (83) ** AIR 1960 Ker LJ 388 1960 Ker LT 442 (447) (DB) ** AIR 1960 Mad 529 (532) ** AIR 1959 Cal 213 (215) ** AIR 1958 Pat 472 (474) (DB). (Reversed** on another point in AIR 1965 SC 1591) ** ILR (1958) Ker 538 ** AIR 1958 Punj 218 (220) (DB) ** AIR 1955 Bom 454 (456) ILR (1955) Bom 962 ** AIR 1952 Bom 315 (318) . ILR (1952) Bom 715 (DB) ** AIR 1943 Sind 36 (38) ILR (1942) Kar 479 (DB) (A memorandum evidencing an equitable mortgage must refer to the equitable mortgage, if it is to evidence it, it may mention the loan, the period of loan,

case, it need not be registered(**117**). For the purpose of considering whether the memorandum is to be taken as embodying the bargain between the mortgagor and the mortgagee or as evidencing a transaction which had already been completed before the memorandum was executed or delivered not only the terms of the document must be looked into but also the surrounding circumstances(**118**).

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the rate of interest, and describe the property, there is nothing wrong that evidence even written evidence of it should be preserved If it becomes so complete as to contain in itself the bargain as such, then the written contract supersedes the oral contract and the parties must take the risk) ** AIR 1937 Cal 741 (745) ILR (1938) 1 Cal 187 (DB) ** AIR 1935 Rang 333 (334) (DB) ** AIR 1933 Pesh 35 (36, 37) (DB) ** AIR 1932 Bom 401 (402, 403) ** AIR 1922 Bom 440 (442) (DB) (Mortgage by deposit of title deeds accompanied by writing which evidenced charge — Writing held required registration) ** AIR 1921 Lah 253 (254) (DB) ** AIR 1914 Bom 15 (16) 38 Bom 372 (DB) ** (1979) 3 Bom 312 (319) (DB) (Assignment of equitable mortgage — Assignment purporting to be of all property and all debts due to grantor and all securities therefor — Document held to be the mode which parties selected to evidence their contract — **Assignment held needed registration.**)

[See also AIR 1930 Sind 159 (161)

117. AIR 1970 SC 659 (662) 1970 L J (SC) 201 ** AIR 1965 SC 1591 (1593), AIR 1958 Pat 472 **Reversed**) ** AIR 1950 SC 272 (273, 274) ** AIR 1974 Kant 60 , (1974) 1 Kant LJ 177 (FB)** ** AIR 1987 Mad 108 (113) (1987) 100 Mad LW 4 (The memorandum accompanying the deposit of title deeds containing only a statement that a deposit is made by way of security for the repayment of loan does not need registration as it is only evidence of fact that the title deeds have been deposited with the mortgagee) ** ILR (2000) Kant 1962 (1964) ** (1992) 1 Mad LJ 371 (377) ** (1983) (2) Guj LR 1025 1983 Guj LH 603 (609) (DB) ** (1979) 1 Cal LJ 112 (119) ** AIR 1977 Andh Pra 123 (127) (1976) 2 Andh WR 221 (DB) ** AIR 1976 Cal 224 (228) 80 Cal WN 278 (DB) ** 1973 Mys LJ 73 (DB) ** AIR 1969 Delhi 120 (125) (DB) (Where a forwarding memo is signed by one of the two mortgagors and does not contain all the terms of the mortgage such as rate of interest etc it is not the sole repository of the terms and does not require registration) ** AIR 1968 Delhi 244 (248) ** AIR 1967 Andh Pra 51 (54) (DB) ** AIR 1966 Raj 219 (220) ILR (1966) 16 Raj 635 ** AIR 1962 Mad 258 (259) (DB) ** AIR 1961 Pat 158 (161) (DB) (**Held**, on construction of document that the parties did not intend thereby to create a charge and that it purported only to recite a transaction which had already been orally agreed upon) ** AIR 1961 Punj 81 (83) ** AIR 1960 Mad 529 (532) ** 1960 Ker LT 442 (447) (DB) ** AIR 1959 Cal 213 (215) ** AIR 1958 Punj 218 (220) (DB) ** AIR 1955 Bom 454 (456) ILR (1955) Bom 962 ** AIR 1952 Bom 315 (318) ILR (1952) Bom 715 (DB) ** AIR 1923 PC 50 (53) 50 Cal 338 : 1 Rang 66 : 50 Ind App 77** AIR 1943 Sind 36 (38) ILR (1942) Kar 479 (DB) (Document held did not constitute bargain but evidenced it and hence did not require registration) ** AIR 1940 Lah 285 (287) (DB) ** AIR 1938 Mad 865 (871) (dB) ** AIR 1938 Cal 823 (826) (DB) ** AIR 1935 Rang 333 (334) (DB) ** AIR 1935 Lah 821 (823, 824) (DB) ** (1935) 62 Cal 998 (1001, 1002) (DB) ** AIR 1928 Sind 17 (18) 22 Sind LR 222 ** AIR 1924 Mad 547 (548) 47 Mad 398 (DB) ** AIR 1921 Lah 274 (275) ** AIR 1917 Cal 104 (104) (DB) ** (1871) 7 Beng LR 55 (57).**

118. AIR 1950 SC 272 (273, 274) ** ILR (1966) 2 All 840 (852) (Separate memorandum executed after depositing title deeds — Document disclosing stipulation as to rate of interest amount secured and details of deeds deposited **Held**, memorandum was a contract of mortgage and required registration) ** AIR 1961 Pat 158 (162) (DB) (Document may be handed over along with title deeds and yet may not be registrable or it may be delivered at later date and, nevertheless, be registrable Time factor is not decisive) ** AIR 1958 Pat 472 (474) (**Reversed** on another point in AIR 1965 SC 1591) ** AIR 1938 Cal 823 (826, 827) (DB) ** AIR 1931 Bom 337 (339) (DB) (A advancing loan to B at the request of C — Letter by C to A that when a lease deed to be granted in favour of C is ready it would be sent to A by his solicitor to be held by A as security — Title

In *Hari Shankar v Kedra Nath*(119) where the parties professing to create a mortgage by deposit of title deeds contemporaneously entered into an agreement in writing containing all the essentials of the transaction, expressly conferring a power of a sale on the mortgagee and in fact purported to be an instrument not merely evidencing a transaction already completed but by itself effective to create an interest in the property, their Lordships of the Privy Council held that the document was compulsorily regsitrable Lord Macmillan in delivering the judgment of the Board observed :

> "Their Lordships are of opinion that where, as here, the parties professing to create a mortgage by deposit of title deeds contemporaneously enter into a contractual agreement, in writing, which is made an integral part of the transaction and is itself an operative instrument and not merely evidential, such a document must, under the statute, be registered"

The test to be applied to conclude whether a letter written to a creditor at the time of deposit of title deeds or thereafter requires registration or not depends on the matter contained in that letter and if it recites that through this letter the mortgage was created, then only it would require registration otherwise not Where the equitable mortgage was already created and the letter written thereafter only confirmed the act of deposit of title deed, it did not require registration(120).

See the undermentioned cases(121) to the same effect.

In instant case title deeds were deposited to create an equitable mortgage Thereafter, the mortgagor wrote a letter to Bank referring to maximum liability. The letter did not say anything about the rate of interest, nor amount actually borrowed, nor method of repayment and time for repayment. Thus the document i e the letter did not require registration. Moreover, it referred to equitable mortgage already created By no stretch of imagination it could be said that the letter contained all the terms of the transaction and therefore required registration(122).

On the other side of the line is the case of *Sundarachariar v. Narayana Ayyar*(123). In that

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deeds subsequently sent to A after a period of one year — **Held** letter operated only as a contract imposing upon C the obligation to cerate a mortgage when they acquired the property and hence did not require registration.)

[See also AIR 1967 Mad 1 (3) : ILR (1966) 2 Mad 465 (FB).

119. AIR 1939 PC 167 (170) : 66 nd App 184. (Confirming on appeal in AIR 1938 Cal 308)

120. 1977 (4) Andh LT 112 (116)

121. AIR 1968 Delhi 244 (245 246) (DB) ** AIR 1958 Pat 472 (474) (DB) (**Reversed** on another point in AIR 1965 SC 1591) ** AIR 1940 Mad 671 (674) (DB) (Equitable mortgage — Collateral letter signed at the time of deposit f title-deeds and delivered to mortgagee by way of security for loan, held required registration AIR 1938 Mad 547, **Reversed.**) ** AIR 1936 Mad 256 (257) (DB) (Letter representing terms of the agreement — **Held**, must be registered) ** AIR 1935 Lah 889 (892) (DB) (Correspondence between mortgagor and mortgagee Bank in respect of equitable mortgage — Document addressed to Bank containing request that Bank should advance loan on security of title-deeds alleged to be attached and also declaration that properties covered by title-deeds are free from encumbrance — Document constitutes bargain between parties and is inadmissible in evidence unless registered) ** AIR 1932 Cal 356 (365) , 50 Cal 586 (DB) ** AIR 1931 Mad 124 (128) (DB) ** AIR 1928 Mad 909 (911) (DB) ** AIR 1928 Mad 972 (976) ** AIR 1928 Mad 919 (920) (DB) ** AIR 1926 Mad 743 (744) (Letter containing terms of arrangement must be registered) ** AIR 1926 Mad 1188 (1189) ** AIR 1920 Cal 312 (314) (DB) ** AIR 1917 Mad 773 (774) · 40 Mad 547 (DB) ** AIR 1917 Mad 799 (800, 801) (DB) (A letter accompanying deposit of deed held did not require registration) ** (1871) 7 Beng LR 55 (57) ** (1836) 163 Ind Cas 709 (711) (DB) (Lah) ** (1832) 138 Ind Cas 247 (248) (DB) (Lah) ** (1928) 108 Ind Cas 291 (292) (Mad). (AIR 1923 PC 50, Foll — Letter held to constitute bargain and to require registration.)

122. 1995 (1) Bank Cases 441 (446) (Mad).

123. AIR 1931 PC 36 (39) : 8 Ind App 68 : 54 Mad 257.

case A gave a promissory note to B and on the same date gave a memo containing list of title deeds with in the introductory words "as agreed upon in person, I have delivered to you the undermentioned documents as security" It was held by their Lordships of the Privy Council that the memorandum was merely a record of the particulars of the deeds, the subject of deposit, that it did not embody the terms of the agreement between the parties, that it did not purport to create, assign or declare any right, title, or interest in the property under S 17 of the Registration Act and was therefore, admissible in evidence without registration. It was further held that though the agreement was embodied in a written instrument (which will be inadmissible if required to be registered), an oral agreement to create a security can be proved not only by oral evidence, but also by written evidence. Where there is nothing to show that the memorandum of deposit of title deed was executed simultaneously or prior to the deposit/delivery of the title deed, the memorandum did not require compulsory registration(**124**).

See also the cases noted below(**125**) to the same effect

Even in the Punjab where the Act does not apply, a memorandum constituting the bargain between the parties must be registered under the Registration Act(**126**).

In order that a memorandum may constitute a bargain between the parties so as to require registration, the memorandum must be between the *parties* to the mortgage by deposit of title deeds In *Paras Nath v. Mohan Manchua*(**127**), B borrowed from A a certain sum upon a pronote and uopn the terms that the deeds of certain property would be deposited as security The title deeds and pro-note were accordingly handed over to A's agent who thereupon wrote a letter forwarding the same to A. It was held by their Lordships of the Privy Council that the letter having been written by A's agent to A could not be regarded as itself constituting the agreement between A and B so as to require registration.

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124. AIR 2000 Ker 240 (241) : 2000 (1) Ker LJ 546

125. **AIR 1965 SC 1591 (1594).** (Letter relating to deposit of title deeds did not mention what was principal amount borrowed or to be borrowed — Neither did it refer to rate of interest for loan nor did it mention details of title deeds which were to be deposited — Letter held was not intended to be integral part of transaction and did not by itself operate to create interest in immovable property — AIR 1958 Pat 472 **Reversed**) ** AIR 1961 Pat 158 (162) (DB) ** ILR (1958) Ker 538 ** AIR 1943 Sind 36 (39) ILR (1942) Kar 479 (DB) (Document held did not constitute the bargain but was merely the evidence of it and hence did not require registration) ** AIR 1941 Lah 224 (225) (DB) (Merely a record of the title deeds that had been deposited as collateral security for the amount agreed to be advanced does not required registration) ** AIR 1940 Sind 204 (206) ** AIR 1940 Lah 166 (171) (A mere list of the documents deposited which is handed to the mortgagee does not require registration) ** AIR 1938 Mad 865 (871 872) (DB) ** AIR 1938 Cal 823 (826) (DB) ** AIR 1937 Lah 135 (140) (DB) (Letter of request to Bank to advance money to bearer on security sent along with bearer Bank advancing much less than request — **Held**, letter did not require registration as it did not create any charge) ** AIR 1936 Lah 65 (66) (DB) (Letter offering title deed as security — Title-deed not accompanying letter — **Held**, letter did not create equitable mortgage and was not compulsorily registrable) ** AIR 1936 Cal 125 (126) (DB) ** AIR 1935 Lah 821 (824) (DB) ** AIR 1933 Rang 307 (310) 11 Rang 481 (DB) ** AIR 1932 Cal 589 (592) 59 Cal 781 (DB) ** AIR 1932 Sind 73 (75) 26 Sind LR 29 ** AIR 1930 Pat 479 (480) ** AIR 1927 Mad 1145 (1146) ** AIR 1927 Cal 538 (541) (DB) ** AIR 1926 Rang 10 (12, 13) : 3 Rang 443 (DB) (Mortgage completed by handing over documents — Subsequent memo does not create) ** AIR 1925 Cal 973 (975) (DB) ** AIR 1923 Mad 262 (265) (DB) ** AIR 1918 Low Bur 52 (52) (DB) ** AIR 1918 Cal 165 (166) (DB) ** (1886) 13 Cal 322 (325, 326) (DB) ** (1873) 11 Beng LR 405 (4, 2 413) (DB) ** (1869) 6 Bom HCR (OC) 134 (136) ** (1836) 62 Cal 998 (1004) (DB)

126. AIR 1941 Lah 224 (225) (DB) ** AIR 1937 Lah 135 (140) (DB)

127. **AIR 1944 PC 22 (23, 24) : ILR (1944) Kar (PC) 73.**

Where the loan is obtained from the Bank on the security of immovable property mortgaged by deposit of title deeds in favour of bank and the document creating the mortgage by deposit of title deeds does not contemplate execution of any further document for creating a mortgage in favour of Bank, such document does not require registration(**128**).

Delivery of document of title alone is sufficient to create an equitable mortgage under S 58(f) There is no necessity to execute any document Where a document was executed on the same date on which title deeds were delivered and parties had intention of creating a separate mortgage in the document in question for the purpose of securing the amount advanced under promissory note the document required registration(**129**).

(F) Remedy of the equitable mortgagee.

In England a mortgage by deposit of title deeds carries with it the remedies incident to an English mortgage such a foreclosure(**130**). Further the equitable mortgagee has *prima facie* no right to the rents of the mortgaged property until he has obtained an order of the Court(**131**). Before the amendment of the Act in 1929 there was difference of opinion as to the nature of the remedy available under this Act to an equitable mortgagee(**132**). Section 96 of the Act newly inserted by the amending Act of 1929 now makes it perfectly clear that an equitable mortgagee has remedies similar to those of a simple mortgagee(**133**).

A mortgagee by deposit of title deeds is not deprived of his right to recover the debt by his inability to produce either the deeds deposited or any memorandum of deposit when the Court believes that there was a deposit and that the deeds have been really lost(**134**).

When the debtor deposits with creditor title deeds of his property with an intent to create a security, the law implies a contract between the parties to create a mortgage Whether there is inteniton is a question of fact.

The Court could not refuse to register a suit for recovery of debt on basis of deposit of title deeds on ground that there is no writing to show that the title deeds were handed over with an intent to create a security(**135**).

Where at the time of a mortgage by deposit of title deeds a person other than the mortgagor is in possession of the property, the mortgagee will be imputed with notice of the title and of all facts and circumstances under which possession was retained, which any one dealing with property

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128. AIR 1988 Kant 59 (63) : ILR (1987) Kant 1242.

129. AIR 1998 Ker 344 (347) : ILR (1998) 3 Ker 416.

130. **AIR 1939 Rang 321 (323) : 1939 Rang LR 403 (FB)** ** AIR 1960 Mad 529 (532) (If there is a memorandum to execute a legal mortgage either sale or foreclosure may be asked) ** (1878) 26 WR (Eng) 504 (504) 8 Ch D 444, Backhouse v Charlton ** (1879) 27 WR (Eng) 704 (704) 11 Ch D 205, York Union Banking Co v Artley

131. **AIR 1962 Mad 59 (70) : ILR (1961) Mad 1158 (FB)** ** AIR 1960 Mad 529 (532) ** AIR 1936 Rang 290 (291) 14 Rang 292 (DB) ** (1905) 1 KB 427 (529) , 74 LJ KB 345 (346) : 92 LT 297, Finck v. Tranter.

132. See Note 17 on S 67, Note 1 on S 96 and the Report of the Select Committee clause 47 (now clause 49), printed on pages 132, 135.

133. AIR 1960 Mad 529 (532) ** AIR 1936 Rang 400 (401) (DB).

[**See also AIR 1933 Mad 570 (575) (FB).** (Under the T P Act an equitable mortgagee has no right to possession His only right is to obtain a decree for sale) ** AIR 1953 Cal 208 (210) (By the combined operation of S 96 and S 58(b) an equitable mortgage must be held to be a mortgage where the mortgagor binds himself personally to pay the mortgage-money.)]

134. (1863) 11 WR (Eng) 1019 (1020) 2 NR 547, Baskkett v Skeel

135. 1996 (3) Bank LJ 359 (361).

cannot, without risk, ignore(136).

(G) Remedy of the mortgagor in equitable mortgage.

After an equitable mortgage by deposit, an action for detenu cannot be brought before repayment The remedy of the mortgagor is only an action for redemption(137).

(H) Merger.

Where a deposit of title deeds to secure loans X and Y was made and subsequently a regular mortgage was executed of the properties in the title deeds, to secure loan X and no mention was made of loan Y, it was held that the mortgage by deposit was merged in the regular mortgage which being confined to loan X, there was no mortgage for loan Y(138).

(I) Interest.

In England in the absence of any agreement as to interest a mortgage by deposit of title deeds carries interest at 4 per cent(139).

See also the undermentioned case(140).

(J) Terrtories in which equitable mortgage can be made.

The territorial restrictions referred to in the clause have reference to the *delivery* of the deeds and not to the situation of the *property*(141). Even if the property is situated out of India a valid mortgage might be created if the delivery of the title deeds is made in the territories specified(142). So also the property may be situated outside the territories specified provided the delivery was within such territories(143). In a suit which is not for land viz a suit for realisation of mortgage

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136. AIR 1920 PC 214 (276).

137. AIR 1983 All 234 (246) (DB) ** (1889) 37 WR (Eng) Dig 129 (129) 59 LJ PC 82 60 LT 467 14 App Cas 278 Bank of New South Wales v O'Connor

138. (1854) 100 RR 140 (143) 2 Drew 289 2 WR (Eng 295 In re Annesley Vaughan v Vanderstegen.

139. AIR 1960 Mad 529 (532) ** (1869) 17 WR (Eng) 989 (990) 8 Eq 331 38 LJ Ch 539 In re Kerr's Policy

See also Halsbury, Laws of England, Vol. 21, para 411

140. AIR 1993 Kant 359 (366) 1993 (2) Kant LJ 649 (Equitable mortgage — Bank loan — Loan taken for commercial purposes and not for agricultural purposes — Rate of interest charged by Bank and its revision accepted by borrower — Severe losses sustained by borrower on account of flood — Cannon be reason for reduction of contractual rate of interest.)

141. AIR 1960 Mad 529 (531) (The property may also be partly within and partly without the area of those towns.) ** AIR 1993 Kant 359 (365) 1993 (2) Kant LJ 649 (Registration of the memorandum confirming equitable mortgage already created can be outside notified.) ** 1960 Ker LT 442 (445) (DB)

142. AIR 1932 Bom 642 (644) : 57 Bom 834

143. 1980 Ker LT 550 (553) (DB) ** AIR 1993 Kant 359 (364) 1993 (2) Kant LJ 649 (An equitable mortgage of a property which lies outside the territories of notified town can be validly created by the delivering the documents of title to the creditor or his agent in a notified town.) ** AIR 1960 Mad 529 (531) ** 1960 Ker LT 442 (445) (DB) ** AIR 1936 Lah 946 (953) 17 Lah 686 (DB) ** AIR 1933 Lah 972 (976) (DB) ** AIR 1914 Bom 15 (17) 38 Bom 372 (DB) ** (1897) 24 Cal 348 (349) (Deposit in Calcutta — Some of the properties outside Calcutta.) ** (1892) 14 All 238 (241) (DB) (Deposit in Calcutta — Property situate in Benares Affirmed in 19 All 76 by the Privy Council.) ** (1890) 14 Bom 269 (271) (DB) ** (1912) 6 Low Bur Rul 23 (25) (DB)

[See also (1913) 38 Cal 824 (827) (A, B and C jointly liable for debt offering title deeds of properties situate outside Calcutta city and of a leasehold premises within Calcutta as collateral security — Leasehold offered as security subsequently substituted

security where the mortgagor, who resides, carries on business or personally works for gain within thet limits of the ordinary original civil jurisdiction of Court, had created an equitable mortgage under S 58 T P Act of property situated outside those limits, in favour of mortgagee: the leave of Court under Cl 12 of Letters Patent 1865, is not a precondition to the exercise of jurisdiction by Court(**144**). A delivery outside the specified territories will not create a mortgage even if the property is within such territory(**145**). It has been held by the Privy Council that an equitable mortgage might be made by deposit in Madras of the title deeds of property situated within the Civil and Military Station of Bangalore(**146**).

In the undermentioned case(**147**) it was held that a deposit in England of the title deeds of land in India created a valid mortgage on the land The expression "person *in* any of the following towns" does not mean that the person delivering the documents should be in the towns specified The various towns must be read as going with "delivers". It is only the *delivery* that should be made within the said towns(**148**).

The validity of an equitable mortgage is not affected merely because the documents were delivered in a town other than notified town when they were forwarded to notified town for deposit(**149**).

Where A, in Bombay asked B in Poona to send the title deeds by post and B sent them by post, it was held that the delivery to the Post Office was a delivery to A's agent made in Poona and not in Bombay(**150**). The case would, however, be otherwise where A had not asked B to send them by post, but B had, of his own accord, sent them by post.

In instant case, it was alleged that equitable mortgage by deposit of title deeds was created at Indore branch of the Bank and the loan was advanced from Khargone Branch, Indore was specified as a town for the purpose of T. P Act by the erstwhile Madhya Bharat Govt. but there was no evidence that it remained operative even after formation of State of Madhya Pradesh. No documents or papers concerning alleged equitable mortgage were produced before the Court Also no evidence was led to show that equitable mortgage at Indore was operative for loan transaction conducted at Khargone Branch It could not therefore be said that equitable mortgage as alleged was created(**151**).

(K) Punjab and other areas.

The Act does not apply to the Punjab and a part of the Province of Delhi. Therefore there is no

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by leasehold of different premises to which A was not a party — **Held**, that Calcutta High Court had original jurisdiction over the mortgage inasmuch as a part of the property was in Calcutta and could therefore pass a decree binding upon A's share as well in the mortgageed properties and the fact that A had no interest in the second leasehold was not material to the question of its jurisdiction.)]

144. 1980 Mah LJ 192 (194).

145. AIR 1932 Cal 823 (825) (DB) ** AIR 1932 All 451 (452) (DB) ("Mere deposit of title outside the towns mentioned in S 59, T P Act, will not amount to creation of a charge on the properties to which the deeds relate") ** AIR 1927 Pat 41 (42) (DB) ** (1904) 28 Mad 54 (56) (DB).

146. AIR 1931 PC 239 (241) : 58 Ind App 333.

147. (1862) 11 WR (Eng) PC Dig 6 (6) 6 LT 767, Sam v Lallah.

148. AIR 1958 Mad 132 (133) ILR (1958) Mad 15 (DB) ** AIR 1937 Bom 39 (41) : ILR (1937) Bom 763.

149. AIR 1975 Mad 70 (72) (DB)

150. AIR 1937 Bom 39 (43) : ILR (1939) Bom 763.

151. 1996 (2) Bank Cases 190 (191) (Madh Pra).

prohibition of creating an equitable mortgage in any part of those provinces(152). Section 59 of the old Act was, however, made applicable to the cantonment areas in the Punjab Hence, an equitable mortgage cannot be made there as such area are not mentioned in S 59(153). An equitable mortgage can be made of property situated in the cantonment area, by a deposit outside that area but within the province(154). But such a mortgage cannot be made by a deposit within that cantonment area of property situate outside(155).

The Transfer of Property Act is now extended to Punjab The promulgation of the Notification dated 28th August, 1975 by the Punjab Government extending the provisions of S 58(f) to Punjab, is nothing but an official recognition of the legal position already in existence since long It cannot therefore be said that the mortgage by deposit of title deeds affected earlier to the date of the Notification would not be valid(156).

(L) Simla.

Mortgage by deposit of title deed is permissible in Simla and is not void for want of stamp and registration in view of Notification No 5/73 Rev A dt 22-5-76(157).

(M) Rajasthan.

Even where the Section does not apply the mortgage is created by deposit of title deeds It is construed as a simple mortgage and is valid(158).

40. Anomalous mortgages.

Section 98 as it stood before the amendment of 1929, excluded, from the category of anomalous mortgages, a combination of a simple mortgage and a usufructuary mortgage and a combination of a mortgage by conditional sale and a usufructuary mortgage There was no such definition of an anomalous mortgage as is found in cl (g) to this section which was added in 1929 Under the present definition, the combinations referred to above would amount to anomalous mortgages(1). Further a mortgage may be anomalous without being made up of two or more of the four types defined in the section(2). The important result of this change is that in the case of such combina-

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152. AIR 1944 PC 22 (24) : ILR (1944) Kar (PC) 73 (Delhi) ** AIR 1937 Lah 819 (820) (DB). (Do.) ** AIR 1935 Lah 10 (11) (The Punjab) ** AIR 1933 Lah 972 (973) (DB) (Do.)

[See also AIR 1962 Raj 12 (18) ILR (1961) 11 Raj 76 (Hypothecation of immoveable properties by delivery of title deeds in Marwar when the Act was not in force there held brought into existence a simple mortgage of the properties),

153. AIR 1933 Lah 972 (974) (DB) ** AIR 1933 Lah 1001 (1002) (DB)

154. AIR 1936 Lah 946 (953) 17 Lah 686 (DB) (Property situate in cantonment of Dogshai — Mortgage bond by deposit of title deed executed at Simla where Act is not in force — **Held**, valid mortgage was created.)

155. AIR 1933 Lah 972 (974) (DB).

156. 1976 Pun LJ 533 (535) (DB).

157. AIR 1984 (NOC) 22 · 1983 Sim LC 191 (DB) (Him Pra).

158. AIR 1972 Raj 159 (160) : 1971 Raj LW 272 (DB).

Section 58 — Note 40

1. (1968)1 Mad LJ 139 (144) (Usufructuary mortgage with personal covenant to pay — It is a case composite or anomalous mortgage — Mortgagee could be entitled to a decree for sale) ** AIR 1968 Pat 222 (226) ILR 46 Pat 1202 (DB) ** AIR 1956 Mad 434 (437) ILR (1956) Mad 983 (DB) ** (1941) 73 Cal LJ 246 (248) (DB) (Combination of usufructuary mortgage and mortgage by conditional sale)

2. AIR 1936 Pat 211 (220) · 14 Pat 560 (DB). (Per Dhavle J)

tions the rights and liabilities of the parties would be governed by the *contract* between the parties as evidenced in the mortgage deed or, by local usage(3). But to be an anomalous mortgage it must first amount to a mortgage as required by cl. (a) to S 58(4).

Where the mortgage was neither purely simple nor-usufructuary exclusively but a mixture of two, it was anomalous mortgage The mortgage stipulated that in the event of failure on the part of the mortgagor to pay up the amount due under the mortgage within specified period of time, it shall be open to the mortgagee to make realisation of the same by sale of mortgaged property This evdently construed the characterntial teanure of simple mortgage under S 58(b) and yet the mortgage was not purely simple because under the mortgage deed the the mortgagee was given constructive, if not actual, possession over certain shops with the right to realise the rent thereof from the respective tenants It was further provided that the mortgagee shall be entitled to be in possession over certains lands These terms gave the tenants of a usufructurary mortgage(5).

An anomalous mortgagee is not barred from recovering the money by sale of mortgaged property on the ground that there was no such agreement giving him such right The creation of a mortgage *prima facie* results in creation of a loan and the loan involves personal liability which is not displaced by giving a security Such presumption is displaced only in the case of usufructuary mortgage.(6)

Where the mortgagee was put into possession of mortgaged land and there was no unconditional promise by mortgagor for payment of money and the deed further provided that in case of non-payment, the usufructuary nature of transaction was to continue, it could not be said that the mortgage was anomalous and not usufructuary (7)

The document introducing any conditions other than those covered by S 58(d) could not be regarded as usufuctuary mortgage but an anomalous mortgage To illustrate if the document introduces personal covenant enabling the mortgagee to demand the mortgage money at a particular date and the document fixes a time limit, it would not be a usufructuary mortgage Similarly if the document introduces other elements regarding improvements, payments and creates rights in regard therein, the document would came out of purview of definition of usufructure any mortgage would have to be termed as clarified an anomalous mortgage (8)

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3. AIR 1968 Pat 222 (231) ILR 48 Pat 1202 (DB) ** 1961 Jab LJ 1207 (1208) (Usufructuary mortgage also continuing stipulation for sale of property to realise debt Dismissal of suit for sale by mortgagee does not extinguish his right to possess the property until liquidation of debt) ** AIR 1957 Andh Pra 511 (512) (In cases of anomalous mortgages the rights and liabilities of the parties depend on the terms of the contract as controlled by the T P Act — Terms of contract cannot offend terms of S 60 and clog redemption) ** AIR 1956 Mad 434 (437) ILR (1956) Mad 983 (DB) (Mortgage with possession — Mortgagee allowed to realise amount advanced by sale of mortgaged property — No charge held created for interest.) ** ILR (1956) Cut 650 (664) (DB).

   [See AIR 1942 Oudh 172 (174) : 17 Luck 362]

   [See also 1913 Pun LR 189 18 Ind Cas 914 (914) (DB) (Case prior to amendment of 1929 — Where apart from the stipulation for a conditional sale a mortgage is with possession and the former remedy is barred by legislation, the mortgagee can sue for possession as mortgagee.)]

4. ILR (1956) Cut 650 (664) (DB)

5. AIR 1987 All 155 (158) : 1986 All WC 963.

6. **AIR 1973 Raj 173 (184, 185) : 1972 Raj LW 310 (FB).** ((1906) ILR 28 All 157 and AIR 198 All 418, **Diss. from.**)

7. AIR 1985 Pat 183 (186) : 1984 Pat LJR 846

8. **AIR 1994 Ker 371 (375) : 1994 (2) Ker LJ 88 (FB).** ((1990) 1 Ker LN 18 Approved)

Anomalous mortgages may take as many forms as the parties may agree to enter into. The following are some of the forms of such mortgages:

(1) A mortgage with possession containing also a covenant to pay the principal and interest **(9)**

(2) A mortgage with possession with a stipulation that the transferee should appropriate the rents and profits for a *specified term* of years and then give back the land **(10)**

(3) A mortgage with possession for specified term, the mortgagee to credit the rents and profits first to interest, and the balance to principal, and the deficiency, if any, to be paid by the mortgagor.

(4) Simple mortgage repayable in a specified time, but giving the mortgagee a power to foreclose if a creditor brought a suit against the mortgagor or attempted to attach his property.

(5) Mortgage where possession is partly given and there is no covenant to pay.

(6) Mortgage with covenant to pay interest, but with no covenant to pay the principal.

(7) The *othi, kanom and peruartham* forms of mortgages prevailing in Madras, *vati* mortgages prevailing in Gujarat, and *iladarawara* mortgages prevailing in South Canara. As to the incidents of these mortgages, see S. 98. As to the incidents of chitham and vatantar mortgages, see Notes 37b and 37c respectively.

Where though the document in question was styled as a possessory mortgage deed, the mortgagee was given the right to bring the property to sell on the mortgagor failing to pay the mortgaged money after the prescribed period, the document would not be a usufructuary mortgage simplicitor as it would partake a character of simple mortgage also. Such a mortgage comes under the category of anomalous mortgage.**(11)**

See also the undermentioned cases.**(12)**

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9. AIR 1947 Lah 40 (46, 47) : ILR (1946) Lah 805 (FB) (Mortgage ceases to be usufructuary and becomes simple mortgage — Mortgagee can bring mortgaged property to sale — AIR 1933 Lah 151, **Overruled.**) ** **AIR 1927 PC 32 (36) : 54 Ind App 68** ** AIR 1964 Madh Pra 305 (306) (DB) (Usufructuary mortgage — Mortgage is also binding themselves personally to pay — Mortgage being a simple mortgage usufructuary mortgagee has a right to bring mortgaged property to sale.) ** 1961 Jab LJ 1207 (1208) (Usufructuary mortgage containing also a stipulation for sale of property — Suit for sale of property dismissed — Right to possess property not extinguished — Until debt is liquidated security remains unaffected.) ** AIR 1956 Assam 17 (19) : ILR (1955) 5 Assam 489 (DB) ** AIR 1954 Mys 177 (178) : ILR (1955) Mys 15 (DB) ** AIR 1952 Assam 19 (21) : ILR (1950) 2 Assam 444 (DB) (Usufructuary mortgage with stipulation to redeem by payment of mortgage debt at the end of five years — Mortgagee to remain in possession in lieu of interest — Mortgage is anomalous.) ** AIR 1942 Cal 55 (58) (DB) (Whether in a usufructuary mortgage there is a personal covenant to pay, it becomes an anomalous mortgage.) ** AIR 1930 Pat 152 (152) (DB) (Possessory mortgage — Covenant to pay on fixed date coupled with stipulation that if money is not paid mortgage would continue, does not amount to a covenant to re-pay — Mortgagee not entitled to sue for sale.) ** AIR 1922 Pat 167 (169) : 1 Pat 350 (DB) (Where a due date is fixed for payment of the mortgage-money in a mortgage deed the mortgage is not a pure usufructuary mortgage and the mortgagee is entitled to sue for sale immediately after the due date has passed even though he still remains in possession of the property.) ** (1891) 14 Mad 232 (234) (DB)

10. (1902) 26 Bom 252 (258) (FB) ** (1898) 21 Mad 1 (3) (DB)

11. AIR 1994 Ker 141 (144) : 1994 (1) Ker LJ 89

12. (1967) 2 SCWR 315 (317). (Where mortgagee is put in possession to take income of the property but is also authorised to recover the money by sale of the property and in case of deficit from the person and other property of the mortgagor the mortgage is anomalous.) ** **AIR 1919 PC 121 (123) : 15 Nag LR 134.** (Mortgagor to re-pay by instalments with interest or to redeem at any time — Mortgagee to remain in possession — Mortgage held

anomalous) ** 1982 Pat LJR 446 (449) (A mortgage document was described as 'reham' with possession, also mentioned the personal liability of the mortgagor to pay the debt with further provision that in case of default of payment the mortgagee would be entitled either to continue in possession of property or to realise his total dues from mortgagor — The mortgagee was thus given a choice of suing for the mortgage money as also for any other monetary claim arising out of accounting made under the term of the deed — **Held,** the mortgage being non-usufrutuary was interpreted as anomalous one) ** AIR 1994 Ker 141 (144) 1994 (1) Ker LJ 89 (Though the document in the present case is styled as a possessory mortgage deed, the mortgagee is given the right to bring the property to sell on the mortgagor failing to pay the mortgaged money after the prescribed period The document is therefore not a usufructuary mortgage simpliciter whereas it partakes the character of a simple mortgage also Such a mortgage comes under the category of anomalous mortgage) ** (1990) 9 Cur Civ C 84 (86) (Gau) (1) (Where the mortgage in question was not simple mortgage as there was delivery of possession of mortgaged property nor was it mortgage by conditional sale nor usufructuary mortgage as there was stipulation that the debt would be paid within 3 years, such a mortgage would be anomalous mortgage.) ** AIR 1976 Him Pra 41 (51) (DB) (Where under a mortgage on failure to pay the money by certain date the mortgagee is entitled to take possession of the entire land and the mortgagee sues to recover the mortgage money by sale of the property the mortgage is an anomalous mortgage) ** AIR 1972 Pat 432 (434, 435) (DB) (A decree for sale of the property could be passed in an anomalous mortgage Where there is a usufructuary mortgage and also a lease back the question whether it is usufructuary pure and simple or not will be decided with reference to the facts of each case) ** ILR (1970) 1 Punj 46 (DB) (A clause in usufructuary mortgage of personal liability of the mortgagor makes it an anomalous mortgage) ** (1967) 1 Mys LJ 126 (DB) (Where under a possessory mortgage of a house for two years the mortgagor undertook to redeem after paying the principal with interest and to repair the house which carried no rent the mortgage is anomalous and not usufructuary) ** 1966 Ker LT 619 1966 Ker LJ 559 (Otti mortgage in Travancore is an anomalous mortgage in which under customary law a personal covenant to repay is implied) ** 1966 Ker LT 692 1966 Ker LJ 725 (A document styled as 'nadappupana Yar' with advance amount called 'Ottyartham' is held to be a mortgage and not a lease Provision for payment of customary dues does not make it a lease as it is not peculiar to leases only Such provision is common to transaction except absolute alienation executed by Jenmis) ** (1964) 77 Mad LW 666 (668) (Usufructuary mortgatge providing particular date for redemption — Provision, in case of default in redemption, for payment on the particular date of any subsequent years - Deed held to contain personal covenant to pay — Mortgage held anomalous mortgage) ** AIR 1960 Bom 411 (412) ILR (1960) Bom 719 (DB) (Mortgage with possession — Consideration payable by instalments — In default of payment of certain instalments mortgage to be deemed as foreclosed and right of redemption to become extinguished — Mortgage is anomalous and not usufructuary) ** AIR 1957 Andh Pra 511 (512) (Mortgage with possession with a default clause entitling the penalty in the form of a automatic sale) ** AIR 1957 Raj 32 (33) ILR (1957) 7 Raj 268 (House mortgaged with possession — Provision that if mortgagor made objection to repayment of money in Court, it would be considered to be false — **Held,** latter provision contemplated suit for sale - Mortgage held to be anomalous) ** AIR 1956 Hyd 107 (110) ILR (1956) Hyd 339 (Where under the mortgage without possession a period was fixed for payment of the mortgage debt, and in the event of default the mortgagee was entitled to enter into possession of the land, such a mortgage is an anomalous mortgage.) ** AIR 1956 Madh B 110 (112) ILR (1956) Madh Bha 92. (Mortgage with possession — Stipulation that mortgage amount would carry interest and rents and profits would be credited to interest — Mortgagor to make good deficiency in interest and to appropriate the excess if any — Mortgagor to redeem in two years — Mortgagee having option to sue for mortgage amount by sale of property on mortgagor's failure to redeem — **Held,** mortgage was anomalous mortgage) ** AIR 1953 Mad 13 (14) ILR (1952) Mad 993 (DB). (Mortgage with possession — Mortgagee to enjoy property in lieu of interest — Mortgagor entitled to pay mortgage amount within four years and get back property but in case of

default mortgagee to continue in possession as mortgagee till redemption — Mortgagor also stipulating to pay on demand the principal with interest at specified rate from date of default to date of payment — Mortgage held anomalous) ** AIR 1951 Orissa 147 (147) (Where the mortgagee is put in possession of the mortgaged property in lieu of interest and besides, there is a personal covenant by the mortgagor to pay the mortgage amount through the sale of his other properties and further the mortgagor holds himself primarily liable for the mortgage debt, the mortgage is an anomalous mortgage) ** AIR 1950 Assam 107 (111) (DB) (Possession given to the mortgagee — Provision that if the mortgagor failed to pay the mortgage money within the stipulated period the mortgagee would be entitled to enjoy the mortgage land as security — Mortgage is anomalous) ** AIR 1941 All 169 (171) ILR (1941) All 240 (Mortgage without possession — Mortgagor not entitled to redeem before five years — On non-payment mortgagee given a right of foreclosure — No ostensible sale or any requirement of S 58(c) — **Held,** anomalous mortgage) ** AIR 1940 Cal 372 (372, 373) (A mortgage deed provided that on receipt of certain amount the possession of the property was made over to the mortgagee — It was then stipulated that after a period of 28 years the debt would be extinguished both as regards the principal and interest — There was a stipulation by which the mortgagor agreed that in the event of the mortgagee being dispossessed of the property in any way the mortgagor would on account of the period of dispossession, be liable to pay interest at certain rate per month — There was, in addition to this, a personal covenant to pay — **Held,** that the mortgage in question was an anomalous mortgage) ** AIR 1940 Nag 156 (157) ILR (1941) Nag 607 (DB) (Words in the mortgage were — if the amount of this mortgage deed is not satisfied according to the stipulation agreed upon the mortgaged property shall stand foreclosed as given below I will have no connexion with the mortgaged property in future — The words "lahan gahan" were used — Deed held to be anomalous mortgage and not mortgage by conditional sale) ** AIR 1940 Cal 426 (DB) A usufructuary mortgage with a clause that if the mortgagor does not pay off the mortgage money in accordance with the demand of the mortgagee the latter will be entitled to realize the money by auction sale of the mortgaged property with the help of the Court) ** AIR 1938 Lah 145 (147) (DB) (Where a mortgage deed contained one clause which would make it a usufructuary mortgage but another clause provided in the most explicit terms for recovery of the amount due from the mortgaged property, held that the mortgage was not usufructuary but was anomalous — ** AIR 1937 Rang 151 (152) 14 Rang 685 (Mortgage with possession for limited period with right of redemption to mortgagor on being demanded by mortgagee — Mortgage held anomalous) ** AIR 1937 Pat 261 (262) (DB) (In a dakhali-rehan deed the mortgagors stated that they had taken a loan which they expressly promised to pay by a certain date — It was next stipulated that in the event of non-payment, the creditors would be put in possession of certain property as dakhali-rehandars until payment — There was a further stipulation that if the creditors, through any act done by the mortgagor or in any manner failed to get possession over the property they should be at liberty to realize the principal with interest from the person and properties of the mortgagors or from the rehan property in any manner they liked — **Held,** that the mortgage was of an anomalous kind) ** AIR 1934 Rang 159 (159) (Mortgage was in the first instance a simple mortgage and in the event of non-payment of principal sum on the date fixed mortgage to be converted into usufructuary mortgage) ** AIR 1929 Oudh 282 (282) (DB) (A clause in a mortgage to the effect that after the expiry of the due date the mortgagee shall have power to realise the amount by sale of the property or he may enter into possession by having it foreclosed makes it an anomalous mortgage) ** AIR 1928 Rang 16 (17) 5 Rang 558 (DB) (Where a mortgage deed contained a covenant to pay interest but nowhere was there any covenant to re-pay the principal and subsequently the mortgagor deposited certain title deeds not mentioned in the mortgage as further security — **Held,** that it was an anomalous mortgage) ** AIR 1927 Cal 836 (840) 54 Cal 687 (DB) (A mortgage bond ran thus — 'We shall pay off your said amount within three years from today But, if in the meantime a third party brings any suit against us or any one of us and attaches or endeavours to bring into auction any property of us, then, without waiting for the due date, you shall forthwith bring a suit for foreclosure of this kot kobala and having got a decree shall be owners of

41. Simple mortgage usufructuary.

A combination of a simple mortgage and a usufructuary mortgage often referred to as a "simple mortgage usufructuary" was not classed under the Act, as it stood before 1929, as an anomalous mortgage,(1) though in some cases(2) it was referred to as anamalous mortgage. Under the present Section it is a anomalous mortgage.(3)

The characteristic of this mortgage is that the property is collaterally pledged as in the case of a simple mortgage with a covenant to pay, and the mortgagee is given the usufruct of it by allowing him to take the rents and profits (4) In the undermentioned cases(5) it was held that a personal

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the properties mentioned in the schedule" — **Held**, that the document was not a mortgage by conditional sale but an anomalous mortgage) ** AIR 1924 Cal 592 (593) (DB) ** AIR 1919 Oudh 418 (419) 21 Oudh Cas 341 ** AIR 1915 Oudh 16 (22) 18 Oudh Cas 10 (DB) ** (1907) 10 Oudh Cas 14 (16) (DB) ** (1903) 6 Oudh Cas 167 (171) ** (1899) 2 Oudh Cas 12 (17) ** (1890) 12 All 203 (205) (DB) ** (1913) 21 Ind Cas 457 (458) (DB) (All).

Section 58 — Note 41

1. **AIR 1929 PC 139 (141) : 4 Luck 363 : 56 Ind App 290** ** ILR (1986) 1 Ker 352 (356) ** AIR 1939 Pat 540 (542) (DB) ** AIR 1918 Mad 572 (573) (DB) (Per Sadashiva Aiyar, J) ** AIR 1921 Oudh 216 (217) ** AIR 1914 Mad 42 (44) 38 Mad 667 (DB) ** (1904) 7 Oudh Cas 11 (12) ** (1913) 16 Oudh Cas 90 (92)

2. **(1889) 13 Bom 90 (94) (FB)** ** AIR 1932 Mad 768 (770) (DB) (Mortgage before 1929) ** AIR 1929 Lah 289 (290) ** AIR 1918 Mad 572 (573) (DB) (The condition for converting the mortgage held invalid as clog on redemption.) ** (1902) 27 Bom 600 (603) (DB) ** (1910) 6 Nag LR 20 (25) ** 1886 All WN 212 (213) (DB).

   [See also 1900 Pun Re No. 23 p. 82 (84)]

3. (1978) 19 Guj LR 420 (429) (1978) 2 Ren CR 25 (DB) (Mortgagor binding personally — Also possession given to mortgagee with right to receive rents and profits — **Held** anomalous mortgage, it being combination of both simple and usufructuary mortgage) ** AIR 1968 Pat 222 (226) ILR 46 Pat 1202 (DB) ** AIR 1957 Raj 32 (33) ILR (1957) 7 Raj 268 ** AIR 1956 Assam 17 (19) ILR (1955) 7 Assam 489 (DB) ** AIR 1956 Mad 434 (437) . ILR (1956) Mad 983 (DB) ** AIR 1953 Madh Bha 9 (12) ILR (1953) MB 104 (Where under a deed possession was given to the creditor on the understanding that he was to retain the land for a period of 12 years and appropriate the income determined at Rs 100 a year towards the discharge of the debt and in the same document the debtor also bound himself to pay the mortgage debt with interest at a specified rate in the event of the debt not being repaid it was held that the deed was an anomalous mortgage) ** AIR 1953 Mad 13 (14) ILR (1952) Mad 993 (DB) ** AIR 1953 Madh B 9 (11) ILR (1953) Madh B 104 (Deed transferring possession to creditor for certain period — Discharge of debt to be out of income of property — Debtor also contracting for personal liability and there was also a right to redeem — Transaction held was an anomalous mortgage, combination of simple and usufructuary mortgage and was not a zuripeshgi lease) ** AIR 1950 Assam 107 (111) (DB) ** AIR 1950 Assam 18 (20) ILR (1949) 1 Assam 167 (DB) (Mortgage with possession containing stipulation for repayment within specified time — It is not usufructuary mortgage but anomalous mortgage.) ** AIR 1939 All 615 (616) ** AIR 1934 Oudh 255 (255) : 10 Luck 10 (DB).

   [See also AIR 1942 Oudh 172 (174) : 17 Luck 362.)]

4. **(1904) 27 Mad 526 (527) (FB)** ** AIR 1914 Nag 36 (37) 10 Nag LR 185 ** (1893) 17 Bor 425 (428) (DB)

   [See also (1903) 27 Bom 600 (603) (DB).]

5. **(1894) 17 Mad 131 (133) (FB)** ** (1968) 1 Mad LJ 139 (144) ** AIR 1968 Pat 222 (226) · ILR 46 Pat 1202 (DB) (Anomalous mortgage — Absence of covenant for suing for sale of mortgaged property — Provisions of S 67 are applicable — Provisions of Ss 67 and 98 are not conflicting — Mortgagee entitled to realise mortgage money by sale of mortgaged

covenant to pay would entitled the mortgagee to sue for sale though merely as usufructuary mortgagee he could not do so. (There is, however, a difference of opinion on this point See S 67, Note 15 and S 68, Note 17). Where, under an instrument purporting to be a mortgage, possession was transferred and there was a stipulation to pay the money at a particular time, failing which the property was to be regarded as sold to the mortgage, it was held that it was a simple mortgage usufructuary and not a mortgage by conditional sale **(6)** Where a mortgage provided that if the mortgagee took possession, he would be entitled to receive the rents and profits in lieu of interest, but that, if during the period of possession the profits do not cover the amount of interest at a certain rate, the mortgagor will make good the deficiency, it was held by their Lordships of the Privy Council that this was a combination of a simple and a usufructuary mortgage **(7)** A stipulation in a mortgage document ran as follows :

> "If according to the terms of the deed the interest of each year be not paid on the due date these terms will not prevent you (mortgagee) from recovering the amount without waiting for the due date If interest is not paid, you can enter upon the property and pay yourself the interest and also portion of the principal if the income is available for that purpose also"

It was held taht the mortgage was primarily a simple mortgage, though in certain events, it might be converted into a usufructuary mortgage **(8)** See also the undermentioned case **(9)**

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property) ** AIR 1964 Madh Pra 305 (306) (DB) ** AIR 1962 Mad 368 (368) ** AIR 1953 Mad 13 (15) ILR (1952) Mad 993 (DB) ** AIR 1952 Mad 856 (858) ** AIR 1950 Assam 18 (20) ILR (1949) 1 Assam 167 (DB) ** AIR 1933 Mad 613 (615) 56 Mad 892 (DB) (**Held,** that the deed contained no personal covenant to pay so as to entitle the plaintiff to sue for sale) ** AIR 1928 Lah 355 (357) (DB) ** AIR 1914 All 350 (350) (DB) ** (1908) 30 All 162 (162) (DB) ** (1903) 5 Bom LR 119 (120) (DB) ** (1898) 21 All 4 (9) (DB) ** (1896) 19 Mad 411 (413) (DB) ** (1893) 17 Bom 425 (428) (DB) ** 1888 All WN 171 (172) (DB) ** 1886 All WN 212 (213 214) (DB) ** 1881 All WN 63 (64) (DB) ** (1866) 6 Suth WR 283 (284) (DB) ** (1910) 6 Ind Cas 153 (153) (DB) (Cal) ** (1910) 6 Nag LR 20 (25) ** (1910) 34 Bom 462 (466) (DB) ** (1910) 6 Ind Cas 795 (796) (DB) (All).

[**See also** AIR 1935 Lah 103 (104) 16 Lah 612 (DB) (Mortgage partly usufructuary containing express promise to pay on particular date and redeem land — Mortgage is anomalous one — Land not liable to be sold under the Punjab Land Alienation Act in execution of decree — Mortgagee can give up security and obtain simple money decree)]

Also see Note 35.

6. **AIR 1921 Mad 12 (16) : 43 Mad 589 (FB).**

7. **(1906) 28 All 225 (231) : 33 Ind App 42 (PC).**

   [**See also** AIR 1929 Sind 235 (237) (DB).]

8. AIR 1917 Mad 198 (199) (DB).

9. **(1970) 2 SCJ 348 (351).** (Anomalous mortgage — Where under the covenants in the deed of mortgage there is a stipulated rate of interest payable by the mortgagor on the mortgage money and the amount recovered from the income of the property is to be first applied towards the interest and the balance towards the Principal and the mortgagee is also entitled to recover by suit interest accruing due the mortgage is an anomalous mortgage) ** **AIR 1943 All 337 (339) : ILR (1943) All 802 (FB).** (A bond mentioned the receipt of certain amount from the obligee and further contained an agreement by the executant to pay certain interest per year regularly and that in default of payment of interest he would put obligee in possession of the mortgaged property as detailed below in the deed The obligees were at liberty to enjoy the usufruct and appropriate the profits to the interest and the executant was to take back the property on payment of the entire money due to the obligee There was a further mention of 'mortgage in the deed It was contended that the deed was a simple money bond at the date of execution which was to be converted into mortgage on the event of default It was held that the deed was a mortgage deed from the

42. Limitation to enforce mortgages.

See Articles 61, 62 and 92 of the AIR Commentaries on the Limitation Act 7th (1997), Edn

43. Sale in execution of mortgage decrees and money decrees.

See O. 21, R. 94, Note 8 and O. 34, R. 5, Note 19 of the AIR Commentaries on the Civil Procedure Code 10th (1985), Edn.

Where a simple mortgagee obtains only a *money* decree against the mortgagor and sells the property in execution, the auction purchaser gets only the right, title and interest of the judgment-debtor at the time of the *sale*.(1) But a sale in execution of a *mortgage* decree will pass the right, title and interest of the judgment-debtor existing not at the time of sale, but at the time of the *mortgage*.(2) If a mortgagee puts up the mortgaged property for sale in execution of a decree, he sells the entire interest and he and the mortgagor could jointly sell and not merely the right, title and interest of the mortgagor as they stood at the time of the sale.(3)

44. Miscellaneous — Construction.

Where the instrument is of a doubtful character, it is incumbent on the Court to ascertain the intention of the parties as disclosed in the deed itself (1) The scope of the mortgage deed with respect to the items of the property mortgaged is to be determined from the intention of the parties as expressed in the deed.(2) *A gave a mortgage to B*, and it was stated therein that if the mortgagor sold the mortgaged property or any part of it, he would pay over the entire proceeds to B. A subsequently sold a part of the property to C without the consent of B, and a portion of the proceeds was paid to B. The question arose whether the clause empowered the mortgagor to sell the mortgaged property to any one without the consent of the mortgagee *free of the mortgage*. It was held by the Judicial Committee that it did not, but that it was merely a provision for piecemeal redemption.(3) Their Lordships observed :

> "The essence of a transaction by way of loan on security, is that the lender, unwilling to rely solely on the personal liability of the borrower, requires, in addition to be given a right *in rem*; and, to insert in the same document a provision by which the borrower bestows the required right *in rem*, and a provision enabling the borrower to destroy it forthwith, is a proceeding difficult to contemplate as probable. To reach the conclusion that such is the intention and operation of a mortgage security, their Lordships would require to be confronted with language admitting of no possible doubt as to its meaning."

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date of its execution, of the kind known as anomalous mortgage) ** 1959 MPC 563 · 1960 Jab LJ 950 (953) (Usufructuary mortgage and lease back — Mortgagor continuing in possession to be in occupation not as owner but as tenant of mortgagee — Mortgage deed providing for interest and the date on which money was to be paid — **Held**, that the transaction was perfectly legal and it amounted to a combination of a simple and usufractuary mortgage.)

Section 58 — Note 43

1. **(1875) 1 All 240 (245) (FB).**
2. **(1875) 1 All 240 (245) (FB).**
3. (1879) 4 Cal 817 (820, 823) (DB).

Section 58 — Note 44

1. AIR 1942 Nag 115 (116) ILR (1942) Nag 592 (DB). (In other words, the Corut has to ascertain what the parties meant by the words they have used and to give effect to the intention which is expressed by the words used by the parties themselves AIR 1932 PC 252 Quoted and Relied on) ** AIR 1940 All 29 (35) (DB) (One deed cannot be interpreted in light of the language used in other deeds.) ** (1908) 10 Bom LR 615 (616) (DB). (21 All 4, Followed)
2. (1868) 3 Agra 27 (29) (DB).
3. **AIR 1937 PC 124 (126) : ILR (1937) Lah 245 : 64 Ind App 126 : 31 Sind LR 271.**

A mortgage deed specifically enumerated certain villages as the property mortgaged but in describing the rent thereof, included the rent of other villages also. It was held that the mortgage should be treated as operative only in respect of the villages specifically mentioned, because there was a specific mention of certain properties followed by a description which if taken literally would have the effect of widening the description which had preceded (4)

In the undermentioned case(5) the land mortgaged was stated to be 12 bighas out of the mortgagor's holding of 15 bighas. The proportionate rent was also stated. The mortgagee obtained a decree for sale and the property was sold by auction. It was, however, subsequently found that the holding contained 25 bighas, but the rent was the same The auction purchaser, therefore, claimed possession of the land in proportion to the rent stated in the bond out of the 25 bighas It was held that it was not correct, as between a debtor and a creditor, to give the creditor a larger portion than what was mortgaged to him just because of the proportion of the rent

By a bond, a mortgagor charged a half share of the profits of his *mouza* with the payment of the mortgage debt and interest It was further stipulated that the mortgagee should take the management of the *mouza*, render accounts to the mortgagor and, if the mortgagor failed to pay the debt when due, the mortgagee should continue in possession till all the debt was paid It was also provided that the mortgagor will have no power to transfer or alienate the property It was held that it was a mortgage of the profits of the *mouza* and not the *mouza* itself Had the last condition stood alone it would have been sufficient to constitute a simple mortgage of the estate itself (6)

A usufructuary mortgagee was to take profits in lieu of interest which was fixed Any deficiency was to be paid by the mortgagor and in case of default the mortgagee was to recover it from the property Z. It was held that Z was secured for the payment of the deficiency in interest (7)

A mortgaged property to B. Afterwards a dispute having arisen between them, it was agreed that the property should be put in possession of the mortgagee and he should take the interest from the profits and the excess should be paid to the mortgagor The arrangement was to come into effect on the same date and was recorded by the Court (Revenue) It was held that this arrangement effected a fresh contract of mortgage.(8)

See also the undermentioned cases.(9)

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4. AIR 1914 Cal 793 (794) (DB).
5. AIR 1936 Cal 780 (781)
6. (1875) 1 All 611 (612, 613) (DB).
7. (1912) 16 Ind Cas 982 (983) (DB) (All).
8. AIR 1925 Oudh 308 (309) : 27 Oudh Cas 357
9. **AIR 1964 SC 1295 (1298) : 43 Pat 895.** (Mauzas A and B mortgaged — Mortgagee competent to realise amount due by selling mauzas A B and C — **Held**, that Mauza C was also mortgaged AIR 1955 Pat 505 **Reversed.**) ** AIR 1961 J & K 85 (87 88) (DB) (Mortgage with possession and lease back — Though both may form part of same transaction documents cannot be read together to spell out a simple mortgage) ** AIR 1959 J & K 103 (105) (Do Suit to evict and recover arrears of rent held competent) ** AIR 1958 Ker 245 (246) (DB). (Mortgage to obtain possession by evicting tenants — Mortgage period to run from date mortgagee obtained possession Legislation not permitting mortgagee to obtain possession — Term as to date of mortgage held bad — Period held ran from date of document) ** AIR 1957 Pat 717 (719) (DB) (Relevant portion of document ran as follows "x x x I, the executant, have let out in rehan with possession for a term of two years the 16 annas house together with all the materials electricity water pipe etc well latrine etc and all rights appertaining to the house constituting the rehan property It is desirable that the said rehandar should himself reside in the house let out in rehan to him or should let out the same on rent and should anually appropriate the rent in lieu of profit or the rehan money or should keep the same vacant the executant landlord, have or shall have no connection and concern with the house let out in rehan till

Whether or "not one" of the parties intended on hoped to ultimately dodge his obligation as a mortgagee and claim statutory protection as a tenant, he cannot free himself of the legal effect of the words which he used in the knowledge of their import and meaning inasmuch as they had used language of mortgage.(10)

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^[59. MORTGAGE WHEN TO BE BY ASSURANCE.— Where the principal money secured is one hundred rupees or upwards, a mortgage [B][other than a mortgage by deposit of title-deeds] can be effected only by a registered instrument signed by the mortgagor and attested by at least was witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by [C][a registered instrument] signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

[D][* * * * * * *].

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the term and till the day of repayment of the entire rehan money . . For the entire expenses, in respect of the house such as Chaukidari tax, repair etc , tax, electric bill, etc , that is, for all these the person and property of me, the executant shall be held liable" **Held,** that the document was a mortgage with possession and not a simple mortgage Mere fact that the mortgagor undertook to pay the taxes, electric bill etc , did not make the transaction a simple mortgage) **AIR 1956 Cal 625 (628). (Two mortgagors mortgaging his 2 properties under one mortgage deed in discharge of debt separately owned — Considering all the provisions of the mortgage held that there were really two separate mortgages embodied in one document, in spite of the fact that the provision for recovering the debt from all the properties of the mortgagors and the absence ofspecification regarding the portion of the instalments to be paid by each of them might lead to the inference of the mortgage being one and indivisible) ** 1955 Raj LW 190 (191) (Relevant portion of document was as follows :— "Mortgage executed by H in favour of R in lieu of Rs. 200 borrowed wherefor 12 gah pators have ben mortgaged. The agreement to pay money is of Sawan Sudi 14 If money is not paid on due date possession will be given - If money not paid on due date it will carry interest after 12 months" — Held, that the document purported to be a simple mortgage at the outset with stipulation for delivery of possession later on) ** AIR 1954 Trav-Co 165 (166) ILR (1953) Trav-Co 871 (DB). (There were three mortgages in favour of the same individual in respect of the same property Possession had been given under first mortgage deed The third mortgage deed contained an express stipulation that in case of failure to repay the loan on the third mortgage within a period of two years, the deed shall be deemed to be a sale deed and the total amount due to the mortgagee on all the three mortgages shall be treated as the consideration for the sale — It was held, that both the previous two and the third subsequent deed must be read together and the mortgagee should be treated as having held the mortgaged property as a mortgagee in possession under a mortgage in the form of a mortgagee by conditional sale) ** AIR 1943 Mad 338 (340) (DB) (A mortgage deed contained a stipulation that if at any time a sum of not less than Rs 1,000 was paid, the mortgagee shall, after appropriating the interest due on the entire debt outstanding, credit the balance towards principal **Held,** that the effect of a payment in the light of the stipulation was that without any further act on the part of the creditor, the payment would necessarily be appropriated in the manner indicated in the covenant and that the payments must be deemed to have been appropriated on the day they were made) ** AIR 1917 All 301 (301, 302) (A mortgage deed stated "I have taken Rs. 125 from J In lieu of Rs. 80, I have made a usufructuary mortgage for 8 years . I will pay Rs 45 the balane with interest at Re 1-8-0 per cent, per annum along with the mortgage money — **Held,** that mortgage was for Rs 125 and plaintiff could redeem on payment of the entire sum with interest.)

10. (1988) 1 Ker LT 50 (53) (DB).

[A] Section 59 extended to the State of Haryana — Hary Govt Gaz, 5-8-1967, Pt III, Ext, p 229

To Mysore, Davangere and Bangalore — See Mys Gaz, 20-9-1951, Pt IV-S. I (c) p 453

Extended to the whole of the State of Punjab — See Punj Govt Gaz, 10-6-1968, Pt III (L S) Ext., p. 247.

Paragraphs 2 and 3 of S 59 with respect to transfer of property by registered instrument have been extended to every cantonment from the commencement of the Cantonments Act, 1924 See S. 287 of that Act.

The operation of paragraphs 2 and 3 of S 59 have been exempted by the Central Government w e f 1-1-1950 from all the territories of Himachal Pradesh except (1) an area within the limits of a Municipality under S 241 of the Punjab Municipal Act, 1911, as applied to Himachal Pradesh— See S R O 1873 in Gaz of India, 1 12 1951, Pt II, S 3, p 2040 read with S R O 395 ibid, 8-3-1952, Pt. II, S. 3, p. 370.

Extended to Chandigarh — See Chandigarh Gaz, 31 3-1975, Ext, p 82

[B] Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S 20

[C] Substituted for the words "an instrument" ibid, 1904 (VI of 1904) S 3

[D] The third paragraph was omitted by Act XX of 1929, S 20

Synopsis

1. **Legislative changes.**
2. **Scope of the section.**
3. **"Principal money secured."**
4. **Mortgage when sum secured is one hundred rupees or upwards.**
5. **Mortgage where sum secured isless than one hundred rupees.**
6. **Registered instrument.**
7. **"Signed."**
8. **Attested by two witnesses.**
8A. **Proof of attested document** — See Note 8
9. **Attestation and estoppel.**
10. **Registration of memo accompanying deposit of title deeds.** See Note 39 on S 58
11. **Material alteration of mortgage document — Effect.**
12. **Mortgage by company.**
13. **Registered document when takes effect.**
14. **Unregistered bond — Admissibility in evidence.**
15. **Effect of transaction where mortgage is not registered or registration is invalid.**

1. Legislative changes.

The old section ran as follows :—

"59. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgage in the towns of Calcutta Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein Akyab and in any other town which the Governor-General) in Council may by notification in the Gazette of India, specify in this behalf by delivery to a creditor or his agent of documents of title to immovable property, with intent to create a security thereon."

The last paragraph has now been transferred to S 58(f) and the words "other than a mortgage by deposit of title deeds" inserted in the first paragraph as a consequential amendment

The words "a registered instrument" in the second paragraph were inserted for the words "an instrument" by Act VI of 1904. See Note 5.

2. Scope of the section.

This section prescribes the *mode* in which a mrotgage is to be effected Before the passing of

this Act no written convevance was necessary by the law of India (1) An oral mortgage could be validly made without writing, by simple delivery of possession.(2) Where, however, a mortgage securing a sum of more than one hundred rupees was created by a written instrument, it was required to be registered under the provisions of the Registration Act.(3) Under this section—

(1) A *simple* mortgage can be made only by a registered instrument, *whatever* be the amount of the principal money secured.(4)

(2) A mortgage, other than an equitable mortgage, can be made only by a registered instrument, if the principal money secured by it is one hundred rupees or upwards.

(3) A mortgage, other than a simple mortgage or an equitable mortgage, can be made *either* by a registered instrument *or* by delivery of possession if the principal money secured by it is less than one hundred rupees.

The section does not say in what *form* an equitable mortgage is to be made But S. 58(f) makes it clear that such a mortgage is effected by *delivery of the title deeds with the intention of creating security* in the property comprised in such deeds.

In a suit for redemption in condition precedent is that there should be a registered deed evidencing the mortgage of immovable property for a sum of Rs. 100/- or above secured as mortgage money evidencing the mortgage as contemplated by S. 59. The provision in S. 59 is essentially a rule of law and not a rule of evidence.(5)

All mortgages, to be valid, must conform to the requirements of this section. Thus, even anomalous mortgages such as a *kanom* or a melcharth or *melkanom* rent, must, in order to be valid, conform to these requirements (6)

All that this section requires for the creation of a valid mortgage is a writing duly executed, attested and registered. It imposes no obligation on a mortgagee who takes a registered deed, of calling for and retaining the title deeds of the properties mortgaged If, therefore, the failure on the part of the mortgagee to ask for or keep the title deeds of the properties, enables the mortgagor to raise money on them from another mortgagee, the latter is not entitled to priority over the former.(7)

This section does not apply to territories for the time being excluded from the operation of the Registration Act, 1908(8). By sub-section (1) of S 287 of the Cantonments Act, 1924, this section has been extended to cantonments.

Section 59 which is not applicable to Sikkim does not embody any rule of natural justice. But documents relating to sell the mortgage etc. require registration according to Rules applicable in Sikkim.(9)

Section 59 — Note 2

1. **AIR 1914 PC 27 (29) : 42 Cal 801 : 42 Ind App 1.**
2. **AIR 1916 PC 41 (43) : 38 All 494 : 43 Ind App 264 ** (1882) 6 Bom 193 (200) (FB).** (In Gujarat, in cases of San mortgages, delivery too was not necessary) **** (1882) 6 Bom 168 (175) (FB) **** (1895) 17 All 252 (261) (DB) ** (1884) 6 All 581 (583) (DB) (No delivery of possession, hence no valid mortgage.)

   Also see S. 2, Note 5 and S. 9, Note 1.
3. (1876) 25 Suth WR 78 (78) ** (1871) 6 Beng LR (App) 69 (70) (If unregistered it could be a basis for a suit only.) ** (1869) 12 Suth WR 163 (164) (DB) ** (1869) 12 Suth WR 222 (223) (DB)
4. (1911) 12 Ind Cas 25 (26) (Low Bur).
5. 1997 (3) Kant LJ 347 (353)
6. AIR 1921 Mad 243 (245) : 44 Mad 344 (DB).
7. AIR 1936 Rang 152 (157) (DB).
8. See Section 1
9. AIR 1980 Sikkim 1 (4)

A mortgage of *movables* is not within the Act and is not governed by this section and does not require to be registered or attested.**(10)**

This section does not apply to instruments falling within the purview of O 21, R 34, Civil P.C An instrument of mortgage executed by Court in pursuance of a decree for specific performance, therefore, needs no attestation by two witnesses as required by this section **(11)**

Though the principles of this Act had been applied in the Punjab as being rules of justice, equity and good conscience, the technical rules, such as are referred to in this section, relating to *the execution*, and *attestation* of a mortgage as required by this section, had never been applied **(12)** From 10-6-1968, however, the provisions of the section have now been extended to the State of Punjab · See foot note 'A' under the text of the section This section does not apply to a part of the Province of Delhi**(13)** and did not apply to the former State of Bikaner**(14)** and to Vindhya Pradesh before this Act was extended to it **(15)** Where the mortgage is executed in a place to which the Act applies but the property is situated in another place to which the Act does not apply the form and validity of the conveyance is determined not by the *lex loci contractus* but by the *lex situs* of the property involved.**(16)**

This section does not apply to transfers effected before the date of commencement of the Jammu and Kashmir Transfer of Property (Amendment) Act, Smvt 1996 and hence mortgages effected by oral agreements or by unregistered documents prior to that date are not hit by the section.**(17)**

In the undermentioned case**(18)** it was observed that the Act is not exhaustive and that an

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10. (1946) 50 Cal WN 258 (259) (DB) ** AIR 1941 Mad 805 (805) ** AIR 1924 Mad 542 (544) (DB) (An othi deed of palmyrah trees for Rs 152 where no limitation is placed on the transferor's right of enjoyment over the land)

[See AIR 1933 All 50 (51 52 53) 54 All 437 (Mortgage with possession of fruit bearing treesis transfer of interest in immovable property) ** (1911) 9 Ind Cas 478 (478) (All) (A mango grove apart from the land on which it stands is not immovable property within the meaning of S 3, T P Act) ** AIR 1926 All 164 (164) (Under S 3 of this Act growing crops are not immovable property)]

[See also AIR 1916 Lah 54 (55) (DB) (Hypotheca of movables in Punjab — Writing not required.)]

11. AIR 1960 Andh Pra 465 (467 470) ILR (1960) 1 Andh Pra 81 (DB)

12. AIR 1936 Lah 946 (953) 17 Lah 686 (DB) (Equitable mortgage) ** AIR 1929 Lah 495 (495) (DB) ** AIR 1928 Lah 148 (149) ** AIR 1926 Lah 220 (221) (Oral mortgage can be made whatever be the amount

[See also **AIR 1983 Punj 171 (173) : 85 Pun LR 288 (FB).** (Provisions of Haryana till 5 8-1967; 1966 Punj LR 408, **Overruled.**)]

13. AIR 1930 Lah 920 (922) : 11 Lah 564 (DB).

14. AIR 1963 Raj 116 (119) ILR (1963) 13 Raj 355 ** AIR 1955 Raj 39 (41) ILR (1955) 5 Raj 278 (DB).

15. AIR 1955 Vind Pra 6 (8) (The Transfer of Property Act, 1882, came into force in Vindhya Pradesh on 15th May, 1949)

16. AIR 1947 Lah 324 (335) : ILR (1947) Lah 828 (FB). (AIR 1933 Lah 972, **Overruled.**)

17. AIR 1959 J & K 64 (65) (FB). (Held, that provisions of J & K Restitution of Mortgaged Properties Act, 2003 apply to such mortgages)

18. AIR 1924 Sind 23 (24) : 17 Sind LR 178 (DB)

[See **however** AIR 1967 Andh Pra 257 (Award providing for personal liability as well as for a charge on immovable property of the party made liable Not registered – Award admissible to prove personal covenant.)]

award of arbitrators could create a valid mortgage though unattested and unregistered. It is submitted that this view is not correct. It may create a charge, but not a mortgage.

Section 63-A of the Dekkhan Agriculturist's Relief Act (XVII of 1879) did not affect the requisition prescribed by this section and so a document of mortgage, though properly executed in accordance with S. 63-A of that Act, was held to be invalid if it was not duly attested as required by this section.**(19)**

Where Financial Banking Institutions advance agricultural loans a mortgage can be created by obtaining declaration and registration as not required in view of M.P. Act 32 of 1973).**(20)**

Under the Stamp Act, an instrument of mortgage need not be valid in law or meet the requirements of law as a valid mortgage document before it is chargeable to stamp duty under the Act **(21)** (See also S. 58, Note 2.)

3. "Principal money secured."

If the *principal* money secured is less than one hundred rupees, the mortgage can be made without a registered instrument Thus, a mortgage of Rs 99 payable in two years with interest at 12 per cent per annum can be made without a registered instrument even though the total amount secured including interest will be more than one hundred rupees. In other words, interest is not to be taken into account in estimating the amount secured Section 17 of the Registration Act makes no reference to the "principal money" as being the value of the right or interest created by a mortgage. But it has been held that even under the said Act, that is the amount which is to be considered for the purpose of deciding whether the registration of the mortgage instrument is optional or compulsory.**(1)**

4. Mortgage when sum secured is one hundred rupees or upwards.

Before the enactment of this Act, a mortgage could be made *orally* And before the Registration Act of 1964, even a *document* of mortgage did not require to be registered whatever might be the amount of the mortgage.**(1)**

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19. (1909) 33 Bom 44 (49) (DB).

20. 2001 Bank LJ 293 (298) (Madh Pra).

21. **AIR 1968 Andh Pra 213 (218) (Pr 12) (FB).** (AIR 1953 Mad 764 **(FB), (Dissent from.)**)

Section 59 — Note 3

1. **(1883) 5 All 447 (449, 450) (FB).** (3 All 157 (FB), **Overruled,** 1 All 274 and 2 All 40 **held no longer good law.) (1900) 23 Mad 105 (112, 113) (FB)** ** (1908) 4 Nag LR 90 (95) ** (1897) 10 CPLR 10 (13) ** (1883) 12 Cal LR 444 (445) (DB) (Value of the interest created by mortgage is the sum secured by it and the interest is only a usufruct of it) ** 1882 All WN 209 (209) (DB) (A hypothecation bond for securing payment of Rs 50 with interest at 9 per cent did not mention any due date — When sued on, the money due on the bond by calculation exceeded Rs 100 - **Held,** that this circumstance would not necessitate the registration of the bond) ** (1879) 2 All 216 (218) (DB) ** (1879) 4 Cal 61 (65, 67) (DB) ** (1878) 2 Bom 353 (355) (DB) ** (1878) 2 All 96 (97) (DB) ** (1913) 21 Ind Cas 78 (78) (All) (The bond showed that Rs 91 were due and the mortgagor agreed to pay that sum in 18 years by six monthly instalments of Rs 5 each, carrying a certain interest — He was in case of default, liable for the payment of the whole sum of Rs 180 plus interest The deed, however, nowhere expressly mentioned that in case of default Rs 180 were recoverable — It was pleaded that the mortgage was for Rs 180 and, it being unregistered could not be enforced — **Held,** that the principal debt secured by the mortgage was not Rs. 180 but Rs 91, which was to be paid in 18 years by six monthly instalments of Rs 5 each and the mortgage-deed did not, therefore, require registration)

[**See also** (1884) 8 Bom 610 (614) (DB) (Transaction of assignment of mortgage)]

Section 59 — Note 4

1. (1879) 2 Mad 108 (110) (DB).

This Act lays down the manner in which a mortgage can be validly made. And it is a general principle that where a statute requires a transfer to be made in a particular manner, it can be made only in the way so pointed out by the statute, or by a decree of a competent Court.(2) The section requires that where the principal amount secured is one hundred rupees or upwards a mortgage other than an equitable mortgage can be made only by a registered instrument (3) A security bond furnished for stay of execution of the decree on the security of property in the suit exceeding Rs. 100/- in value must be registered.(4) An *unregistered document* of mortgage, in such a case, does not affect the property dealt with by it (5) Where such bond is executed in consideration of previous bonds, the previous bonds do not get merged in the unregistered bond and the promisee does not lose his right to proceed to enforce such previous bonds (6) Where the amount exceeding Rs. 100/- was secured and mortgage money but the mortgage deed was unregistered, it could not be accepted in evidence for establishing relationship of mortgagor and mortgagee, between the parties, in view of the provisions of S. 59 (7) Where the principal amount involved in a mortgage was Rs. 200/- and the document was unregistered and unstamped, it could not be treated as a valid mortgage merely because the dependant admitted in his written statement that the suit property was mortgaged with him (8) An *oral* mortgage, in a case where the sum secured is one hundred rupees or upwards is also invalid and conveys no interest (9)

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2. **AIR 1941 PC 90 (92) : 68 Ind App 136.** (It is invalid for all purposes and not merely between particular parties thereto.) ** AIR 1927 All 411 (412) (DB) ** (1911) 33 All 728 (731) (DB) (Order of Revenue Court based on compromise of parties is neither admissible nor creates any title without registration.)

3. 1978 Rev LR 252 (255) (P & H) (When debtor deposits with the creditor i.e. deeds of his property with an interest to create a security, the law implies a contract between the parties to create a mortgage and no registered instrument is required under Section 59 of the Act as in other classes of mortgage.) ** AIR 1935 Cal 388 (388) (DB) ** AIR 1935 All 578 (578) ** AIR 1934 All 444 (445) (DB) ** AIR 1930 All 175 (176) ** AIR 1928 Rang 242 (242) (Party cannot escape registration by receiving money in instalments.) ** AIR 1928 Rang 44 (45) 5 Rang 668 (DB) ** AIR 1927 Lah 763 (764) (Security bond hypothecation immovable property upwards of Rs. 100 to stay a sale in execution proceedings.) ** AIR 1925 Oudh 628 (628) ** AIR 1925 Rang 1 (1) 2 Rang 313 (DB) ** AIR 1923 Rang 52 (54) 11 Low Bur Rul 456 ** (1906) 29 All 50 (52) (DB) (Where a person borrowed Rs. 198 and executed two registered mortgage bonds for Rs. 99 each on the same date — **Held** that as there was nothing in the Registration Act which forbade the splitting of a transaction in this manner the bonds were valid.) ** (1879) 2 All 481 (483, 485) (DB) ** (1851) 15 RD 281 (282) ** (1912) 17 Ind Cas 520 (520, 521) (All) ** (1911) 34 Mad 64 (67) (Mortgage of future rents upwards of Rs. 100.)

   [**See also** AIR 1934 Rang 196 (197) (Mortgage deed, though unregistered, is admissible to prove loan.) ** AIR 1914 All 559 (559) (Case after the passing of the Registration Act but before the passing of the T. P. Act.) ** (1898) 2 Cal WN 591 (593) (DB) (Simple mortgage-bond unregistered — Mortgage invalid.)]

4. AIR 1980 Andh Pra 290 (292) (1980) 2 Andh LT 205, (AIR 1928 Bom 42, AIR 1934 Lah 138 (FB), AIR 1961 Madh Pra 2, AIR 1947 Nag 26, AIR 1974 Delhi 136, AIR 1975 Him Pra 25 (FB), AIR 1980 Orissa 44, AIR 1960 Punj 517, **Dissented from.**)

5. AIR 1947 Pat 110 (111) (Section 59 cannot be evaded by application of doctrine of part performance.) ** AIR 1921 Oudh 203 (203) ** (1904) 28 Mad 54 (56) (DB) ** (1908) 31 Mad 330 (332) (DB) ** (1912) 14 Ind Cas 815 (816) (Upp Bur)

6. (1912) 13 Ind Cas 858 (859) (DB) (Bom).

7. 1999 (90) Rev Dec 44 (2) (46) (All).

8. AIR 1996 Orissa 7 (8).

9. **AIR 1951 Pat 137 (138) (FB) ** AIR 1935 Rang 230 (232) : 13 Rang 274 (FB) ** AIR**

No evidence is admissible to prove such a mortgage.(10) Where possession has been delivered to the lender in such a case, the borrower cannot sue for *redemption* on the basis of the mortgage. His remedy would be to sue for possession on *title*, and the lender's remedy is to sue for recovery of the amount paid by him.(11)

1917 Low Bur 128 (129) : * 8 Low Bur Rul 334 (FB) ** AIR 1940 Rang 11 (12) : 1939 Rang LR 645 (FB) ** AIR 1973 Raj 208 (216) : 1972 Raj LW 522 (No evidence is admissible to prove mortgage.) ** 1963 All LJ 456 (457). (Oral agreement between debtor and creditor that creditor shall remain in possession of debtor's land in lieu of interest — Not mortgage.) ** AIR 1956 All 150 (150). (Loan on Rs. 500 on foot of pronote — Subsequent oral agreement under which creditor entered into possession of debtor's fields till liquidation of debt — Transaction is not mortgage.) ** AIR 1953 Pat 134 (134, 135) (DB) ** AIR 1947 Pat 110 (111). (The mortgagor's admission that another person was in possession under an oral mortgage for a sum over Rs. 100 will not be sufficient to prove the mortgage nor an entry in the record of rights that the plaintiff was in possession as mortgagee. The principle once a mortgage always a mortgage cannot be invoked in such a case where there is no mortgage at all because of the absence of a registered instrument.) ** AIR 1940 Rang 102 (103). 1940 Rang LR 7 ** AIR 1937 Rang 473 (474) ** AIR 1937 Rang 148 (149) ** AIR 1926 Rang 201 (201) ** AIR 1925 Rang 55 (58). 2 Rang 429 (DB) ** AIR 1923 Rang 51 (51).**

[**See also** AIR 1953 Pat 134 (134, 135) (DB) ** AIR 1952 Hyd 5 (6) : ILR (1952) Hyd 351. (Subsequent oral agreement allowing usufructuary mortgagee to remain in possession for a further period in lieu of interest on debt of Rs. 500 incurred subsequent to mortgage — it is an additional usufructuary mortgage and must be registered — Mortgagee cannot rely on oral agreement.)]

10. **AIR 1935 Rang 230 (232) : 13 Rang 274 (FB) ** AIR 1925 Rang 291 (293) : 4 Rang 1 (FB) ** AIR 1952 Hyd 5 (6). ILR (1952) Hyd 351 ** AIR 1932 All 259 (259) (DB) ** AIR 1928 Rang 242 (242) ** AIR 1925 Rang 61 (62) : 2 Rang 441.**

11. **AIR 1974 SC 689 (690) : 1974 Civ App J 38.** (In the case of a transaction of oral mortgage where possession is delivered the remedy of the mortgagor is to recover possession on the strength of his title.) **** AIR 1940 Rang 11 (12) : 1939 Rang LR 645 (FB) ** AIR 1917 Low Bur 128 (129) : 8 Low Bur Rul 334 (FB) ** AIR 1935 Rang 230 (232) : 13 Rang 274 (FB) ** AIR 1925 Rang 291 (293) : 4 Rang 1 (FB) ** AIR 1971 Orissa 58 (61, 62).** (Mortgagee claiming to be in possession as owner on the basis of sale — Suit for redemption 12 years after possession — Suit held barred.) ** ILR (1953) MB 303 (310, 312) ** AIR 1947 Bom 206 (208). ILR (1947) Bom 228. (Usufructuary mortgage for over Rs. 100 not registered.) ** AIR 1935 All 578 (578) ** AIR 1932 All 259 (259, 260) (DB) ** AIR 1929 Rang 179 (181). 7 Rang 140. (Where borrower sues for redemption, the plaint cannot be amended so as to convert the suit into one for possession.) ** AIR 1928 Rang 53 (54) : 5 Rang 679 (DB) ** AIR 1928 Rang 44 (45) : 5 Rang 668 (DB) ** AIR 1927 Rang 332 (333) ** AIR 1926 Rang 201 (202) ** AIR 1925 Rang 1(3) : 2 Rang 313 (DB). (Where in such a case, the borrower brings a suit for possession relying solely on his title, and has not offered to repay the loan, the suit should not be dismissed but plaintiff should be granted a decree for possession conditional on his paying back the loan.) ** (1911) 34 Mad 64 (67) (DB). (Moregage of futue rents — Mortgagee, under an unregistered document, is liable to be evicted as a trespasser.)

[**See** AIR 1963 Raj 129. ILR (1963) 13 Raj 334. (Unregistered mortgage — Creditor can recover loan without having recourse to security if he can prove payment of the amount by independent evidence.)]

[**See also** AIR 1957 Raj 362 (364) : ILR (1957) 7 Raj 432. (Mortgage for Rs. 230 not registered — Possession of mortgagee is that of trespasser — Suit for possession without offering to pay redemption money — **Held**, not a suit for redemption but one for restoration of possession pure and simple.) ** AIR 1923 Rang 51 (51, 52). (The borrower can get back property on payment of debt for which the property was handed over.)]

Also see S. 60, Note 48.

An admission by the mortgagor that the mortgagee was in possession of the property as mortgagee under an oral mortgage for a consideration of more than Rs 100 cannot creates a mortgage a nor any entry in the revenue record to this effect is sufficient (12)

Until the mortgage document is registered the mortgagee is not under any obligation to advance the mortgage money to the mortgagor Till then there is no debt in the hands of the mortgagee payable to the mortgagor. A creditor of the latter cannot therefore attach such amount in the hands of the mortgagee.(13)

See also Notes 14, 15.

5. Mortgage where sum secured is less than one hundred rupees.

Under the section as it stood before the year 1904, a mortgage for less than one hundred rupees could be made by an *unregistered instrument*(1) or by delivery of the property In dealing with questions of priority of registered over unregistered instrument under S 50 of the Registration Act, difficulties arose by reason of the decisions of Court that the provisions of that Act as regards priority were subject to the doctrine of notice (2) This section was, therefore, amended by Act VI of 1904 by substituting the words "a registered instrument" for the words ' an instrument ' thus making it clear that a mortgage for less than one hundred rupees cannot be validly made by an *instrument* unless it is registered (3) Except in cases of instruments executed before the amendment of 1904, a

12. AIR 1986 Madh Pra 215 (217) 1986 Jab LJ 622 ** (1991) 2 Cur LJ (CCR) 658 (661)

13. AIR 1922 All 384 (385) (DB).

Section 59 — Note 5

1. (1909) 12 Oudh Cas 257 (258) (In this case the document appears to have been executed before 1904 though the date is not given) ** (1882) 6 Bom 490 (493) (DB) ** (1880) 4 Bom 459 (461) (DB) ** (1912) 16 Ind Cas 625 (625) (All)

   [See also (1909) 2 Ind Cas 495 (495) (All) ** (1907) 29 All 506 (521) (DB) (Where a person borrowed Rs 198 and executed two registered mortgage bonds for Rs 99 each on the same date, it was held that as there was nothing in the Registration Act which forbade the splitting up of the transaction in this manner, the bonds were valid)]

2. (1903) 16 Pun LR 95 (96) (As between a prior unregistered mortgagee and a subsequent registered mortgagee the preference given to the latter by registration must prevail in the absence of proof of notice of the prior transaction amounting to fraud on his part) ** (1902) 25 Mad 1 (2) (DB) (The holder of a registered mortgage deed has no priority over a prior unregistered mortgage, if when he got the mortgage he had notice of the latter) ** (1900) 2 Bom LR 223 (224) (DB) (A purchaser in possession under a registered sale-deed has priority over a person who claims under a prior unregistered mortgage unaccompanied by possession of which the purchaser had no notice) ** (1886) 13 Cal 70 (DB) (Where there was an unregistered mortgage the registration of which was not compulsory, a purchaser of the property who had registered his deed of sale but who had brought with notice of the unregistered mortgage was held to have purchased subject to the mortgage) ** (1882) 6 Bom 490 (493) (DB) (Possession or registration is necessary to validate a mortgage in the Deccan or elsewhere in the Presidency of Bombay except Gujrat, against a private purchaser for valuable consideration without notice) ** (1882) 6 Bom 515 (518) (DB). (Registered mortgagee cannot avail himself of the registration of his deed against prior unregistered deed of which he had notice.) ** (1880) 4 Bom 459 (461) (DB) ** (1876) 1 Bom 314 (317) (DB) (In the case of an unregistered mortgage without possession, there cannot be any presumption of notice against any subsequent registered moregagee with possession.) ** (1867) 4 Bom HCR (AC) 68 (69) (DB) (A registered mortgage, although without possession, is entitled to priority over a subsequent purchaser) ** (1867) 4 Bom HCR (AC) 69 (70) (DB). (An unregistered mortgage without possession is not valid against a purchaser with possession.)

3. AIR 1922 Oudh 135 (137) 25 Oudh Cas 89 (An unregistered sub-mortgage for less than

competition between a registered and unregistered mortgage instrument cannot now arise As has been seen already, a *simple* mortgage, even for less tan one hundred rupees, must be made only by a registered instrument.(4) But other mortgages (excepting mortgages by deposit of title deeds) may be made either by a registered instrument or by delivery of the property.(5) Where delivery of the property is not possible, as where the mortgagee is already in possession as a usufructuary mortgagee, a fresh mortgage to him can only be made by a registered instrument.(6) Where an instrument recited that a mortgage with possession "has been made from the ensuing year" it was held that the parties intended to effect a mortgage by delivery after a year.(7)

The transaction in the instant case was a usufructuary mortgage but it was not in writing and registered as required under S 59 Therefore, the suit by mortgagor that mortgagee be directed to accept the mortgage amount and return back the mortgaged land was not maintainable The transaction could not be treated as a contract because if so treated S 59 would be otiose (8)

Where a mortgage for less than one hundred rupees is evidenced by an unregistered instrument and there has also been a delivery of the property, the existence of the unregistered instrument would, on the principles discussed in Note 21 on S 54, prevent the passing of any valid title by way of a mortgage The undermentioned cases(9) expressing a contrary view must be held to be not good law.

The delivery contemplated by the section is delivery contemporaneous with the contract of mortgage and not delivery subsequent to it.(10)

The phraseology "delivery of property" should be given intelligible meaning and should not be made rule of thumb. If a person is already in possession and a mortgage is created for an amount less than one hundred rupees by an unregistered deed then he can avoid of that possession after fulfilling the requirements of S. 59 No insistence can be made for contemporaneous delivery of possession in cases covered by S. 59 on the analogy of S 54.(11) An oral mortgage by delivery of possession where such can be made is as good as a mortgage by a registered instrument and stands on the same footing in dealing with the question of priorities A prior mortgage of the former kind will be entitled to priority over a subsequent mortgage of the latter kind (12)

In the undermentioned case(13) a usufructuary mortgage was executed in 1900 by an unregistered instrument for Rs 95. The question arose after the amendment of 1929 whether the instru-

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Rs 100 is not admissible in evidence to prove a lien) ** AIR 1921 Upp Bur 3 (4) 4 Upp Bur Rul 80 ** AIR 1917 Oudh 203 (203) ** (1914) All 162 (DB) ** (1909) 2 Ind Cas 516 (516) (All).

4. AIR 1914 Low Bur 207 (207) (DB)

5. AIR 1939 Rang 188 (188) : 1939 Rang LR 39

[See AIR 1936 Rang 303 (304).]

[See also AIR 1915 Upp Bur 2 (4) (Oral mortgage with delivery of possession — Mortgage is complete — Subsequent execution of deed does not bar oral evidence to prove original transaction)]

6. AIR 1930 All 136 (140) : 52 All 281 (FB) ** AIR 1930 All 431 (432, 433) ** (1908) 11 Oudh Cas 248 (250).

7. AIR 1938 Mad 85 (86, 87)

8. (1990) 2 Cur CC 340 (345) (Gauhati)

9. AIR 1922 Oudh 123 (124) ** AIR 1921 All 81 (81) ** AIR 1921 Upp Bur 3 (4) 4 Upp Bur Rul 80

10. AIR 1917 Oudh 203 (203).

11. (1987) 1 Rajasthan LR 1015 (1019).

12. 1871 Pun Rc No. 47, page 109 (111)

13. AIR 1939 Rang 188 (189) : 1939 Rang LR 39

ment was admissible in evidence to prove the mortgage. It was held that the admissibility of a document was a matter of procedure governed by the present law, and, therefore, it was not admissible under S. 49 of the Registration Act.

In Bengal a permanent tenure can be transferred only by a registered instrument under the provisions of the Bengal Tenancy Act, 1885. Consequently a mortgage of such tenure can be effected only by a registered instrument even if the consideration is less than one hundred rupees, and this is so, notwithstanding this section.(14)

6. Registered instrument.

The word "registered" has been defined in S. 3 as meaning registered in any part of the territories of which the Act extends under the law for the time being in force regulating the registration of documents. The Registration Act, 1908, is the law referred to.

The word "registered" must be taken as meaning "validly registered," and a deed not validly registered conveys no interest in the property dealt with by it.(1) A mortgage deed not validly *presented* as required by S. 32 of the Registration Act cannot be said to be validly registered and cannot convey any interest.(2) Again where the registration of the deed is a fraud on the registration law, the deed cannot be said to have been validly registered. Thus, where *non-existing* property(3) or property not *intended* to be conveyed or transferred at all(4) is included in the document merely for the purpose of effecting registration, the registration so effected is a fraud upon the registration law and is invalid and conveys no title. Similarly if the property is so incorrectly or insufficiently

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14. (1899) 3 Cal WN 499 (501) (DB).

Section 59 — Note 6

1. **(1891) 18 Cal 556 (569) (FB)** ** AIR 1920 Lah 362 (363) (Registration in the wrong book is not valid registration especially where that was at the instance of the parties to the document.) ** 1900 Pun LR No. 21 (DB) (A sale-deed registered after 4 months, the period allowed by Ss. 23 and 26 of the Registration Act. – Hence the deed is invalid.)

2. **AIR 1931 PC 52 (56, 57) : 10 Pat 481 : 58 Ind App 58 ** (1913) 35 All 34 (40) (FB)** (Mortgage deed by a pardanashin lady presented for registration by her husband without authority.) ** AIR 1937 Rang 293 (295, 296) (DB) ** AIR 1933 All 233 (235) (DB) (Mortgage deed presented by agent not duly authorized is invalid.) ** AIR 1917 Low Bur 54 (55) (DB). (The presumption of due registration of document arising from the certificate of registration loses much of its weight by the apparent presentation of document by a person other than the person signing the endorsement.) ** (1912) 34 All 331 (339) (DB).

   [See also AIR 1921 PC 93 (96, 97) : 47 Ind App 177.]

   Also see S. 3, Note 20.

3. **AIR 1914 PC 67 (71) : 41 Ind App 110 : 41 Cal 972** ** AIR 1927 Oudh 214 (214, 215) (DB) ** AIR 1927 Mad 863 (865) : 50 Mad 800 (DB) ** AIR 1924 Cal 348 (348) (DB) (Property did not belong to the mortgagor.) ** AIR 1920 Nag 99 (100) (DB) ** AIR 1919 Nag 129 (130) : 15 Nag LR 75 ** AIR 1914 All 76 (76, 77) (DB) ** (1902) 29 Cal 654 (663). (**Reversed** in appeal in 31 Cal 146 on a question of fact. In appeal it was held that the mortgagor had a property in the district in which the deed was registered and hence the transaction could be enforced.) ** (1910) 5 Ind Cas 127 (128) (DB) (Cal). (If title of executant to the property is disputed that circumstance is not sufficient to hold that there is no property within the jurisdiction of the Sub-Registrar.)

4. **AIR 1936 PC 91 (93) : 63 Ind App 169 : 59 Mad 539 ** AIR 1921 PC 8 (10) : 48 Cal 509 : 48 Ind App 127 ** AIR 1934 PC 157 (167) : 56 All 468 : 61 Ind App 286** ** AIR 1937 Oudh 493 (496) : 13 Luck 484 (DB) ** AIR 1928 Oudh 439 (441, 442) : 4 Luck 13 (DB) ** AIR 1928 Nag 1 (1) : 23 Nag LR 143 (DB) ** AIR 1927 Mad 863 (865) : 50 Mad 800 (DB) ** AIR 1926 Oudh 138 (138) ** AIR 1923 Mad 447 (447) : 46 Mad 435 (DB) (Property not belonging to morgagor included in the deed.) ** (1912) 16 Ind Cas 108 (108) (DB) (All).

described that it cannot be identified,(5) or when the deed is registered in any office within whose jurisdiction the property is not situate,(6) or where a document is accepted for registration after the period prescribed,(7) or where the registration is effected notwithstanding the denial of execution by the executant(8) the registration would be invalid But where some property, however small, is included with the intention of transferring it by way of mortgage, for the purpose of getting it registered by a particular Sub-Registrar, it cannot be said that there is a fraud on the registration law. The smallness of the property has no importance in this connection.(9) Nor is the registration rendered invalid by the mere fact that the property included in the document did not belong to the mortgagor, unless it is shown that both the mortgagor and the mortgagee colluded to insert the item with the knowledge that the mortgagor had no title and with no intention of transferring.(10) In other words, registration is not invalid merely because there is a flaw in the title of the mortgagor to the property and subsequently it turns out that the transferor had ceased to have any interest in the property.(11) Where the mortgagee does not know that the mortgagor had no title to the property included, and the mortgagor represents to the mortgagee that he is the owner, the mortgagor cannot take advantage of his own fraud by pleading that the deed is not registered at the proper place.(12)

A transaction in registration of which there is a mere procedural defect is binding on the parties provided it does not injure innocent persons.(13) Thus, a document registered in Book IV instead of Book I is an error of the Sub-Registrar and cannot prejudice the parties The registration

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5. AIR 1928 Cal 385 (386, 387) (DB) ** AIR 1927 Mad 586 (589) (DB). (The description in the deed held sufficient to identify the property) ** (1895) 18 Mad 364 (367) (DB) ** (1912) 15 Ind Cas 335 (336) (All)

6. **AIR 1914 PC 67 (71) : 41 Ind App 110** ** AIR 1937 All 711 (712) ** AIR 1914 All 76 (76, 77) (DB) (Registration is without jurisdiction) ** (1913) 20 Ind Cas 385 (392) (DB) (Mad).

   Also see S. 3, Note 38

7. (1907) 4 Low Bur Rul 88 (93) (DB) ** (1873) 10 Bom HCR 98 (99) (DB)

8. (1903) 26 All 57 (59, 60) (DB) (See S 35 of the Registration Act)

9. AIR 1927 Mad 863 (865) 50 Mad 800 (DB) (Bona fide purchased property included in the deed only with the intention to effect registration in a particular office is to fraud.) ** AIR 1920 Mad 974 (975) (DB).

10. AIR 1931 Mad 335 (339) (DB) (It is not a question of negligence by mortgagee but of fraud on his part and the burden of proving it is on the other party) ** AIR 1929 Mad 432 (435, 436 440) (DB) ** AIR 1929 Mad 426 (428 429) (Certain land belonging to mortgagees inserted in mortgage-deed with mortgagee's knowledge in order to obtain registration at certain Sub-Registrar's office, where it could not otherwise have been obtained — Insertion, being fraud on registration law, rendered deed void) ** AIR 1925 Mad 430 (430) ** AIR 1924 Mad 281 (284) (DB) ** AIR 1924 All 473 (473) (DB) (There was a reason to believe that the portion belonged to the mortgagor) ** AIR 1919 All 450 (451, 452) 41 All 22 (25) (DB) ** (1910) 13 Oudh Cas 265 (268) (DB).

    [See also AIR 1927 Mad 92 (93) (Unless both the parties have intention to evade the registration law, the document is not invalid.)]

11. AIR 1919 Pat 572 (573) 4 Pat LJ 433 (DB) (Only thing essential is the existence of the property.)

12. AIR 1922 All 231 (232) (DB).

13. AIR 1947 Mad 175 (176). (Mortgage recorded in Book IV instead of Book I — Subsequent encumbrancer abstaining from making search in registration office — He has constructive notice of prior mortgage and cannot be said to have been injured by mistake — Prior mortgage is binding on him.)

is not invalid.(14) An omission by the Sub Registrar to affix his seal to the document does not render the registration invalid.(15) When a mortgage is embodied in more documents than one then *all* such papers and must be registered in order to constitute a valid mortgaged (16)

Loss of registered instrument — Proof of execution.

See also the undermentioned case.(17)

7. "Signed."

For a fuller discussion see Note 12 on section 3.

The place and manner of signature of a document are immaterial provided that the signature is inserted in such a manner as to authenticate the document Where the instrument is in the handwriting of the executant, it is sufficient if his name is inserted at the commencement and the document will be operative though not signed by the executant at the end of the document (1)

The mortgagor can sign by an agent.(2) The signature can be made by means of types or by a facsimile, or, where the mortgagor is an illiterate person, by his mark (3) But a literate person

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14. AIR 1947 Mad 175 (176) (Registration — Recording of mortgage in Book IV instead of Book I — Defect merely procedural Mortgage is not invalid AIR 1935 PC 165 Rel on.) ** AIR 1936 Cal 212 (214) (Do.) ** (1910) 34 Bom 202 (207) (DB)

15. (1902) 6 Cal WN 528 (530) (DB).

16. (1904) 27 Mad 348 (350) (DB)

[See also AIR 1956 Bhopal 59 (61) (Mortgage by conditional sale under S 58 Bhopal T P Act which does not have a proviso as in S 58(c) of the Central Act — Two separate documents — Registration of both is necessary) ** AIR 1950 Hyd 5 (52) ILR (1951) Hyd 189 (DB) (Mortgage by conditional sale in 2 documents — Both should be registered.) ** **AIR 1926 Bom 497 (504) : 50 Bom 566 (DB).** (Case before addition of Proviso to S 58(c) — One transaction evidenced by two deeds By first deed which was registered, immovable property worth more than Rs 100 conveyed Second deed unregistered is mortgage, second deed is inadmissible If transaction is sale with contract to repurchase, it is admissible — AIR 1914 Bom 231, **Overruled.**)]

17. (1948) 7 Sau LR 70 (Usufructuary mortgage of 1871 long before T P Act or Registration Act was in force — Deed registered in 1892 after Registration Act came into force — Loss of document — Documents being very old, no proof of their execution could be expected and the Registrar's endorsement held should be taken as sufficient proof of the originals)

Section 59 — Note 7

1. See AIR 1916 Cal 61 (63) (DB) (Case of a release deed — Lord St Leonard's "Vendors and Purchaser" (14th Edn.) P. 142 quoted.)

2. **(1902) 23 All 319 (330, 331) (FB).** (Illiterate mortgagor — Name may be signed by scribe in his presence) ** AIR 1915 All 466 (467) (DB) (In the case of illiterate purdanashin lady it will be sufficient if any man with her authority executes the deed in her name) ** (1909) 1 Oudh Cas 257 (259) ** (1903) 16 CPLR 45 (46) ** (1903) 6 Oudh Cas 279 (287) (Person affixing the signature of the mortgagor with his authority)

[See also AIR 1924 All 832 (833) (Mortgage executed before Transfer of Property Act — Signature of executant who was illiterate made by scribe at his instance held valid)]

3. AIR 1916 Bom 123 (124) 41 Bom 384 (DB) (Mark of a dagger made by an illiterate executant.) ** (1905) 1 Nag LR 14 (15).

[See also AIR 1917 All 16 (16) (DB) (But the mark must be proved to have been affixed in presence of the witnesses) ** AIR 1921 Bom 156 (157) 45 Bom 989 (DB) (Case under S 50, Succession Act — Thumb impression by illiterate executant) ** (1896) 6 Mad LJ 209 (210) (Case of a muchilaka — Executant touching pen in token of consent to the agreement embodied in the document and then handing it over to another — Latter putting executant's mark on his behalf — Document held properly executed) ** (1898) 25 Cal 911 (916) (DB). (Case of will.)]

making a mark cannot be said to have signed the document.(4) A person who is literate but becomes incapable of writing owing to paralysis and who has been in the habit of affixing a name stamp through his servant, can however validly execute a document by such affixture.(5)

A mortgage not signed by the mortgagor or mortgagors is not a mortgage at all (6) A mortgage *intended* to be executed by *all the* shares in a certain property but actually exctuted by some of them only is wholly inoperative and does not convey any interest in the mortgaged property (7)

See also the undermentioned case.(8)

The *mere signing* of a document is not necessarily the *execution* of the document. The execution of the document implies the intelligent appreciation of the contents of the document and signing it in token of the acceptance of such contents.(9) Further, the signing of the document without delivery thereof to the executee is not execution of the document. Execution means all acts necessary to make the parties to the contract bound thereby.(10) Moreover all means, where the document has to be attested, by witnesses, the *signing* in the presence of the witnesses (11)

The mere fact that a document is signed and attested a few days after it is written out, does not render its execution invalid or alter its legal affect (12)

8. Attested by two witnesses.

As to the meaning of the word "attest" see Notes 11 to 19 on S 3 and the undermentioned cases.(1)

Before the passing of this Act the law did not require a mortgage document to be attested (2)

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4. (1905) 2 Cri LJ 405 32 Cal 550 (551) (DB) (A mark by a literate person is not a signature within the meaning of S. 3, Cl. 52 of the General Clauses Act.)
5. (1898) 25 Cal 911 (916) (DB).
6. AIR 1924 Lah 249 (249) (DB) (Letters Patent Appeal from AIR 1923 Lah 242, confirming it)
7. AIR 1919 Lah 78 (79).
8. AIR 1939 Oudh 96 (98 99) 14 Luck 393 (Mortgage executed in Oudh in such old time as 1822 bearing expression 'Sahi' instead of signature of executant can be held to be valid)
9. AIR 1935 Pat 497 (499).

   [See also AIR 1961 Orissa 178 (179) (DB) (Mortgage deed in English — Deed signed by pardanashin lady not knowing English — No evidence that it was read over and fully explained to her — Execution held not proved.)]
10. AIR 1933 Pat 129 (129).
11. AIR 1923 Cal 149 (150).
12. AIR 1919 Oudh 23 (24) (DB)

Section 59 — Note 8

1. 1967 Raj LW 51 (53, 54) (Mortgage deed first signed by two witnesses and then below their signature, by the executant, according to the practice in old Jodhpur State — Attestation held improper — Unless there is evidence on record that the Sub Registrar who registered the deed, signed in the presence of the executant, he could not be an attesting witness) ** AIR 1951 Pat 368 (369) 28 Pat 158 (DB) (Signatures by one attesting witness for himself and for other witness at his request and in his presence — No mark by other witness and in his presence — No mark by other witness — Attestation held proper) ** (1938) 67 Cal LJ 31 (34). (In view of amended definition it is enough if the executant acknowledges his signature in the presence of attesting witnesses) ** (1931) 53 Cal LJ 326 (327) (Amendment of S 3 is retrospective — Attesting witnesses signing on acknowledgment of signature by executant — Attestation held valid) ** (1909) 13 Cal WN 40 (42, 43) (DB) (Document executed by pardanashin lady — Attestation — Witnesses present in the room where the lady signed behind parda — Attestation held valid.)
2. 1954 Andhra LT (Civ) 35 (38) (Therefore it was enough to prove that it was executed by

This section makes attestation a condition of the validity of the mortgage The word "attested" must be regarded as important and the requirement as to attestation must be enforced with stringency (3) There is, however, no particular form for attestation, nor is it necessary that the signatures of the attesting witnesses must appear in any particular place on the document (4) Attestation by, a person who had made attestation even before executant signed the document is invalid (5) (See also S 3, Note 16.)

A party to a document cannot be a valid attesting witness also for the same document Thus, where A signs as an executant of a mortgage deed under a power of attorney from B. B is the executant of the deed and though physically a different person from A, B cannot be treated as an attesting witness of the deed (6) But where the lender of mortgage money is not a party to the mortgage deed this section does not debar him from attesting the deed (7) See also S 3, Note 17

The section enacts that a mortgage instrument must, in order to be valid, be attested by *two* witnesses A mortgage not attested by two witnesses is not enforceable as a mortgage (8) A deed purporting to be a mortgage but attested by *one* witness only cannot operate as a mortgage (9)

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the mortgagor in favour of the mortgagee mentioned in the deed) ** AIR 1940 All 101 (103) ** AIR 1924 All 929 (931) (DB)

3. AIR 1918 All 211 (215) : 40 All 187 (DB).

4. AIR 1944 Bom 25 (26) ILR (1944) Bom 388 (Mortgage signed by mortgagor at foot and also below the receipt clause — Attesting witnesses signing against receipt clauses only — **Mortgage held adequately attested.**)

5. AIR 1973 Raj 123 (127) : 1973 Raj LW 128

6. AIR 1954 Mad 126 (128)

7. **AIR 1965 SC 1738 (1740)** (12 Ind Cas 531 (Bom) and AIR 1931 Oudh 285 (FB), Approved.) **** AIR 1931 Oudh 285 (287) : 7 Luck 41 (FB).**

   [See also (1911) 13 Bom LR 944 (946) (DB) (A person not a party but interested in the money advanced can validly attest a deed of mortgage)]

8. **AIR 1925 PC 89 (91) ** AIR 1916 PC 169 (171)** ** AIR 1961 Assam 48 (50) ILR (1961) 13 Assam 23 (DB) (Suit for redemption of usufructuary mortgage — Execution of mortgage not denied by mortgagee — Deed not attested — Mortgage held invalid — Decree however could be granted on basis of mortgagor's title) ** (1958) 24 Cut LT 461 (463) ** AIR 1921 Mad 701 (702) (DB) ** AIR 1919 Mad 469 (470) (DB) ** AIR 1918 Mad 1069 (1069) (DB) (Melkanom is a deed of mortgage and of lease and is invalid if not properly attested) ** AIR 1918 Oudh 22 (23) 20 Oudh Cas 306 (DB) ** AIR 1918 Low Bur 62 (62) (DB) ** AIR 1917 All 27 (28) 39 All 109 (DB) ** AIR 1916 All 103 (104) 38 All 461 (DB) (Mortgage signed by one attesting witness and also containing name of another witness written by the scribe — No proof for such authority in favour of scribe — **Held,** mortgage was invalid) ** AIR 1915 All 254 (254) ** (1909) 33 Bom 44 (48) (DB) ** (1906) 4 Cal LJ 510 (514 518) (DB) ** (1899) 26 Cal 246 (248) (DB)

   [See also AIR 1926 PC 129 (130). (Assignment of mortgagee rights with mortgagor's consent not duly attested may not effect a valid mortgage but it binds the mortgagor) ** AIR 1927 Nag 83 (83) (Where an earlier mortgage is substituted by a subsequent mortgage but the subsequent mortgage is invalid for want of legal attestation the mortgagee can fall back on the earlier mortgage) ** AIR 1920 Bom 249 (250) 44 Bom 405 (DB) (Ordinarily a scribe or writer of the document is not intended to be and is not an attesting witness.) ** (1913) 20 Ind Cas 544 (545) (Oudh) (Attestation of agreement qualifying **previous mortgage-deed is not necessary.**)]

9. (1967) 2 Mad LJ 388 (390) (DB) (Mortgage attested by only one witness — Sub Registrar held not the other attesting witness — Mortgage not valid) ** AIR 1915 Oudh 65 (71) 18 Oudh Cas 168 (DB) ** AIR 1914 Low Bur 135 (135) (DB) (A mortgage which is attested by only one witness and is signed by the scribe as writer and not as a witness is invalid) ** (1899) 26 Cal 78 (79) (DB) (The question of attestation is a question of fact) ** AIR 1926 Rang 145 (145) ** (1897) 1 Cal WN 81 (82, 83) (DB) ** (1912) 15 Ind Cas 666 (667) (DB) (Cal) (The other being the executant himself)

much less is a mortgage enforceable if it is not attested *at all*.(**10**) Nor can such a mortgage instrument operate to create a *charge* within the meaning of S. 100,(**11**) though it may be admissible in evidence to prove a *personal covenant* to pay the amount,(**12**) or to prove some collateral purpose.(**13**) The same would be the case when the document is *improperly* attested.(**14**)

It is not necessary to plead in a suit regarding a mortgage that the mortgage was duly attested.(**15**)

A Sub-Registrar while enquiring from the executant about the execution of the document or calling upon him to produce an identifying witness carries on his statutory duty and it cannot be predicated that the registering officer had the necessary animus of attesting the document.(**16**)

A *validly* attested document can be proved only in the mode provided by S. 68 of the Evidence Act(**17**) and it has been held in some cases(**18**) that in the absence of such proof it cannot be used as evidence of the personal covenant to pay. In the Punjab, at a time when the Transfer of Property Act did not apply, a mortgage was not required by law to be attested and, therefore, was

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10. AIR 1927 Pat 131 (132) (DB) ** AIR 1927 Cal 926 (928) (DB)

11. **(1913) 35 All 164 (165) (FB)** ** AIR 1973 Raj 123 (131) 1973 Raj LW 128 ** (1905) 32 Cal 729 (732) (DB). (Mortgage not attested as required by S 59 — Cannot operate to create a charge under S 100.) ** AIR 1926 Sind 88 (89) 18 Sind LR 22 (DB) ** AIR 1917 Mad 849 (852) (DB). (17 Mad LJ 39 **Not approved.**) ** AIR 1916 All 103 (104) : 38 All 461 (DB) ** (1908) 31 Mad 337 (337) (DB) ** (1905) 7 Bom LR 934 (935) (DB) ** (1901) 14 CPLR 42 (45).

[**See also** (1901) 24 Mad 397 (399) (DB) (Quaere).]

Also see Note 15 and S 100, Note 14

[**But See** (1907) 17 Mad LJ 39 (39) (DB). (**Not approved** in 31 Mad 337)]

12. **(1909) 32 Mad 410 (413, 414) (FB).** (18 Mad 29 **Overruled;** 20 Mad 284 Approved) ** (1939) 2 Mad LJ 664 (666) (DB) (Suit on mortgage — Attestation by two witnesses not proved — Court can pass decree on personal covenant.) ** AIR 1933 Sind 257 (257) (DB) ** AIR 1931 Mad 140 (143) · 54 Mad 163 (DB). (A mortgage executed by the guardian of a minor) ** AIR 1931 Mad 124 (128) (DB) ** AIR 1926 Rang 145 (145, 146) ** AIR 1925 Mad 991 (992) ** AIR 1923 Mad 36 (36) 46 Mad 64 (DB). (It is like a bond enforceable personally) ** AIR 1921 Low Bur 34 (35, 36) 11 Low Bur Rul 148 (DB) ** AIR 1917 All 483 (483) (DB) ** AIR 1916 All 103 (104) 38 All 461 (DB) ** AIR 1916 Oudh 185 (187) (DB) (Simple mortgage deed) ** (1907) 30 Mad 284 (288) (DB). (Per Subrahamania Ayyar, J.) ** (1906) 4 Cal LJ 510 (513, 518) (DB).

[**See also** (1899) 26 Cal 78 (79) (DB) (Mortgagee granted a decree for principal money upon covenants in the bond) ** (1912) 15 Ind Cas 666 (668) (DB) (Cal) (Suit on personal covenant was barred.)]

13. AIR 1915 Oudh 65 (71) · 18 Oudh Cas 168 (DB) (To prove ratification of certain leases unconnected with mortgage).

14. AIR 1926 Cal 637 (638) (DB) ** AIR 1915 All 254 (255)

15. AIR 1972 Gauhati 44 (47) (Form No 45, Appendix A, Civil P C relates to a suit on the basis of mortgage. That form does not enjoin that the plaintiff must mention in the plaint that the mortgage deed had been attested in the manner required by law AIR 1951 Nag 343, Rel. on.)

16. AIR 1973 Raj 123 (128) : 1973 Raj LW 128.

17. See AIR 1920 Mad 717 (719, 720) (DB) (Section 59 does not lay down any mode of proof of execution of mortgage in derogation of S. 68, Evidence Act.)

18. AIR 1926 Oudh 266 (267, 268) (A mortgage deed which is not the basis of a suit but which is sought to be used for a collateral purpose must be proved as in the other class of

not required to be proved in the manner provided by S 68 of the Evidence Act **(19)** It may be noted that the provisions of this section have now been extended to the State of Punjab from 10-6-1968.

Sections 68 to 71 of the Evidence Act lay down how a document required by law to be attested should be *proved*. These rules may be summarised as follows

(1) Where the execution of the document is *specifically denied*, one attesting witness at least, if alive, must be called to prove its execution This is not necessary if the execution of the document is not specifically denied.**(20)** (S 68) The document in such cases can be proved in any manner, so long as the evidence is sufficient to satisfy the Court that the execution was so proable that a prudent man ought under the circumstances to act upon the supposition that it was executed **(21)** Where the defendant says "I do not admit the execution" it is not a "specific denial "**(22)** The averments that the document is concocted one it is not executed by person purported to be the executant and that the document is created fraudulently amounts to 'specific denial'.**(23)**

If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence **(24)** (S. 71)

(2) If no attesting witness can be found or if the document purports to have been executed in the United Kingdom, the signature of the person executing the document and the attestation of *one* attesting witness must be shown to be in the hadwriting of that person (S 69)**(25)**. If that is shown the presumption will be that the witness actually witnessed the execution of the deed.**(26)**

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cases by examining the attestors) ** AIR 1922 Cal 160 (162) (DB) (Section 68 is impera tive.) ** (1907) 30 Mad 251 (252) (DB)

19. AIR 1929 Lah 495 (495) (DB) ** AIR 1928 Lah 148 (149)

20. ILR (1960) Cut 214 (216) ** AIR 1917 Oudh 71 (72) ** AIR 1929 Mad 881 (882) 53 Mad 119 (DB) ** AIR 1928 Bom 267 (268) . 52 Bom 219 (DB)

[**See also AIR 1944 Mad 121 (122) (FB).** (One of executants denying execution — No attesting witness called to prove execution — Failure is fatal to mortgagee s claim against such executant.)]

21. ILR (1960) Cut 214 (216) ** AIR 1929 Sind 235 (236) (DB)

22. AIR 1935 All 781 (784)

[**See also AIR 1944 Mad 121 (122) (FB).** (Allegation that mortgage was sham and nomi nal transaction does not amount to denial of execution.)]

23. AIR 1989 Ker 163 (165, 166) : (1988) 2 Ker LT 805

24. (1859) 25 Cut LT 291 (295) ** AIR 1942 Oudh 201 (201) ** AIR 1937 All 273 (275 276) (DB) (Any person present at the execution can prove it) ** AIR 1927 Bom 655 (656) (DB) ** AIR 1924 Nag 367 (368, 369) ** (1913) 19 Ind Cas 789 (789) (DB) (All)

[**See** (1913) 35 All 353 (358) (DB) (Attesting witness produced not recollecting if executant signed the document in his presence - Further opportunity to prove execution should be given) ** (1913) 19 Ind Cas 643 (643) (All) (One of the attesting witnesses dead — Other denying all knowledge — No other evidence of execution — Execution held not proved.)]

[**See also** AIR 1924 Rang 139 (140) 1 Rang 557 (Even though one of the attestors denies having attested the execution of a deed of gift, it is open to the Court to come to the conclusion from other evidence that he had in fact so attested) ** AIR 1919 All 448 (448) 41 All 250 (DB).]

25. AIR 1935 All 527 (528) (Witness present at the time of execution identifying their signatures) ** (1912) 34 All 615 (617) (DB) (All the attesting witnesses and the scribe deed — Proof of the hand-writing of the scribe and that the two attesting witnesses appear to have signed by the pen of the scribe is sufficient.)

26. AIR 1941 Rang 122 (125) (DB) ** AIR 1934 Mad 365 (366) 7 Mad 662 (DB) (Affirming

(3) Where the execution of the document is *admitted* by a party it is sufficient proof of execution *as against him* alone.(27) (S. 70), but not against others.(28)

Where execution is admitted but attestation is specifically denied, then attestation must be proved (29) The reason is that a denial of attestation is a denial of execution, for execution includes signature in the presence of attestors as required by law Even where execution is admitted if the evidence adduced by the mortgagee shows positively that the document has not been attested in accordance with law the mortgagee would fail.(30)

But though *one* attesting witness may be sufficient to be examined as a witness to prove the execution of the document, the facts *proved* must show that the document is a *valid* mortgage. In other words, the facts proved must satisfy the requirements of a valid mortgage under this section. Thus, the facts proved must be that the document was attested by *two witnesses* and that the *mortgagor signed the document.* This is the Madras view as expressed in *Namberumal Chettiar v., Raghavachariar.*(31) Abdur Rahim, J., in that case observed as follows :

> "A mortgage bond, in order to be valid, must be execued in the presence of two attesting witnesses Section 68 of the Evidence Act further requires that one at least of the attesting witnesses to a mortgage bond should be called, if there is any alive But that does not in any way affect the requirements of S 59 of the Transfer of Property Act Section 68 of the Evidence Act lays down that in order to prove a mortgage bond, one of the attestors must be called It would be competent for that attestor or for any other witness to prove that *the execution was in the presence of two attestors* and it is not necessary *to call two attestors* There may be cases where all the attesting witnesses are dead, when the requirements of the law would be satisfied by any evidence which would show that the document was executed in the presence of two attesting witnesses."

And Seshagiri Aiyar, J., in the same case said :

> "Under S. 68, it is necessary that a particular class of witnesses should be called in order to prove a document which is required by law to be attested Therefore this provision does not do away with the necessity of showing that the document is *valid* A document may be proved as required by S 68 and put on record Nonetheless in order that a decree may be found on it, it must be shown to be valid, and for this purpose we must go to S 59 of the Transfer of Property Act That section lays down that unless a mortgage is attested by two witnesses there cannot be a proper mortgage Mere proof by a single witness that it has been executed cannot enable a party to get a decree on the mortgage, unless it is also shown that at its execution, the document is attested by two witnesses"

AIR 1930 Mad 770) ** AIR 1927 Mad 662 (663) ** AIR 1919 Oudh 340 (342) (DB) (*Held*, on the evidence the persumption under S 69 of the Evidence Act, had not been rebutted) ** AIR 1917 All 89 (90) 39 All 112 (DB) ** AIR 1917 All 103 (104) 39 All 241 (DB) ** AIR 1917 All 235 (236) (DB).

27. AIR 1928 Nag 244 (246) (Admission must be in proceedings) ** (1911) 7 Nag LR 85 (87) (Admission in S 70, Evidence Act, must be one in the trial of suit and not the admission before the Registrar at the time of registration.)

28. (1956) 69 Mad LW 815 (816) (AIR 1949 Nag 149 Rel on) ** AIR 1919 Cal 1024 (1025) (DB) ** AIR 1917 Cal 693 (696) 44 Cal 345 (DB) ** (1913) 35 All 364 (367) (DB) ** (1911) 11 Ind Cas 225 (226) (DB) (Oudh).

29. ILR (1949) 1 Assam 150 (153) (DB) (Neither the proviso to S 68 nor S 70 of the Evidence Act can assist the mortgagee, where the mortgagor alleges that the mortgage deed was not duly attested) ** AIR 1936 All 169 (170, 171) (DB) ** AIR 1923 Cal 149 (151) (DB) ** AIR 1916 Nag 5 (8, 9) 13 Nag LR 121 (This has to be done under combined effect of Ss. 68 and 70, Evidence Act.)

30. AIR 1970 Orissa 82 (86, 87) ILR (1970) Cut 368 (ILR (1967) Cut 593 **Reversed**; AIR 1927 Mad 143 **Diss.**)

31. AIR 1921 Mad 701 (702, 703) (DB).

See also the undermentioned cases(**32**) for the view that one attesting witness may be called, but it must be proved that the document was attested by two witnesses. A slightly different view has been expressed by a Full Bench of the Allahabad High Court in *Lachman Singh v. Surendra*,(**33**) namely, that where a mortgagee sues to enforce his mortgage and the execution and attestation of the deed are *not admitted*, the mortgagee need only prove this much — that the mortgagor signed the document in the presence of an attesting witness and one man attested the document, provided that on the face of it the document bears the attestation of more than one person. But if the validity of the mortgage is specifically denied in the sense that the deed did not effect a mortgage in law, then it must be proved by the mortgagee that the deed was attested at least by two witnesses. See also the undermentioned cases.(**34**)

Where the mortgage has not been effected, as required by S. 59, the question of the effect of admission as to its execution by the mortgagor is immaterial (**35**).

The *admission* by the mortgagor of the *execution* of the document is not an admission of the *validity* of the document. Such an admission therefore does not dispense with proof of attestation as required by law (**36**). Where there is a dispute as to the document being a mortgage bond or a money

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32. AIR 1949 Nag 149 (151) : ILR (1948) Nag 621 (DB) (Proof of execution by one attesting witness — He must also testify that other attesting witness was also present when the executant signed the document or that he attested the document after he had received from the executant a personal acknowledgment.) ** AIR 1941 Rang 122 (125) (DB) (Only one attesting witness need be called, if that attesting witness speaks to attestation by the attesting witnesses. But if he does not do so, it is necessary to prove that the deed was properly attested by those other attesting witnesses.) ** AIR 1929 Sind 235 (236) (DB) ** AIR 192[illegible] Bom 655 (656) (DB) (Not only due execution, but due attestation was also proved.) ** AIR 1925 Mad 751 (751) (DB) ** AIR 1924 Pat 317 (318) (DB) (Witness stating that the mortgagor executed a mortgage bond in his presence and in the presence of certain other persons and that he himself attested the mortgage bond — Held, sufficient.) ** AIR 1921 Mad 472 (472) (DB).

33. AIR 1932 527 (531) : 54 All 1051 (FB).

34. AIR 1955 NUC Andh 3608 : (1954) 2 Mad LJ (Andh) 75 (77) (Mortgage deed executed in 1876 — All persons connected therewith passing away — Execution may be proved by circumstantial evidence.) ** AIR 1937 All 646 (648) : ILR (1937) All 723 (DB) ** AIR 1936 All 712 (716, 717) (DB) ** AIR 1923 Nag 234 (234) (Mortgage purported to have been attested by three attesting witnesses — Two of them called as witnesses — One proving attestation — Other denying his having seen the deed executed — Other mortgagee deposing that all the three attesting witnesses were present when deed was executed — Held, even if second witness was not present, the deed was validly attested.) ** AIR 1923 Rang 254 (254) : 1 Rang 121 (DB) (Mortgage attested by A, B and C — A admitting execution of document in his presence and also in presence of B and C — C admitting his signature but saying that he did not see the executants sign — Held, there was proper attestation.)

35. AIR 1920 Mad 717 (720) (DB) (Document on the face attested by two witnesses — One attesting witness examined — Requirement of S. 59 held satisfied.) ** ILR (1949) 1 Assam 150 (156) (DB) (The question does not arise until it is proved that the mortgage was effected as required by S. 59.) ** AIR 1986 Madh Pra 215 (217) : 1986 Jab LJ 622.

36. AIR 1952 Cal 7 (8) : ILR (1953) 1 Cal 120 (DB) (Suit on mortgage — Defence admitting execution but denying due attestation — Issue raised — Mere marking of document as exhibit does not absolve plaintiff from proving attestation.) ** AIR 1936 All 169 (170) (DB) ** AIR 1927 Mad 143 (144) (No issue was framed — Court took the question of attestation under its inherent jurisdiction as the question is such as goes to the root of the subject-matter.) ** AIR 1921 Cal 276 (276) (DB) (Validity and the attestation of a mortgage deed are two different questions.) ** AIR 1919 Mad 469 (470) (DB) ** AIR 1918 Mad 564 (564) (DB).

[**See also** AIR 1956 Bom 65 (68) : ILR (1955) Bom 999 (DB) (Where a certified copy of a

bond and execution is not specifically denied due attestation has to be proved, if advantage is to be taken as a mortgage.(37) Where execution is specifically denied the fact that the attesting witness is not examined because he was won over is not sufficient to consider other evidence of execution and attestation to prove it (38) If it appears on the face of the document or in the evidence that the document is not validly attested by two witnesses as required by law, no decree can be given on the basis of such mortgage.(39) Despite admission of execution of mortgage it is incumbent to prove due attestation if the document is to be used as a mortgage (40) Where, however, there is no proof one way or the other about attestation and there is nothing to show on the face of the document or in the evidence that it has not been properly attested, in such cases the admission of execution would bring in operation the maxim *omnia rite acta praesumuntur* (all things are presumed to have been rightly done) and would be sufficient proof of the execution and the validity of the document (41) The undermentioned cases(42) holding that the admission of execution is proof of its validity also, notwithstanding that on the face of it the document has not been validly attested as required by law, are no longer good law.

Where a mortgage document is invalid for want of due attestation, the mortgagee can, under section 65 of the Contract Act, recover from the mortgagor any money which he may have advanced to him under the mortgage.(43)

A plea as to attestation of a mortgage deed raises a question of law and fact and hence it cannot be taken for the first time in the appellate Court (44) Where during the course of the trial, a

registered mortgage deed is produced, a presumption can be raised under S 60(2) of the Registration Act that the deed had been executed by the mortgagor No presumption can, however, be raised that the document was validly attested AIR 1945 Bom 319, Commented upon. AIR 1946 Bom 193, Approved.)]

37. (1967) 33 Cut LT 811.

38. AIR 1980 All 395 : 1980 All WC 358

39. **AIR 1925 PC 203 (204) : 5 Pat 58 : 52 Ind App 362, (Reversing** AIR 1922 Pat 70) ** (1903) 7 Cal WN 384 (385, 386) (DB).

40. (1967) 33 Cut LT 811

41. AIR 1923 Bom 90 (91, 92) 47 Bom 137 (DB) (Per Shah, Ag C. J , Crump, J , **Dissenting.**) ** AIR 1916 Nag 5 (9) · 13 Nag LR 121. (Provided the attestation is not denied.)

[See AIR 1936 Oudh 270 (272, 273) 12 Luck 109 (DB) (However the attestation was specifically denied in this case.)]

[**See also** AIR 1956 Mys 36 (37) ILR (1956) Mys 18 (Registered hypothecation deed bearing on face of it signature of mortgagor and attestation — Burden is on him who denies genuineness of execution or attestation to establish the contention) ** (1906) 2 Nag LR 10 (16).]

42. AIR 1919 Pat 411 (412) · 4 Pat LJ 511 (DB) ** (1911) 11 Ind Cas 850 (851) (Low Bur) (Mortgage attested by one witness — Execution admitted — Informality of mortgage not put in issue in first Court — Such issue cannot be raised in appeal)

43. **AIR 1918 Oudh 22 (23, 24) : 20 Oudh Cas 306 (DB).**

Also see S 68, Note 13.

44. 1926 Mad WN 639 (640, 641). (The point about the proper attestation cannot be said to be raised merely from the fact that the attestors were cross-examined on the point) ** AIR 1919 Cal 42 (43) (DB) (Valid attestation — Mixed question of law and fact — Plea of absence of valid attestation — Cannot be raised in appeal for first time)

[**See also** AIR 1919 Pat 195 (196) (DB) (It is mixed question of law and fact whether or not the evidence adduced by a mortgagee on whom the onus rests is sufficient to establish due compliance with S. 59.)]

party raises a plea that the attestation is not valid, the Court ought to frame a specific issue, allow both the parties an opportunity to adduce evidence on the question and then decide it (45)

Execution of mortgage can be challenged by any person This right is not confined only to parties to mortgage(46)

8A. Proof of attested document.

See Note 8.

9. Attestation and estoppel.

The mere attestation of a document by a relative of the executant of a document does not necessarily import concurrence (1) It might, no doubt, be shown by other evidence that when he became an attesting witness he fully understood what the transaction was, and that he was a concurring party to it, but from the mere subscription of his name that inference does not necessarily arise.(2)

Attestation by itself would neither create estoppel nor imply consent, it does not involve the attestor in any knowledge of the contents of the deed or affect him with notice of its provisions (3) In *Pandurang Krishnaji v. Markandeva Tukaram*(4) their Lordships of the Privy Council said

> "Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed It conveys neither directly nor by implication any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects"

Where, however, in addition to the fact that a person attested the deed, there is evidence to show that he consented to and acquiesced in the execution of the document, it is a legitimate inference to draw from such evidence that he not only witnessed the execution of the document but also consented to the transaction.(5) See also the undermentioned case (6)

10. Registration of memo accompanying deposit of title deeds.

See Note 39 on S. 58.

11. Material alteration of mortgage document — Effect.

The rule relating to the effect of material alterations in a deed made after its execution by or

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45. AIR 1916 Mad 479 (479) (DB)

46. AIR 1985 Ker 163 (165) : (1988) 2 Ker LJ 805

Section 59 — Note 9

1. **(1869) 13 Moo Ind App 209 (229) : 12 Suth WRPC 47 (50)** ** AIR 1915 All 255 (256) 37 All 350 (DB)

   [See also AIR 1942 All 331 (332) (DB) (Adult male reversioner signing sale deed as a witness — Inference of consent to transaction cannot be drawn)]

2. **(1869) 13 Moo Ind App 209 (299) : 12 Suth WRPC 47 (PC).**

   [See also AIR 1926 Oudh 131 (132) ** AIR 1915 All 255 (256) 37 All 350 (DB) ** (1899) 3 Cal WN 207 (208) (DB). (Sale by a widow).]

3. **AIR 1928 PC 20 (23) ** AIR 1916 PC 110 (112) : 43 Ind App 249** AIR 1933 Lah 551 (553) . 14 Lah 369 (DB) ** AIR 1926 Cal 224 (226) 26 Cri LJ 1574 (DB) ** AIR 1940 Rang 126 (128) 1940 Rang LR 180 (DB) ** (1793) 5 RR 719 (720) 1 Esp 57 Harding v Crithorn, (Case of lease) ** AIR 1926 Oudh 131 (132) ** AIR 1926 Mad 609 (612) (DB) ** (1888) 1 CPLR 67 (68). (Sale deed.)**

   [See also (1912) 16 Ind Cas 943 (945) (DB) (Mad).]

   Also see S. 3, Note 31 and S. 41, Note 13.

4. **AIR 1922 PC 20 (22) : 49 Cal 334 : 49 Ind App 16 : 18 Nag LR 1.**

5. **AIR 1928 PC 20 (23).**

6. (1913) 20 Ind Cas 291 (293) (DB) (Lah).

with the consent of any party thereto, as it prevails in English Courts, applies to Indian cases(1) and is briefly summarised by their Lordships of the Privy Council in *Nathu Lal v. Gomit Kuar*(2) as follows :

"If an alteration (by erasure, interlineation or otherwise) is made in a material part of a deed after its execution, by or with the consent of any party thereto or person entitled thereunder, but without the consent of the party or parties liable thereunder, the deed is thereby made void.

"The avoidance however, is not *ab initio* or so as to nullify any conveyancing effect which the deed had already had, but only operates as from the time of such alteration and so as to prevent the person who has made or authorised the alteration and those claiming under him, from putting the deed in suit to enforce, against any party bound thereby who did not consent to the alteration, any obligation, covenant or promise thereby undertaken or made.

"A material alteration is one which varies the rights, liabilities, or legal position of the parties ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally executed

"The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed The avoidance of the deed is not retrospective and does not revest or reconvey and estate or interest in property which passed under it And the deed may be put in evidence to prove that such estate or interest so passed or for any other purpose than to maintain an action to enforce some agreement therein contained."

See also the undermentioned cases.(3)

Section 59 — Note 11

1. (1901) 25 Bom 616 (620) (DB).
2. **AIR 1940 PC 160 (163) : 67 Ind App 318 : ILR (1940) All 625 : ILR (1940) Kar 287.**
3. **(1900) 23 Mad 137 (143, 144) (FB) ** (1885) 9 Mad 399 (413) (FB).** (Suit on bond — Plaintiff found to have altered bond before registration as regards the payment of instalments and rate of interest — Held by the Full Bench that the suit must be dismissed) ** AIR 1934 Lah 543 (544) (DB) (Alteration — Mortgagor admitting interest at simple rate — Document altered as to compound interest — Interest at simple rate should not be disallowed) ** AIR 1926 Mad 1060 (1061) (DB) (Attestation Survey numbers interpolated after attestation — Addition in fact unnecessary — Validity of document is not affected) ** AIR 1921 Cal 435 (443) (DB) (What is material alteration stated — Alteration held not material in this case) ** AIR 1920 Mad 596 (598) 43 Mad 405 (DB) (With the consent and knowledge of the mortgagor and in the presence of the attesting witnesses an item was put in the mortgage to avoid delay in registration and to get the document registered in an office near the place where the mortgagor was living — *Held*, there was a valid mortgage as regards the item and that the deed must be deemed to have been properly executed and attested with regard to that item) ** AIR 1920 Mad 974 (976) (DB) (Unless there is any contrary evidence, and any note by the Registrar about it any alteration or interpolation in a document is presumed to have been made before its registration) ** (1886) 10 Bom 487 (492) (DB). (Material alteration with consent of all parties need not vitiate the deed) ** AIR 1916 Pat 325 (326) (DB) (Mere addition of name as executant who did not sign the document is not material alteration as would render the document void) ** AIR 1914 Lah 418 (418) (Suit based on document materially altered so as to cast liability on a party should be dismissed) ** (1906) 33 Cal 812 (817, 818) (DB) (Suit on a simple money bond — Adding name of the defendant as an executant is material alteration and vitiates the bond) ** 1900 Pun Re No 91, pp 377 (378) (DB) (Addition of a name as one of the executants is a material alteration which invalidates the document) ** (1891) 15 Bom 44 (45) (DB) (Affixing of signature of attesting witness after execution is not material alteration) ** (1891) 15 Mad 70 (72) (DB) (Alteration not material — Not altering situation in which parties stood — Deed not invalid.) ** (1885) 12 Cal 313 (316) (DB) (Material alteration vitiates the bond — Mere adding names of witnesses to a deed which does not require witnesses is not a material alteration) ** (1883) 7 Bom 418 (419)

In absence of the mortgage deed providing for interest a subsequent letter agreeing to pay interest in respect of immovable property involving worth more than Rs. 100/- is not admissible for want of registration and interest cannot be claimed (4)

12. Mortgage by company.

Where a company executes a mortgage of its property the mortgage must, in order to bind the property, be not only registered under the Registration Act as required by this section, but must also be registered under S. 125 of the Companies Act, 1956. However, the want of the latter kind of registration does not render the mortgage wholly invalid, it is valid as an admission of *debt* but, as against a creditor or liquidator, it cannot create a valid charge on the property (1)

Even if a mortgage created by a limited company is valid according to the T. P. Act but is not registered under the Companies Act 1956, the position of the creditor would be that of an unsecured creditor. But if the mortgage is valid being in violation of Rule 94(a) of the Defence of India Rules 1939 the question of registration does not arise.(2)

13. Registered document when takes effect.

See section 47 of the Registration Act. A registered document speaks from the date of its execution and not from the date of its registration (1) Under S. 54 of the Provincial Insolvency Act,

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(DB) (Addition of name of attesting witness to instrument not required to be attested is a material alteration.) ** (1882) 4 All 62 (64) (DB) (Suit on an instrument which was intentionally altered in most important and material particulars — Plaintiff held not entitled to relief on the instrument.) ** (1881) 7 Cal 616 (619) (DB) (Suit on a bond — Material alteration by the plaintiff creditor — Plaintiff not entitled to a decree.) ** (1868) 3 Mad HCR 247 (249) (DB) (The altered document might be used as evidence of the debt between the parties and also of the creation of the charge upon the property hypothecated — It lies upon the parties who seek to enforce an altered instrument to show the circumstances under which the alteration took place.) ** (1913) 21 Ind Cas 79 (80, 81) (DB) (Cal) (Addition of a clause for payment of compound interest is a material alteration and vitiates the deed.) ** (1910) 6 Nag LR 1 (2) (Instruments which produce their full effect at the moment of execution, though subsequently altered, may be admitted in evidence for proving vested rights created by them.) ** (1902) 71 LJ Ch 279 (281) 86 LT 180 (1902) 1 Ch 451 In re Howgate and Osborn's Contract ** (1859) 28 LJ Ex 257 (258) 4 H & N 519 118 RR 589 Reynolds v. Hall ** (1863) 55 ER 286 (287) 33 Beav 52 9 LT (NS) 110 11 WR (Eng) 1092 140 RR 14 Adsetts v. Hives (Formal alterations carrying out intention of parties do not render deed void.) ** (1905) 74 LJ Ch 697 (698) 93 LT 157 54 WR (Eng) 156 (1905) 2 Ch 455 Crediton v. Exeter (Alteration not of substance does not render deed void.) ** (1821) 106 ER 1082 (1084) 4 B & Ald 672 Doe v. Bingham (Immaterial alteration does not invalidate deed.) ** (1891) 1 Mad LJ 388 (390) (DB) (Do.) ** 1901 Pun LR No. 40 P. 78 (79). (Do.)

4. AIR 1974 Bom 46 (48) : ILR (1974) Bom 1011.

Section 59 — Note 12

1. AIR 1930 PC 66 (75) : 57 Ind App 76.
2. AIR 1969 Cal 578 (590).

Section 59 — Note 13

1. AIR 1957 Ker 117 (119) (Mortgage deed — No indication that it is to be effective when consideration is paid — It is effective from date of execution and not from that of registration.) ** AIR 1951 Pat 566 (567) : 30 Pat 391 (DB) (Mortgage deed — Takes effect from execution on registration — Delivery of deed to mortgagee not essential.) ** AIR 1942 Oudh 201 (202) ** AIR 1934 Mad 637 (638) 58 Mad 166 (DB) ** AIR 1933 Cal 212 (213) (DB) (An attachment of the property after the execution of the mortgage deed but before its registration cannot affect the mortgage lien.) ** AIR 1933 Mad 185 (187) ** AIR 1917 Mad 364 (365) (DB) ** (1904) 29 Bom 46 (51) (DB)

Also see S. 48, Note 8.

1920, the three months's time, however, runs from the date of the registration and not from the date of its execution.(2) In the Punjab where the Transfer of Property Act did not apply, it was held that the three months' time for an application under S. 9 of the Insolvency Act runs from the date of the execution and not the date of the registration of the document.(3)

14. Unregistered bond — Admissibility in evidence.

In cases arising before the amendment of S. 49 of the Registration Act by Act XXI of 1929 it was held that an unregistered mortgage document was not admissible in evidence where the mortgage itself was sought to be thereby given effect to e.g., to prove a right of redemption(1) or to prove a right to damages for breach of the mortgtage contract by failure to secure possession to the mortgagee (2) But there was a difference of opinion as to whether an unregistered mortgage document could be used as evidence for any other purpose.

(A) To prove personal covenant to pay.

The general trend of opinion was that the document could be used as evidence to prove the personal covenant to pay contained in the document — one class of cases(3) resting this view on the ground that such a covenant was *divisible* from the hypothecation part of the document, and did not by itself require registraton, and another class of cases(4) resting the view on the ground that such a covenant did not *affect* immovable property, independent of any question whether the covenant was divisible or not from the hypothecation part of the document. A contrary opinion was

2. AIR 1934 Mad 637 (638) 58 Mad 166 (DB) ** AIR 1933 Mad 185 (187)

Also see S 54, Note 17.

3. AIR 1933 Lah 821 (822).

Section 59 — Note 14

1. AIR 1927 Lah 57 (58).

[**But see** (1921) 63 Ind Cas 400 (400) (DB) (Pat) (Submitted not correct.)]

2. (1905) 1 Nag LR 47 (48).

3. ILR (1969) 2 Cal 503 (508) ** AIR 1968 Assam 10 (11, 12) ILR (1967) 19 Assam 247 ** (1898) 2 Cal WN 591 (593) (DB) ** 1883 Pun Re No. 10, p 33 (35) (DB) ** (1882) 11 Cal LR 166 (167) (DB) ** (1881) 4 All 3 (5, 6) (DB) (It would also be admissible in proof of the fact that the debt is not exigible until after the expiry of certain period from the date of the loan) ** 1881 Pun Re No 80, p 176 (177) (DB) ** 1880 Pun Re No. 88, p 210 (212) (DB) ** 1874 Pun Re No 40, p. 157 (157) (DB) ** (1910) 8 Ind Cas 985 (986) (Low Bur).

4. AIR 1925 Lah 356 (356) (1 Ind Cas 1 (FB), Followed.) ** **(1909) 32 Mad 410 (413, 414) (FB)** ** **(1882) 9 Cal 520 (525) (FB)** ** AIR 1931 Mad 124 (128) (DB) ** AIR 1930 Rang 142 (142) ** AIR 1923 Rang 15 (16) ** AIR 1921 Low Bur 34 (36) · 11 Low Bur Rul 148 (DB) ** AIR 1921 Oudh 203 (203, 204) ** (1907) 4 Low Bur Rul 52 (53) ** (1906) 30 Mad 284 (288) (DB) ** (1902) 25 Mad 396 (398) (DB) (Assignment of mortgage not registered does not affect immovable property — But can operate as assignment of debt) 1893-1900 Low Bur Rul 124 ** (1899) 26 Cal 222 (225) (DB) ** (1895) 20 Bom 553 (557) (DB) ** (1891) 15 Mad 253 (254) (DB) ** (1872) 92 Low Bur Rul 195 (196) ** (1882) 5 Mad 119 (121) (DB) ** 1877 Bom PJ 309 (DB) ** (1875) 7 Mad HCR 296 (298) (DB) ** (1868) 9 Suth WR 111 (111) (DB) (Money bond in which land is pledged as mere collateral security is not compulsorily registrable — It does not affect immovable proerty and can, even if not registered, be received in evidence) ** (1870) 7 Bom HCR (AC) 1 (2) (DB) ** (1870) 4 Mad HCR 174 (175) (DB) ** (1869) 2 Beng LR (AC) 310 (311) (DB) (Bye-bilwafa deed of conditional sale) ** (1869) 6 Bom HCR 134 (137). (Operates as an acknowledgment for the time-barred debt) ** (1869) 1 NWPHCR 142 (143) (DB) ** (1868) 3 Agra 170 (170) (DB) ** (1868) 3 Agra 60 (63) ** (1911) 10 Ind Cas 748 (754) (Bom)

[**See also** (1874) 7 Mad HCR 348 (350) (DB).]

held in the undermentioned cases(5) that the covenant to pay cannot be separated from the other portions of the document and that, therefore, the document cannot be used in evidence to prove the covenant. Where the mortgage document did not contain any promise to pay the debt it was held in the cases noted below (6) that it could not to be used in evidence for any purpose

(B) To prove nature of possession.

In *Varada Pillai v Jeevarathnammal*(7) which was a case of gift, their Lordships of the Privy Council held that though unregistered, the document may be evidence to show the nature of a person's possession. In the undermentioned cases(8) of unregistered mortgage deeds, it has been held, similarly that such deeds may be received in evidence to show the nature of possession A contrary view was expressed in cases noted below (9)

(C) To prove the payment of consideration.

One view was that it could be used to prove payment of consideration (10) According to the Nagpur Court, a fact to be collateral must be *independent of and divisible* from the purpose to effect which the law requires registration, that the payment of consideration is not such a collateral fact and that therefore the document cannot be received in evidence to prove consideration (11)

(D) To prove delivery of possession.

An unregistered usufructuary mortgage was held inadmissible to prove delivery of possession to the mortgage on the ground that so to use it would be to affect the land (12)

(E) Effect of amendment of S. 49, Registration Act, by Act 21 of 1929.

Act XXI of 1929 has now amended S 49 of the Registration Act by the addition of the following Proviso :

"Provided that an unregistered document affecting immovable property and required by this Act or by the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a

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5. **(1869) 4 Mad HCR 378 (384) (FB).** (Per Scotland C J) ** AIR 1917 Mad 773 (774) 40 Mad 547 (DB) (Not admissible even for a collateral purpose (e g) to prove a covenant for the payment of compound interest.)

6. 1880 Pun Re No 89, p 213 (214) (DB) ** 1880 Pun Re No 60 p 140 (141) (DB)

7. **AIR 1919 PC 44 (47) : 43 Mad 244 : 46 Ind App 285.**

8. AIR 1947 Lah 335 (338) (Deed in nature of mortgage giving right to mortgagor to redeem requires registration — It cannot be used in suit for redemption — It can, however be used to explain mortgagee's possession) ** 1937 Rang LR 442 (443) (Unregistered usufructuary mortgage — Suit for delivery of possession on repayment of amount borrowed — Unregistered mortgage held admissible to prove nature of defendant's possession) ** AIR 1935 All 155 (155) ** AIR 1931 Rang 40 (44) 8 Rang 556 (DB) ** AIR 1927 Mad 92 (93) ** AIR 1927 All 311 (314) (AIR 1919 PC 44 Foll) ** AIR 1924 All 837 (837) ** AIR 1924 Mad 292 (296) : 47 Mad 203 (DB) ** (1912) 17 Ind Cas 987 (989) (DB) (Mad) (An unregistered document can be admitted to prove the circumstances in which the property came to be in possession — Per Abdur Rahim J , Miller, J , contra)

   [See also AIR 1921 Mad 410 (2) (412) : 44 Mad 946 (DB)]

9. AIR 1929 Nag 115 (116) ** AIR 1928 Bom 484 (487) 52 Bom 875 (DB) (Cannot be used to show quantum of interest of person in possession.)

10. (1909) 2 Ind Cas 516 (516, 517) (All) (Confirmed in 5 Ind Cas 519) ** (1912) 16 Ind Cas 125 (126) (Lah).

    [See also (1907) 9 Bom LR 393 (399) (DB) (Unregistered mortgage bond held admissible to show that the consideration for the bond was different from one alleged in the deed itself.)]

11. AIR 1929 Nag 115 (116).

12. AIR 1925 Oudh 628 (628).

suit for specific performance under chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of S. 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction and required to be effected by registered instrument."

It is now clear that while an unregistered mortgage cannot be received in evidence for purposes which involve the giving effect to the mortgage itself as, for example, to prove a *right of redemption*(**13**) or to prove the terms of the mortgage or true nature of transaction(**14**) it may be used to prove "collateral transactions not required to be effected by a registered instrument"(**15**) According to the High Court of Madras the words "transaction affected such property" in S 49 of the Registration Act mean "transaction purporting to create, declare, assign, limit or extinguish a right, title or interest in immoveable property" and transactions not falling within this description are collateral transactions (**16**) Thus, an unregistered mortgage may be received in evidence to prove a personal covenant to pay,(**17**) or an acknowledgment of the existence of another mort-

13. **AIR 1941 Rang 261 (262) : 1941 Rang LR 706 (FB)** ** AIR 1941 Rang 234 (235) 1941 Rang LR 309 (DB) ** AIR 1938 Pat 479 (480)

[**See also** AIR 1959 J and K 107 (109) (DB) (The term 'mortgage' in J and K Restitution of Mortgaged Properties Act, 2003, has the same meaning as in the T P Act and the provisions of the former Act do not apply to oral mortgages or mortgages not executed in accordance with S 59 of the T P Act) ** **AIR 1958 Ker 377 (379, 380) : ILR (1958) Ker 992 (FB).** (Unregistered security bond in Form No 3 of App G of Civil P.C. — Does not affect immovable property comprised therein.)]

14. 1962 Mys LJ (Supp) 534 (539) (DB) (Whereas S 92, Evidence Act, may be said to lay down only a rule of evidence S. 49, Registration Act, actually renders a transaction of the type described by it totally ineffective with the result that even if the parties may have clearly intended to enter into a particular transaction (in this case, mortgage by conditional sale), the section prevents them from effectuating their intention or achieving their purpose) ** AIR 1957 Raj 229 (301) ** AIR 1955 Hyd 179 (183) ILR (1955) Hyd 440 (DB) ** 1955 Mad WN 75 (77).

[**See also** AIR 1955 Vind Pra 41 (42). (Possessory mortgage for Rs 28/- by means of unregistered deed — Unregistered deed not produced — No secondary evidence adduced — Terms of contract cannot be proved by oral evidence — Whether transaction was mortgage was also a term of contract — Factum of mortgage cannot be proved by oral evidence, when the terms were reduced to writing) ** AIR 1959 Punj 609 (610) (Unregistered mortgage deed — Factum and not terms can be proved by independent evidence like jamabandi entries)]

15. AIR 1955 Hyd 179 (183) ILR (1955) Hyd 440 (DB) (When a transaction may be considered collateral, explained — Agreement of reconveyance putforth for converting a sale into a mortgage — Not a collateral transaction to be admissible in evidence without registration) ** AIR 1953 Bom 50 (56) : ILR (1953) Bom 339 (DB) (Meaning of collateral transaction explained — Partition i.e. severance of joint status held to be collateral transaction.)

[**See also** AIR 1956 Madh Bha 117 (118) (Mortgage deed unstamped and unregistered — Effect — Court may determine its admissibility for collateral purposes on payment of duty and penalty under Stamp Act.)]

16. AIR 1932 Mad 734 (736, 737) : 56 Mad 169 (DB).

17. AIR 1968 Assam 10 (12). (When it is severable from other parts of document) ** AIR 1964 Pat 241 (243) (DB) (In the case of a simple mortgage bond, an unregistered mortgage, though invalid as a mortgage, may be used to prove the debt) ** AIR 1957 Raj 299 (301) ** AIR 1952 Pepsu 56 (57) ** AIR 1944 Oudh 264 (265) (DB) ** AIR 1934 Rang 196 (197). (As proof of the loan it is relevant and extremely cogent evidence) ** AIR 1933 Cal 786 (787). (An unregistered document cannot be used in any legal proceedings to bring about indirectly the effect which it would have had if registered) ** AIR 1932 Mad 734 (737) : 56 Mad 169 (DB).

gage(**18**) or to prove the nature of a person's possession(**19**) or to determine the quantum of interest for which the mortgagee prescribed.(**20**) See also AIR Commenary on Limitation Act, 1963, 7th (1997), Edition Arts. 64 and 65. Notes 60 and 95 for full discussion

15. Effect of trasaction where mortgage is not registered or registration is invalid.

A mortgage, which is registered but the registration of which is invalid, cannot operate as a charge,(**1**) though it may be used in evidence for collateral purposes such as to prove the nature and character of the possession that might have been delivered in pursuance of the transaction(**2**) or to prove the debt by reason of the personal covenant to pay recited in the document (**3**) Where a mortgage document, executed in consideration of two prior mortgages, is not validly registered, the mortgagee can fall back upon the two prior mortgages (**4**)

[**See** AIR 1959 Madh Pra 178 (181) (Unregistered mortgage — Mortgagee to remain in possession and enjoy rents and profits in lieu of interest — Mortgagor promising to pay principal after two years and in default mortgagee to continue in possession as before till redemption — Deed held did not import personal covenant to pay — Bond held not admissible in evidence.)]

[**See also AIR 1967 Andh Pra 257 (264) (FB).** (Case of charge.) ** AIR 1964 Orissa 35 (36) (Unregistered usufructuary mortgage — Mortgagor forcibly taking back possession — Mortgagee cannot sue for recovery of possession — Suit to recover debt treating the deed as simple money bond held governed by Art. 57 or 66 Limitation Act (1908).) ** 1961 MPLJ 1225 (1228) (Unregistered deed embodying mortgage transaction for Rs.917 — Mortgagee to enjoy usufruct of property till stipulated period at the end of which loan to be repaid — On failure mortgagee to secure repayment by sale of property through Court — Borrowers held did not undertake personal liability to pay loan — Deed held could not be enforced as mortgage bond or money bond.) ** 1960 MPLJ 673 (674) (Unregistered simple mortgage — May operate at the most as a bond.) ** AIR 1940 Lah 486 (491, 492) ILR (1941) Lah 601 (DB). (**It is a divisible and distinct transaction.**)]

[**But see** AIR 1956 Sau 27 (28).]

18. AIR 1938 Mad 865 (875) (DB).

19. **AIR 1960 Raj 1 (7) : ILR (1959) 9 Raj 1121 (SB) ** AIR 1941 Rang 261 (262) : 1941 Rang LR 706 (FB)** 1955 Raj LW 190 (192) ** AIR 1950 Orissa 213 (216) ILR (1950) Cut 50 (DB) ** AIR 1935 All 155 (155)**

20. **AIR 1960 Raj 1 (8, 9) : ILR (1959) 9 Raj 1121 (SB).** (AIR 1958 Raj 102 **Overruled** and AIR 1938 Pat 479, **Dissented from.**) ** AIR 1959 Pat 164 (165) (DB) (Observations in AIR 1938 Pat 479 **Held obiter** and not correct.) ** AIR 1957 Pat 245 (247) (DB) (AIR 1938 Pat 479, **Held obiter** and not correct. AIR 1950 Orissa 213 Foll.) ** AIR 1950 Orissa 213 (216) ILR (1950) Cut 50 (DB) (Unregistered document can be referred to for determining the quantum of interest for which the defendant presented under invalid mortgage — The document is not used as the source of mortgagee's title the title itself having been acquired by adverse possession and prescription — AIR 1938 Pat 479 **Not Foll.**)

[**But see** AIR 1938 Pat 479 (480) (DB).]

Section 59 — Note 15

1. AIR 1925 Rang 55 (58) 2 Rang 429 (DB) ** AIR 1925 Rang 1 (2) 2 Rang 313 (DB) ** **AIR 1914 Nag 32 (36) : 10 Nag LR 81**

Also see Note 8 and S. 100, Note 14.

2. AIR 1927 Mad 92 (93) (Document is admissible to prove what the mortgage is prescribing for.)

3. AIR 1937 Cal 347 (350) (DB) ** AIR 1923 Mad 447 (448) 46 Mad 435 (DB) (Article 116, Limitation Act, 1908, applies.) ** AIR 1921 Low Bur 34 (36) 11 Low Bur Rul 148 **(DB) ** (1907) 4 Low Bur Rul 88 (93) (DB).**

4. **(1896) 19 Mad 160 (161) (DB).**

It was held in the undermentioned case(5) that an invalidly registered usufructuary mortgage document cannot be used in evidence to recover money under S. 68 inasmuch as such a claim involves the proof of the mortgage as a mortgage. The Rajasthan High Court has in the following case,(6) held that the document cannot be admitted in evidence even for the limited purpose of proving the receipt of consideration and the plaintiff can recover the money only if he can prove the same by other evidence. It is conceived that the document may be used to show that consideration passed under the document, and to recover the amount under S 65 of the Contract Act.(7) It has also been held in the undermentioned case(8) that the mortgagee can base his claim under S. 70 of the Contract Act. The following case(9) has held that the suit to recover back the money is a suit by way of damages for breach of contract.

An unregistered mortgage deed is inadmissible in evidence to prove the terms of mortgage, but it is definitely admissible to establish the nature and character of possession of mortgagee. The possession of mortgagee under an unregistered mortgage deed is permissive. Where the mortgagor cannot regain possession on basis of oral mortgage for want of registration, it is open to him, to recover possession on the strength of his title.(10)

Where in a redemption suit the defendant admits his possession as mortgagee and is willing to restore the possession on payment of the mortgage money the question of the inadmissibility of the mortgage deed due to its non-registration does not arise and the redemption suit is maintainable.(11) See also Notes 4, 14. A mortgage deed which does not conform to the requirements of this section in the matter of registration and attestation, is not liable to stamp duty.(12)

Normally a person in possession of property under an invalid transfer starts prescribing from the date of execution of the transfer, but he cannot prescribe a higher title than what is intended to be transferred. In this case it was held that such person will be deemed only a mortgagee.(13)

If the transaction is a mortgage by conditional sale and the mortgagee remains in possession for more than 12 years pleading adverse possession what he acquires is only the right as a mortgage and cannot resist suit for possession by the mortgagor though the mortgage is invalid for want of registration.(14)

A suit for redemption is not maintainable on the basis of an invalid mortgage (15)

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5. AIR 1937 All 711 (713, 714).
6. AIR 1963 Raj 129 (132, 133) · ILR (1963) 13 Raj 334.
7. See AIR 1955 J & K 20 (22) (Mortgage entered into under mistaken notion of law — Legal formalities not fulfilled — Mortgagor's suit for possession — S. 65, Contract Act applies and the mortgagor would be bound to pay back consideration received by him before restoration of possession to him.)
8. AIR 1956 Sau 27 (29).
9. (1858) 24 Cut LT 447 (449, 450).
10. 2002 (1) MPLJ 16 (18).
11. AIR 1947 Lah 335 (359) (AIR 1928 Lah 662 and AIR 1927 Mad 92, Rel. on — Analogy between position of mortgagor and mortgagee under unregistered mortgage deed and that of lessor and lessee and vendor and vendee under unregistered lease and sale deed respectively pointed out — AIR 1941 Lah 407 (FB), Ref.)
12. **AIR 1953 Mad 764 (766) : ILR (1953) Mad 566 (FB)** ** AIR 1973 Madh Pra 172 (174) · 1973 MPLJ 175
13. AIR 1972 J & K 81 (84).
14. AIR 1972 Guj 204 (206, 207) : ILR (1972) Guj 133.
15. 1971 BLJR 668 (671).

[A][59A. REFERENCES TO MORTGAGORS AND MORTGAGEES TO INCLUDE PERSONS DERIVING TITLE FROM THEM.— Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively]

[A] Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S 21

Synopsis

1. Analogous law.
2. Scope of the section.
3. "Person deriving title from them respectively."
4. "Unless otherwise—expressly provided."

1. Analogous law.

The words "mortgagor" and "mortgagee" are defined in S 205, sub-sec (1) (xvi) of the Law of Property Act, 1925) (15 Geo. V Chap 20), as follows :

> " 'Mortgagor' includes any person from time to time deriving title under the original mortgagor or entitled to redeem a mortgage according to his estate, interest or right in the mortgaged property. 'mortgagee' includes a chargee by way of legal mortgage and any person from time to time deriving title under the original mortgagee."

2. Scope of the section.

This section was newly added by the amending Act of 1929 But even before this section was added, it was generally held that the words "mortgagor" and "mortgagee" in the several sections of the Act would include their representatives(1) though in some cases difficulty was felt in giving this interpretation to these words, e g , in S 68, cl (a) The section has been enacted to avoid any such difficulty(2) and is only statutory recognition of what had been already laid down as the law (3) In their Report in the Special Committee observed :

> "Whether the words 'mortgagor' and 'mortgagee' as used in the different sections in this chapter include all persons deriving title from them has given rise to some difficulties (see 39 Ind App 7 and ILR 21 All 223) In order to make this clear, we propose the addition of section 59A "

3. "Persons deriving title from them respectively."

This section was added by the T P (Amendment) Act, 1929 The effect of the section is to definte the words "mortgagor" and "mortgagee" used in Chapter IV of the Act as including within their scope persons deriving title from them respectively (1) Thus the word "mortgagor" will in-

Section 59-A — Note 2

1. AIR 1932 Pat 273 (274) (DB) (Word 'mortgagor' in S 68 refers also to heirs or assignees — Case under old clause (c)) ** AIR 1991 Ker 66 (69) ** AIR 1929 Lah 207 (208) (Mortgagor includes persons deriving title from him.)
2. AIR 1936 Oudh 47 (49) (DB)
3. AIR 1954 Mad 650 (656) (DB)

Section 59-A — Note 3

1. **AIR 1967 SC 1440 (1445).** (Execution purchaser of whole or part of equity of redemption has right to redeem) ** AIR 1984 (NOC) 297 (All) ** 1971 All WR (HC) 219 (221) (The words "be deemed to include references to persons deriving title from them respectively" cover cases only of succession by inheritance or by transfer inter vivos ** ILR (1957) Bom 874 (878, 879) (DB) (The term 'mortgagee in possession' includes a tenant from him.) ** 1959 Ker LJ 1462 (1463).

   [See also AIR 1963 Guj 280 (282) (Section 59A cannot be applied while interpreting provisions of S A D R Act) ** 1958 All LJ 591 (592) (Definition relied on to construe the term 'mortgagor' in S 14 of U P Z A and L.R Act, 1950)]

clude the subsequent purchaser of the mortgaged property(2) and the word "mortgagee" will include a purchaser of the mortgagee rights.(3)

A right of redemption does not remain independent of the property itself A sale of property that too to a stranger who had nothing to do with the mortgage and who was not a party to the same, would convey complete title to that property to him and once the title to that property goes, the enquity of redemption shall also accompany the property, the stranger would then be in a position to substitute himself in the place of plaintiff mortgagor and to step in his shoes.(4)

It has been held by the High Court of Allahabad that the section draws a distiction between the two categories of mortgagors and mortgagees and that the intention of the section is that the persons who derive title from them are to be persons who derive title *as a mortgagor or as a mortgagee* In other words the word "mortgagor" would not include a mortgagee from him, but would include persons succeeding by inheritance or by will or by sale or by auction-sale to the right of the equity of redemption held by the mortgagor (5) A similar view has been taken also by the Oudh Court and the Calcutta and Madras High Courts (6) It has been held by the High Court of Rangoon that the word "mortgagee" would not include a mortgagee from the mortgagee (i.e , a sub-mortgagee (7) In a case arising before the section was added it was, however, held by the High Court of Madras that the word "mortgagee" in Section 60 would include his sub-mortgagee.(8) In a case decided by that Court after the amendment it has been held that a mortgagee for the purpose of redemption would include all persons who derive title from himand it is immaterial whether that title is derived by sale *in invitum* or by private treaty or whether it is by act of parties or by operation

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2. **AIR 1953 SC 370 (372).** (Liability of a purchaser of equity of redemption to pay the mortgage debt undoubtedly arises on the date of his purchase but the debt itself which has its origin in the mortgage bond did exist from before his purchase) ** AIR 1988 Cal 131 (133) (1986) 2 Cal HN 202 (Suit against mortgagor and subsequent purchaser of mortgage security Mortgagor dying suit can continue against purchaser of mortgagor security) ** (1962) 3 Guj LR 1002 (1004) (Purchaser not personally liable Not a debtor Cannot apply for mortgage accounts under S 30 (1) of Bombay Money Lenders Act, 1947) ** AIR 1961 Andh Pra 183 (185) (DB) (Simple money decree-holder purchasing equity of redemption in execution of his decree against the mortgagor cannot question validity of mortgage) **1959 Ker LJ 1462 (1463) (Usufructuary mortgage by agriculturist before commencement of Kerala Act 31 of 1958 — Purchaser from mortgagor held entitled to apply under S 11 (2) for redemption) ** AIR 1946 Nag 226 (227) ILR (1946) Nag 297 (30 Mad 67, **Held no longer good law;** AIR 1939 Nag 256, Rel on)

   [**See also** AIR 1960 Bom 247 (248) (Purchaser not personally liable – Not a debtor within S 4 B A D R Act) **AIR 1958 Andh Pra 598 (601) (DB) (Purchaser of equity of redemption, if an agriculturist, can claim benefit of scaling down debt) ** AIR 1949 Ajmer 52 (54) (Purchaser from mortgagor can plead want of consideration) ** AIR 1939 Nag 256 (258) ILR (1940) Nag 63 (Mortgagor includes subsequent purchaser. AIR 1932 Pat 273 and AIR 1938 Oudh 210, Followed, AIR 1930 Nag 139 Held **overruled** by Section 59A) ** **AIR 1931 All 277 (289) : 53 All 334 (FB).** (Mortgagor includes auction-purchaser of mortgaged property.)]

3. AIR 1952 Bom 217 (219)

4. AIR 2001 Mad 14 (17) : 2000 (3) Mad LJ 745.

5. AIR 1939 All 190 (192) : ILR (1939) All 185 (DB).

   Also see S. 68, Note 8.

6. AIR 1965 Mad 142 (143) (Term 'mortgagor' in S. 69 does not cover a second mortgagee.) ** AIR 1948 Cal 250 (255) (DB) (Puisne mortgagee not included in term 'mortgagor' in S 72, Proviso) ** (1901) 4 Oudh Cas 100 (103) (DB). (Mortgagee is not a representative in interest of the mortgagor.)

7. AIR 1937 Rang 56 (58) (DB) (Nor 'mortgagor', a sub-mortgagor)

8. AIR 1927 Mad 703 (704).

of law (9) The High Court of Patna has also expressed a similar view.(10)

A person who succeeds to the right of a mortgagor by *survivorship* will be a "mortgagor" within the maning of this section (11) A purchaser of the equity of redemption, is included in the term 'mortgagor' and is entitled to redeem the usufructuary mortgage Application by purchaser from mortgagor for possession under Section 12 Bihar Money Lenders Act will be tenable (12) The execution purchaser of equity redemption is included in the term mortgagor (13) Where the equity of redemption vests in several persons either by devolution or transfer, such persons will be co mortgagors Though the word "mortgagor" would include such legal representatives under the terms of the section, it would not mean that the relationship between them *inter* se would not be that of co-mortgagors (14) A co-mortgagor is entitled to redeem mortgage on his own right (15) See also the undermentioned cases.(16)

See also S. 95, Note 7.

4. "Unless otherwise expressly provided."

It has been held by the High Court of Bombay that S 91 is a provision to the contrary in that it provides that "besides the mortgagor, the following persons are entitled to redeem" and at the same time includes among those persons such persons as derive title from the mortgagor (1)

Section 59A opens with the words "unless otherwise expressly provided" Since S 91 is a provision which provides 'otherwise' as contemplated by S 59-A a purchaser of equity of redemption from the mortgagor either in invitum or by private treaty would be a person who had an interest in the property mortgaged within the meaning of S 91(a), so that he will not be a mortgagor under first part of S. 91.(2)

[See also AIR 1924 Mad 453 (454, 455) (DB) (Word 'mortgagee' in S 83 includes his sub-mortgagee)]

9. AIR 1954 Mad 650 (656) : ILR (1954) Mad 664 (DB)

10. AIR 1957 Pat 136 (138) (Section 96 of the Trusts Act is controlled by and should be read subject to S 59A, T. P. Act.)

11. AIR 1934 Oudh 246 (249) : 9 Luck 657 (DB)

[See also AIR 1935 Oudh 213 (216) 10 Luck 481 (DB) (AIR 1934 Oudh 246 Followed.)]

Also see S. 61, Note 3.

12. AIR 1980 Pat 163 (168) 1980 BBCJ 54 (Purchaser of equity of redemption is also a mortgagor for the purposes of S 12 of the Bihar Money Lenders Act (22 of 1975))

13. AIR 1967 SC 1440 (1445) : (1968) 1 SCJ 68.

14. AIR 1936 Oudh 47 (49) (DB).

15. AIR 1990 (NOC) 73 : (1989) 2 Ker LJ 521.

16. (1941) 45 Cal WN 628 (631) ** AIR 1974 Mad 340 (342) (1974) 2 Mad LJ 9 (A and B were owners of each of half share in property 'A' usufructuarily mortgaged the entire property to 'X' from whom 'B' subsequently obtained an assignment of the mortgage Held, that 'B' was not a co-mortgagor with A and assignment could not be considered as redemption by 'B'.)

Section 59 A — Note 4

1. AIR 1942 Bom 98 (99) : ILR (1942) Bom 169 (DB).

[See also 1964 All LJ 244 (246) (Person not a mortgagor merely because he is entitled to redeem under S. 91.)]

Also see S. 91, Note 3 and S. 92, Note 13.

2. AIR 1976 Mad 44 (45) : (1975) 2 Mad LJ 454 (DB).

Similarly the proviso to S. 68(1), makes an express provision to the contrary that a transferee or legal representative of a mortgagor is not liable on the personal covenant contained in the mortgage.(3) (See S. 68, Note 8)

See also the undermentioned cases.(4)

Rights and Liabilities of Mortgagor

60. RIGHT OF MORTGAGOR TO REDEEM.— At any time after the principal money has become [A][due], the mortgagor has a right, on payment or tender, at a proper time and place of the mortgage-money, to require the mortgagee (a) to deliver [B][to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee], (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished :

Provided that the right conferred by this section has not been extinguished by act of the parties or by [C][decree] of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money

Redemption of portion of mortgaged property.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of a amount remaining due on the mortgage, except [D][only] where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

[A] Substituted for the word "payable" by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 22

[B] Substituted for the words "the mortgage-deed, if any, to the mortgagor, " ibid.

[C] Substituted for the word "order," ibid.

[D] Inserted, ibid.

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3. AIR 1946 Nag 226 (227) ** (1962) 3 Guj LR 1002 (1004) (Purchaser of equity of redemption of mortgage at Court sale — Not a debtor — Cannot apply for mortgage accounts under S. 30 (1) of Bombay Money Lenders Act, 1947.)

4. AIR 1960 Bom 247 (248) (Purchaser of mortgaged property keeping portion of consideration for payment to mortgagee — Purchaser not personally liable to pay mortgage debt — Not a debtor within S. 4, B A. D.R. Act)

Synopsis

1. Scope of the section.
2. Mortgage of movables — Redemption after default.
3. Law where Transfer of Property Act is not in force.
4. Right of redemption, what is.
5. Right of redemption, when arises.
6. Right of redemption, how exercised.
7. "Payment".
8. "Tender". See Note 5 on S. 84.
9. The payment or tender must be made at the proper time and place.
10. The payment or tender must be of the mortgage-money.
11. Assignment of mortgage — Equity between mortgagor and assignee.
12. The payment or tender must be made to the mortgagee.
13. "Mortgagee."
14. Payment or tender to one of several co-mortgagees.
15. Payment or tender to one of several co-heirs of a deceased mortgagee.
16. Delivery of deeds.
17. Delivery of possession.
18. Re-transfer of mortgaged property.
19. "Mortgaged property."
20. Right to registered acknowledgment.
21. Proof of redemption.
22. Extinguishment of right to redeem by act of parties.
23. Purchase by mortgagee at Court sale, if extinguishes right to redeem.
24. Subsequent mortgagee purchasing at sale held by prior mortgagee under his power of sale.
25. Mortgagee purchasing at sale held by himself under his power of sale.
26. Extinguishment of right to redeem by decree of Court.
27. Extinguishment of right of redemption by operation of law.
28. Clog on redemption — General.
29. Clog — Anomalous mortgage.
30. Stipulation giving mortgagee option to purchase the property.
31. Stipulation against redemption by persons other than the mortgagor.
32. Provision for a long period for redemption, if a clog.
33. Stipulation for collateral advantage.
34. Clog — Penalty in case of default.
35. Clog — Stipulation that mortgage will not be redeemed before paying other amounts due.
36. Hard terms — Not a clog.
37. Clog — Miscellaneous.
38. Clogging provisions not binding even on transferees of equity of redemption.
39. Clogging provisions, when should be impeached.
40. Provision for reasoanble notice before redemption.
41. Redemption piecemeal of mortgaged property — Last paragraph of the section.
42. Mortgagee allowing redemption of a share, if splits up security as to the rest.
43. Mortgagee releasing part of mortgaged property from mortgage, if splits up security.
44. Mortgagee acquiring share in property.
45. Undivided property — Mortgagee purchasing share — Redemption.
46. One co-mortgagor acquiring mortgagee right — Redemption by other.
47. One mortgagor — Two or more mortgagees — Redemption by paying one alone.
48. Suit for redemption.
49. Costs of mortgagee in suit for redemption.
50. Onus of proof in suit for redemption.
51. Suit for possession by mortgagee under terms of mortgage deed — Mortgagor, if can plead right of redemption in defence.
52. Limitation.
53. Adverse possession of equity of redemption.
54. Lis pendens.
55. Mortgage pending attachment.
56. Amendments in section not retrospective.

1. Scope of the section.

This section deals with the 'right' of redemption when it arises, how it is to be exercised and what are the rights of the mortgagor on redemption. The right of redemption is often referred to as

the "equity" or redemption, an expression borrowed from the English law but which is strictly inapplicable in this country.(1) In England, an English mortgagee became 'at law' the 'absolute owner' of the property conveyed after the time fixed for payment of the mortgage amount. But Courts of Equity regarded the transaction as merely a borrowing transaction and held that 'time was not of the essence of the contract.' The mortgagor was accordingly allowed to redeem even after the expiry of the period for payment. This was known as the 'equity' of redemption as the mortgagor was allowed in 'equity' to redeem, thought 'at law' he could not. In *Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd.*,(2) Lord Haldane, L.C., stated the history of the equity of redemption as follows

> "The reason for which a Court of Equity will set aside the legal title of a mortgagee and compel him to re-convey the land on being paid principal, interest and costs, is a very old one. It appears to owe its origin to the influence of the Church in the Courts of the early Chancellors. As early as the Council of the Lateran in 1178, we find according to Matthew Parie (Historia Major at pages 114-115), that famous assembly of ecclesiastics condemning usurers, and laying down that when a creditor had been paid his debt he should restore his pledge. It was, therefore, not surprising that the Court of Chancery should, at an early date, have began to exercise jurisdiction "in personam" over mortgagees. This jurisdiction was merely a special application of a mere general power to relieve against penalties and to mould them into mere securities. The case of the Common Law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money which he had advanced to the feoffor was repaid on a date and at a place named, the fee-simple should revest in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land for ever. What made the hardship on the debtor a glaring one was that the debts still remained unpaid and could be recovered from the feoffor, notwithstanding that he had actually forfeited the land to his mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty, by compelling the creditor to use his legal title as a mere security."

The equity of redemption, given by Courts of Equity was, however, regarded as an estate in land which could be devised, granted, etc., and of which there may be seisin (3)

The English doctrine of the equity of redemption was unknown to the ancient law of India. As was observed by their Lordships of the Privy Council in *Pattabhiramier v. Vencatarow Naicken* (4)

> "What is known in the law of England as 'the equity of redemption' depends on the doctrine established by Courts of Equity that the time stipulated in the mortgage deed is not of the essence of the contract. Such a doctrine was unknown to the ancient law of India."

Accordingly, in a mortgage by conditional sale, and in all other mortgages containing a stipulation that on default of payment within the time fixed, the mortgagee was to become the owner, the rule was that after the time fixed for redemption had passed, the mortgagee became the full owner and the mortgagor lost his property.(5)

Section 60 — Note 1

1. **AIR 1959 Pat 153 (155) : ILR 37 Pat 157 (FB).**

   [See (1901) 14 CPLR 177 (179) (In India the distinction between legal and equitable estates is not recognized — Despite the mortgage, ownership of the estate remains with the mortgagor and the expression 'equity of redemption' is misleading in so far as it implies that the interest of the mortgagor is something less than the interest of an owner.)

2. (1914) 83 LJ Ch 79 (84) : 109 LT 802.

3. See Notes 38 on S. 58.

4. **(1871) 13 Moo Ind App 560 (571).**

5. AIR 1930 Mad 924 (925) (DB) (Usufructuary mortgage, executed in 1844 containing a condition for defeasance if not redeemed within thirty years.) ** AIR 1917 Low Bur 178 (178) (DB). (There is no difference in principle between a simple and usufructuary mortgage.)

   [See also AIR 1915 Low Bur 94 (95). (Under a mortgage executed before the Transfer of

This strict rule was to a certain extent modified in Bengal by the Bengal Regulation XVII of 1806 which enacted that the mortgagor could redeem within one year after an application by the mortgagee to the Court under S 8 of that Regulation for foreclosure. But if the mortgagor did not pay the amount within that time, the right of redemption was gone (6) See also the undermentioned cases under that Regulation.(7)

The present section gives a 'statutory right' to the mortgagor, to redeem his mortgage at any time after the principal money has become due The mortgagor remains the 'owner' of the property, the mortgagee, whatever may be the nature of the mortgage, being only a transferee of an interest in such property (8) In a mortgage the mortgagee gets an intangible right for the purpose of seeming

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Property Act the mortgagor agreed to redeem it on a certain date after seven years paying Rs 50 more and in default the mortgagee was to take possession of the land — The mortgagor failed to redeem on the due date but sued to redeem a year later **Held** that it was in accordance with justice equity and good conscience to keep the parties to the agreements made voluntarily and with full knowledge especially when those agreements are themselves reasonable) ** AIR 1923 Rang 232 (233 234) (Case before Transfer of Property Act was extended to Burma)]

6. **(1865) 10 Moo Ind App 340 (348, 349) ** (1887) 9 All 20 (22) : 13 Ind App 113 (PC** (If the money is not fully paid within that time a subsequent suit for redemption would be dismissed) ** AIR 1932 All 53 (54) (DB) ** (1900) 22 All 149 (159, 160) : 27 Ind App 58 (PC).**

   Also see S 58, Note 31

7. **(1881) 3 All 653 (658, 659) (FB).** (Mortgage by conditional sale for Rs 199 — Mortgagor agreeing that if the mortgagee did not obtain possession he was to recover mesne profits for the period he was out of possession — **Held,** under S 7 of the Regulation deposit of Rs 199 was sufficient and payment of mesne profits was not necessary as it was not a condition precedent to redemption) ** **AIR 1921 Lah 9 (11) : 2 Lah 53 (FB)** ** (1881) 3 All 576 (578) (DB) (Conditional sale declared absolutely by Court — Subsequently mortgagor depositing mortgage-money in Court and Court ordering that money should be paid to mortgagee on ground that mortgagor had not been personally served with notice under S 8 of Regulation — **Held,** Court had no jurisdiction to pass such order and application under S 622 of Civil PC of 1877 to reverse the order was entertainable by High Court) ** (1884) 6 All 399 (402) (DB) (Mortgagor making deposit in Court but denying mortgagee's right to receive money and threatening him with legal proceedings if he took it from Court — **Held,** deposit was not unconditional and was valid to prevent foreclosure) ** (1870) 13 Suth WR 44 (46) (DB) (**Held** as mortgage was not finally foreclosed as provided by S 8 of the Regulation mortgagor could redeem) ** (1907) 4 All LJ 717 (718, 719) (DB) (Mortgagee not complying with the provisions of the Regulation — **Held,** mortgagor's right to redeem not lost) ** AIR 1915 Lah 228 (230) (1915 Pun Re No 83 (DB) (The term 'mortgagor's legal representative' is intended to apply to all or any persons who possess title to the equity of redemption whether absolute or defeasible under the mortgage Transferee of mortgagor held legal representative) ** AIR 1923 Lah 71 (72) ** AIR 1922 Oudh 133 (134 135) 25 Oudh Cas 83 ** (1871) 6 Beng LR App 53 (54) (DB) (Where mortgagee is in possession and takes the profits in lieu of interest only principal should be deposited) ** (1867) 8 Suth WR 476 (477) (DB) ** 1864 Suth WR Gap No 157 (157) (DB) (Where mortgage is silent as to interest payment of bare principal within the year of grace is sufficient) ** 1864 Suth WR Gap No 349 (349) (DB) (If the mortgagor did not pay the whole amount found due he could not get a decree of redemption) ** (1875) 24 Suth WR 429 (430) (DB) (If after the expiry of the period of grace the mortgagee extends the time and does not take possession he cannot complain about an alienation of it by the mortgagor to persons who are willing to pay off the mortgage-debt) ** (1869) 3 Beng LR (AC) 141 (144) (DB) (Mortgagor deposited the amount within the year of grace and his equity of redemption was saved)

8. **See** Notes 4 and 38 on Section 58 ** **AIR 1959 Pat 153 (155) : ILR 37 Pat 157 (FB)** ** **AIR 1928 All 726 (729) : 50 All 986 (FB).**

the payment of debt or the performance of an engagement which way give rise to pecuniary liability Only the owner i.e the mortgagor can transfer the property itself subject to the interest which he has transferred to others out of totality of his rights which constitute the ownership **(9)**

In a suit for redemption a condition precedent is that there should be a registered deed evidencing the mortgage of immovable property for a sum of Rs 100/- or above secured as mortgage money evidencing the mortgage as contemplated by S 59. The provision in S 59 is essentially a rule of law and not a rule of evidence **(10)** Following were the observations by Patna High Court though they were obiter that where the mortgage is for amount which is less than Rs 500/- the suit for redemption could not be dismissed on ground of want of registration **(11)**

It has been held by the Kerala High Court in the undermentioned case**(12)** that as this section does not deal with a mere matter of procedure its provisions cannot affect a case where the mortgage sought to be redeemed came into existence before the Act became law in the State and such a case has to be decided according to the pre existing law as found in the precedents.

As to the retrospective effect of the amendments to the section, See Note 56

The right of redemption is, however, a 'right' which a mortgagor may seek to enforce, and not a 'liability' which he may be compelled to discharge **(13)**

Section 60 presupposes three acts by the mortgagee while mortgagor exercises the redemption, namely 1) to hand over the title deeds 2) to deliver possession of property 3) to execute release deed of his right These three sets amount to extinguishment of rights of mortgagee and completion of redemption.**(14)**

The provisions of the section do not state when a mortgage ceases to be a mortgage but simply declare the right of the mortgagor to redeem If the mortgagee receives the mortgage money but does not perform any of the three acts required to be done by him under para 1 of this section the non-compliance will not make the mortgage to continue The mortgagor would then get a new right to have his demands enforced through the Court **(15)**

Where a Bhumidhar had executed a registered mortgage deed and possession of the property was transferred to the mortgagee for securing payment of loan such transaction would amount to be a usufructuary mortgage of the Bhumidhari land and which would be deemed to be sale under S 164 of U P Zamindari Abolition and Land Reforms Act Provisions of S. 60 of T P Act would not be applicable to such mortgage and the mortgagor will have no right to redeem the mortgage and to claim possession from the mortgagee by offering to make payment of loan amount because the

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[See also (1901) 14 CPLR 177 (179) (In India distinction between legal and equitable estate is not recognized Despite the mortgage the ownership of the estate remains with the mortgagor and the expression 'equity of redemption' is misleading in so far as it implies that the interest of the mortgagor is something less than the interest of an owner)]

9. ILR (1992) Kant 650 (659) (AIR 1933 Cal 728. AIR 1936 Mad 70. AIR 1945 Cal 135. **Dissented from.)**

10. 1997 (3) Kant LJ 347 (353).

11. 2002 (2) Pat LJR 149 (151).

12. 1958 Ker LJ 78 (80).

13. **(1911) 9 Ind Cas 513 (519) (FB) (Mad)** ** (1909) 3 Sind LR 17 (28) (DB). (A mortgagor can waive or release his right to redeem and he may by his conduct be estopped from claiming that right) ** AIR 1939 Bom 303 (304, 305) ** AIR 1935 Cal 139 (141) 62 Cal 75 (DB).

    Also see S 91, Note 39

14. AIR 1996 Mad 241 (244) : 1996 (1) Mad LJ 453

15. **AIR 1963 SC 1041 (1042, 1043).**

mortgagee would be treated(16) as if he was a vendee

When a person is assignee of sub-mortgagee he cannot equate his possession of property as that of mortgagee and claim that he is successor-in-interest of mortgagee Consequently on that ground he cannot claim tenancy rights under Ss 2(39A) and 4A(1) of the Kerala Land Reforms Act The sub-mortgage is a lesser right than that of mortgaged right. Thus the right of the mortgagor to redeem is not fettered.(17)

2. Mortgage of movables — Redemption after default.

A mortgagor of movable property is entitled to sue for redemption (1) In the undermentioned case(2) the question was raised but not decided whether in the case of a mortgage of movables by Hindus and Muhammadans, the right of redemption was lost after default In *Sujir Ragunanthaiya v. Saldanha*(3) it was held that the principle of S 60 applies to movables also and that a mortgage of movables could be redeemed even after the expiry of the due date fixed for payment It has been held that the doctrine of clog also applies to mortgage of movables (4)

As to the distinciton between a mortgage of movables and a pledge of movables under S 172 Contract Act, see S. 58, Note 11.

3. Law where Transfer of Property Act is not in force.

The Act and this section have no application to the Punjab In cases arising in the provinces where there is no specific provision of law applicable, the decision should be in accordance with justice, equity and good conscience. A direction to so decide is generally interpreted to mean that the rules of English law are to be followed if found applicable to Indian society and circumstances. The terms of S 60 are an indication that the rules of English Law relating to a mortgagor's right to redeem are applicable to Indian society and circumstances (1) The principles of S 60 will therefore, apply to cases arising in the Punjab,(2) though as has been seen already in the Notes on

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16. 1982 All LJ 29 (32) : 1982 All WC 47

17. AIR 2001 Ker 210 (214) 2001 (1) Ker LT 790 ** (1990) 3 Cur C v C 544 (548) (Ker) (No merger of lease hold rights and mortgage rights Even on redemption of mortgage tenant is entitled to fixing of tenure under S 106 of the Kerala Land Reforms Act

Section 60 — Note 2

1. AIR 1949 Nag 368 (369) ILR (1949) Nag 243 (Suit against mortgagee to recover the property mortgaged would be a suit to redeem as contemplated by S 7 (ix) of the Court fees Act)

2. **AIR 1925 PC 75 (79) : 3 Rang 106.**

3. AIR 1919 Mad 946 (947) (DB)

4. ILR (1954) 1 Cal 220 (229) (Option to creditor to appropriate shares given as security for loan in case of default — Option held clog)

Section 60 — Note 3

1. **AIR 1953 SC 1 (4) ** AIR 1930 PC 142 (143) : 11 Lah 251 : 57 Ind App 168** AIR 1937 Lah 49 (51) (DB).

2. **AIR 1953 SC 1 (4) ** 1969 Cur LJ 294 (306) (Punj)** (In a suit filed by the mortgagee against the mortgagor for foreclosure of a house it was found that the house was sold by mortgagor to one C for Rs 3,000/- out of which Rs 1 000/ were left with C for payment to the mortgagee and the purchaser deposited the amount in Court within time though the deposit was short by small amount — **Held** both the mortgagor and C were entitled to redemption of the house the amount having been deposited — Case from Punjab) ** AIR 1959 Punj 170 (172) (DB) ** AIR 1915 Lah 362 (363) 1915 Pun Re No 103 (DB) ** 1904 Pun Re No 2, p 12 (14) (DB) ** AIR 1951 Punj 404 (407) (Pr 11) ILR (1950) Punj 271 (DB).

S 59, the technical formalities required by the various sections may not be applicable (3) The principles were also applied to Burma, (4) the territories of the former State of Bilaspur,(5) the former States of Alwar and Merwar in Rajasthan(6), Saurashtra(7) and Travancore(8) before the Act was extended to them.

Though T P Act was not in force in Travancore, the document was executed styled a Stridhanam Eedadharam on condition that in case of non-payment of the amount within stipulated time, the transaction is to be treated as sale condition was a clog (9)

Though T P Act is not in force in Sikkim the principle of Section 60 embodying the principle of natural justice is applicable.(10)

4. Right of redemption, what is.

The section enacts that the mortgagor has a right, 'on payment or tender' of the mortgage-money, at a proper time and place to require the mortgagee to do the various things referred to in the section, and that this right is called a "right to redeem" In other words, a right 'to redeem' means the right to buy back or set free by 'payment'(1). The scope of suit for redemption is primarily to

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[See also AIR 1949 PC 330 (331). (The general principle that the mortgage security is indivisible except by the agreement between the mortgagee and the mortgagor is applicable to the North-West Frontier Province — Case arising in the old N W F. Province where also T. P. Act did not apply.)]

3. AIR 1923 Lah 646 (646) 4 Lah 439 (DB) (In the Punjab the principles of Transfer of Property Act certainly apply but in order to take advantage of the provisions of the Act it is necessary to show that a principle has been transgressed as opposed to non-observance of prescribed formalities) ** AIR 1915 Lah 362 (363) 1915 Pun Re No 103 (DB). (In the Punjab, where litigious perversity is so ripe, legal technicality is at a discount and the essential is an enforcement of contracts, where they are not bad by reason of any oppressive condition.)

4. **AIR 1924 Rang 83 (84) : 1 Rang 419 (DB)** ** AIR 1918 Upp Bur 32 (34) 2 Upp Bur Rul 141.

5. AIR 1957 Him Pra 46 (47)

6. **AIR 1965 SC 225 (231).** (Mortgage executed in former Alwar State where Act was not in force — Clog on equity of redemption — Stipulation barring mortgagor's right of redemption after certain period — Court has power to ignore stipulation and enforce mortgagor's right to redeem on principle of justice, equity and good conscience) ** AIR 1957 Raj 321 (325) (Pr 13) : ILR (1957) 7 Raj 964.

7. AIR 1951 Sau 53 (54) (Pr 5) (Principle of clog on redemption applied.)

8. ILR (1966) 2 Ker 388 (392) (DB) ** AIR 1955 Trav Co 130 (132) (DB) (T P Act not in force in Travancore — Charge on property created by decree — Held mortgage was created by operation of law on which mortgagor could file a suit for redemption)

9. AIR 1970 Ker 81 (83) · 1969 Ker LT 338 (DB).

10. AIR 1980 Sikkim 1 (5) : 1978 Sikkim LJ 23 (DB).

Section 60 — Note 4

1. **AIR 1963 SC 1041 (1042, 1043) ** AIR 1961 SC 487 (492).** (Redemption is the act of redeeming which in its ordinary meaning is equal to bringing off charge or obligation by payment.) ** (1971) 73 Pun LR 765 (DB) ** AIR 1918 Pat 322 (323) 3 Pat LJ 490 (DB) ** (1911) 33 All 97 (98) (DB). (A right to redeem is a right to pay or tender the mortgage-money and when the mortgagee is in possession to obtain from him delivery of possession)

[See also AIR 1951 Nag 366 (368) · ILR (1950) Nag 68 (The discharge of a debt by the operation of a statute does not amount to a redemption of the mortgage so long as property remains in the hands of mortgagee 7 IC 385 and 13 IC 963. **Rel. on.**) ** (1912) 10 ALJ 36.

enforce the right to make payment of the mortgage money. A claim to redeem mortgage actually does not attach to land. Although the decree passed in such a suit may ultimately affect possession which is also an interest in the property. By executing a mortgage he only transfers some interest to the mortgagee and that also by way of security. The interest is confined to realisation of the mortgage debt which in the event of non-payment may be realised out of the security. What remains with the mortgagor after executing the mortgage is ownership of the property minus the interest transferred and the right to repay mortgage money and right to get the burden of the security discharged. When the mortgagor enforces right to redeem, he does not enforce right in land. Therefore consolidation proceedings do not affect suit for redemption(2). If the mortgagor redeems the land mortgaged with possession and acquires back the interest in the land as well as possession it cannot be said that he does not acquire it by transfer(3). A right to redeem is a right to buy back or set free on payment. It means a right to pay or tender the mortgage-money and if mortgagee is in possession to obtain delivery of possession(4). This does not mean that a payment or tender is a condition precedent to the coming into existence of the right. It merely means that the mortgagor has a right 'to pay or tender' the mortgage-money at a proper time and place, and as a consequence to require the mortgagee to do the various things referred to in the section. A suit to enforce this right (called a 'suit for redemption') may thus be brought without tendering the mortgage-money to the mortgagee(5), though redemption will not be allowed unless the amount declared by the decree to be due

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(Mortgagor's title plus a valid tender or deposit of mortgage money constitutes the cause of action for suit for redemption.)]

2. AIR 1981 Pat 62 : 1980 Pat LJR 304.

3. (1971) 73 Pun LR 765 : 1971 Punj LJ 494 (499) (DB).

4. ILR (1966) Andh Pra 1084 (1089).

5. **AIR 1921 All 353 (355) : 43 All 638 (FB)** ** AIR 1981 Bom 58 (67) ** AIR 1976 Pat 18 (22) : 1976 BLJR 378 (DB) (A tender of mortgage money will not be valid until notice has been duly served on the mortgagee.) ** ILR (1967) 3 Mad 16 : (1791) ** AIR 1945 Bom 191 (192) (DB) ** AIR 1921 All 71 (72) : 43 All 494 (DB) ** AIR 1917 Oudh 415 (416) ** (1901) 24 Mad 408 (411) (DB) ** (1865) 3 Suth WR 128 (129) (DB) ** AIR 1926 Pat 512 (513) : 6 Pat 102 (DB) ** AIR 1921 All 358 (359) : 43 All 95 (DB) (When the mortgage-money is stated to have been satisfied out of the usufruct, a tender would obviously be out of the question.) ** AIR 1922 All 377 (378) : 44 All 730 (DB).

[**See also** AIR 1914 All 46 : 36 All 36 (DB) (Usufructuary mortgagee purchasing portion of mortgaged property — Stranger purchasing equity of redemption in other portion — Latter paying into Court proportionate amount due on his share — Refusal of tender on the ground that there were subsequent mortgages affecting the property and that sums were due under them also — Suit for redemption by stranger purchaser — **Held** as plaintiff was not aware at the time of tender the existence of subsequent mortgages decree for redemption on payment of proportionate share of amount due under the three mortgages granted to plaintiff was in order.) ** (1902) 5 Oudh Cas 127 (129) (Where there is a real dispute as to the amount due and the mortgagor tenders what turns out to be an insufficient amount or makes no tender at all, his suit for redemption should not be dismissed on the ground that no tender was made.) ** (1903) 6 Oudh Cas 223 (226) (DB) ** (1926) 92 Ind Cas 665 (666) (Oudh) (Where the amount to be tendered for redemption is in dispute the mortgagor's suit for redemption cannot be dismissed on the ground that no tender was made.) ** AIR 1919 All 401 (402) (DB) (Suit for redemption without tender — Objection that suit was premature — **Held**, the suit being based on allegation that the mortgage was satisfied by usufruct, was maintainable without tender.) Also see S. 83 Note 11. The following cases to the contrary are **no longer good law** ** AIR 1920 All 204 (204) : 42 All 420 (DB) ** AIR 1916 All 91 (92) : 38 All 148 (DB) ** 1894 All WN 143 (144) (DB).]

6. **AIR 1921 All 353 (355) : 43 All 638 (FB)** ** AIR 1917 Oudh 415 (416) ** AIR 1921 All 71 (72) : 43 All 424 (DB).

[**See also** AIR 1943 Bom 191 (192) (DB) (Usufructuary mortgage — Usufruct to be

to the mortgagee be paid or tendered on or before the date fixed by the Court in the decree(6). As was observed in *Raghunandan Rai v. Raghunandan Pande*(7) :

> "What S 60 requires is that without payment or tender of the amount due on the mortgage the mortgagor will not be entitled to redeem, and for this purpose it is not necessary that the tender of the mortgage-money should have been made before the institution of the suit."

But the right of redemption connotes the 'right to pay' the mortgage-money and get back the property Where the mortgagee is entitled to remain in possession till the mortgage-debt is wholly discharged from the rents and profits of the property, the mortgagor will not have the right to 'pay' and clear off the encumbrance He will have to allow that debt to be wiped out from usufruct of the property alone The mortgagor's right to get back the property after the debt has been cleared in this matter is not a right of 'redemption' It is simply a right of recovering possession. Such a right is provided for under clause (a) of S 62(8). Decisions in which such a right is referred to as one of redemption(9) must, to that extent, be considered as lacking in precision. (See also S. 62, N. 2)

But where the mortgagor has a right to 'pay' the amount due on the mortgage and get back the property free of the encumbrance, his right is one of 'redemption' In such a case, it is immaterial that at the time when the mortgagor sues to get back the property, nothing is due to the mortgagee, because the mortgage-debt has already been discharged. Even the fact that such discharge has taken place though the mortgagee having been in possession of the mortgaged property and having appropriated the usufruct of the property towards the mortgage debt is not material. The reason is that the actual discharge of the mortgage in this manner does not affect the position that the mortgagor would have been entitled to recover the property by 'payment' if anything had remained due. What must be considered is the mortgagor's right under the mortgage whether he can claim back the property by payment or whether he is bound to wait till the debt gets itself discharged from the usufruct of the property. In the former case, his right is one of redemption though at the date of his suit for redemption nothing may remain due on the mortgage In the latter case, his right is not one

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appropriated in lieu of interest — Suit by mortgagor for accounts and redemption under Dekkhan Agriculturists' Relief Act — Nothing found due on mortgage — Redemption can be decreed, although if anything was found due, mortgagor could not redeem without paying or tendering that amount)] ** AIR 1914 All 46 36 All 36 (DB) (Usufructuary mortgagee purchasing portion of mortgaged property — Stranger purchaser of equity of redemption in the other portion tendering into Court proportionate share of amount due under mortgage — Mortgagee refusing to accept tender on the ground monies were due also under two subsequent mortgages in his favour — Decree for redemption passed in favour of stranger purchaser on his paying his proportionate share of money due under all the three mortgages was held to be in order.)]

7. **AIR 1921 All 353 (355) : 43 All 638 (FB).**

8. AIR 1970 Ker 289 (300) ILR (1970) 1 Ker 10 ** AIR 1943 Bom 191 held no longer good law in view of AIR 1963 SC 1041.) ** AIR 1957 Pat 452 (455) (Section 60 gives the mortgagor a right to redeem and also lays down the condition when redemption can be claimed. Section 62 is in marked contrast to S 60 and provides for a suit for possession in the case of a usufructuary mortgage it has no application to other mortgages) ** AIR 1953 All 620 (621) ILR (1954) 1 All 691 (DB) ** AIR 1953 All 33 (36) (Pr 8) · ILR (1954) 2 All 76 (DB).

[See AIR 1946 All 400 (402) · ILR (1945) All 914 (DB). (Distinction between Ss 60 and 62, explained.)]

[See also AIR 1957 Raj 362 (363) (Pr 4) · ILR (1957) 7 Raj 432 (Unregistered mortgage deed — Delivery of possession under — Subsequent demand by mortgagor for possession of land without offering to pay mortgage money — Mortgagee being trespassed and the mortgagor claimed possession pure and simple without payment of redemption money the suit cannot be said to be a suit for redemption.)]

9. (1893) 6 CPLR 28 (32, 33) ** AIR 1936 Cal 200 (201)

of 'redemption' but simply of recovering possession of the property after the debt is paid off from the usufruct of the property.

Illustration

A, B and C are co-mortgagors under a mortgage. The mortgagee is in possession of the property. But the case is not one in which the mortgage is to be discharged from the rents and profits of the property alone. The mortgagors can also 'pay' the mortgage-money or whatever remains due out of it and claim back the property. A sues for accounts and redemption of the mortgage under the Dekkhan Agriculturists' Relief Act. It is found that A, being an agriculturist, is entitled to the benefit of its provisions. The amount found due on taking accounts under the special provisions of the Act is found to have been completely paid out of the usufruct of the property and accordingly an unconditional decree is passed in A's favour for his recovery of the property from the mortgagee. A takes possession under the decree. A has "redeemed" the mortgage for the purpose of S. 92 of the Act is entitled to subrogation under that section(10).

What must be noted is that the words of the section "right, on payment or tender of the mortgage-money, to require the mortgagee . . . " do not mean that there 'must' be a payment or tender immediately before the suit for redemption or on its institution or under the decree passed in such a suit. Even where the mortgagor sues on the allegation that the mortgage has already been discharged, the suit may be one for redemption. The test is whether the mortgage is one which the mortgagor had a right to get rid of by means of 'payment' or whether the mortgagor was bound to allow the mortgagee to remain in possession till the debt was completely satisfied from out of the rents and profits of the property. Thus where in a usufructuary mortgage, the mortgagee is to adjust the usufruct towards interest, there can be no redemption until the mortgagor pays the principal(11).

A landlord under S. 9, C. P. Tenancy Act (1 of 1920) has a charge upon the holding for the rent, and his will give him a right to redeem the property under Cl. (a) of S. 91 of this Act. But when he brings the holding to sale, in execution of a rent decree, he does not "redeem" the charge but he 'extinguishes' the charge by sale(12).

The redemption of mortgage with possession would involve the retransfer of the same legal right back to the mortgagor and would amount to acquisition by transfer within the meaning of S. 19-A of the Punjab Security of Land Tenures Act(13).

If the mortgage money has been paid but the mortgagee does not perform any of the three acts required of him to be done and the mortgagor goes to the Court to enforce his demands that would not be enforcing his right of redemption which was really his right to make the demands on payment of the mortgage money. The right to demand the mortgagee to do the three acts on payment of the mortgage money is different from enforcing the demands subsequent to the payment of the money(14).

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10. AIR 1943 Bom 191 (192) (DB) (No doubt the mortgagor cannot redeem without paying or tendering whatever amount may be due. But that does not mean that there is no such thing as redemption if in the circumstances it turns out that there is nothing to pay.)

    [See however AIR 1970 Ker 289 (300) ILR (1970) 1 Ker 10 (AIR 1943 Bom 191 held no longer good law in view of AIR 1963 SC 1041)]

11. AIR 1963 Assam 176 (178, 179) ILR (1963) 15 Assam 315 (DB)

    [See also AIR 1960 Pat 51 (52) (Pr 2) (DB) (Case under S. 62(b) — Suit held to be one for redemption and not for mere possession.)]

12. AIR 1948 Nag 316 (321) ILR (1947) Nag 912 (DB) (So the landlord in such a case does not become entitled to subrogation under S. 92 though he is entitled to benefit of S. 101)

13. **AIR 1983 Punj 50 (52) : (1982) 84 Pun LR 177 (FB).**

14. **AIR 1963 SC 1041 (1042, 1043)** ** 1986 Pun LJ 101 (105) (Decree did not amount to be decree of redemption when it directed delivery of possession of land which was under mortgage and had been redeemed by judgment-debtor before that execution at decree)

The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage itself subsists(15).

5. Right of redemption, when arises.

Under the Bengal Regulations I of 1798 and XVII of 1806 the mortgagor had a statutory right to redeem at any time before the expiry of the stipulated period and limitation ran from the date of the execution of the deed(1).

Under the general law as it was before the Transfer of Property Act, also, it was held that where a period was fixed for payment, the mortgagor could redeem at any time within that period(2). In the Punjab where the Act does not apply, it was held that where there is a clause 'forbidding' redemption within a certain period and no clause enabling the mortgagee to sue before that period, the two periods are intended to be 'conterminous', and that the mortgagor cannot sue before that period(3).

Under this section, the right to redeem arises when the principal money becomes "due" As it stood before the amendment of 1929 the right arose when the principal money became 'payable'. There was a difference of opinion on the question whether where the mortgage-deed specified a period for payment the right to redeem may be exercised before the expiry of such period One view was that unless there was a stipulation to the contrary, it could be so exercised, as the time was fixed only for the convenience of the mortgagor(4). Another view was that where the document expressed the time for payment to be "within' a certain period, the right to redeem could be exercised earlier than the expiry of such period(5). It was, however, generally held that where the mortgage

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15. AIR 2002 Bom 133 (141) : 2002 (3) Bom CR 8

Section 60 — Note 5

1. AIR 1940 All 29 (33) : ILR (1939) All 990 (DB).
2. (1866) 3 Mad HCR 363 (367) (DB).
3. 1908 Pun LR No. 126 (DB)
4. 1903 Pun LR No 40 (DB) (The ordinary presumption is that the period for redemption is fixed for the convenience of the mortgagor, and not for the benefit of the mortgagee — But the presumption is rebuttable, and does not arise in a case where the provisions of the deed clearly show that the mortgagee intended to secure his possession for a definite period) ** AIR 1926 Oudh 281 (283) 1 Luck 367 29 OC 336 (DB) (Where in a usufructuary mortgage no period at all is fixed and the intention of the parties clearly is that the mortgagor should get back his property the moment the mortgage-debt is found to have been satisfied, a suit for redemption is not premature by reason of the fact that on taking accounts some money is found still due to the mortgagee) ** 1889 Pun Re No 201 p 711 (714) (DB) ** AIR 1923 Nag 49 (49, 50) (Where a mortgagee of land is to enjoy the usufruct in lieu of interest and pay the rent to the malguzar and there is a possibility of his not being able to realise any profit in some years, if any term for redemption is fixed, the same should be presumed to be for the interest of the mortgagee as well — In such a case the mortgage cannot be redeemed before the expiry of the term) ** 1912 Pun LR No 203 ** (1903) 16 CPLR 59 (60 62, 63) ** (1878-80) 2 Mad 314 (316) (DB) ** AIR 1919 Oudh 385 (385) ** AIR 1914 Oudh 160 (162) 17 Oudh Cas 218 ** (1888) 10 All 602 (609, 610) ** (1875) 8 Mad HCR 31 (35) (DB) ** AIR 1928 Mad 234 (238) (DB) ** (1900) 23 Mad 33 (36). (Can be exercised early.)
5. AIR1929 Mad 339 (341) (DB) ** 1901 All WN 36 (37) (DB) (A simple mortgage deed contained the following covenant as to repayment of the mortgage-money — "Asl arse panch baras men faq rahn kara lenge" — **Held** that the time fixed for payment was any time within five years — And hence time not being the essence of the contract mortgage could be redeemed even earlier than five years) ** AIR 1915 Low Bur 95 (96) ** (1912) 39 Cal 828 (833) (DB) ** (1900) 23 Mad 33 (36) ** (1907) 17 Mad LJ 83 (84) (DB) ** (1906) 16 Mad LJ 146 (147) (DB)

specified a period for payment, the right to redeem accrued only on the expiry of the period, and not before, except where there was a special contract to the contrary(**6**). As was observed by their Lordships of the Privy Council in *Mt Bakhtawar Begam v Hussaini Khanum*(**7**) :

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6. AIR 1963 Pat 114 (116) ILR 42 Pat 733 (DB) (The amendment in 1929 only declared the law that existed.) ** 1984 Har Rent R 245 (246) (Punj and Har) (Where the mortgage deed prescribed the duration of mortgage as five years, the limitation for suit for redemption would start after five years from date of mortgage.) ** AIR 1926 Mad 594 (596) ** AIR 1925 Mad 825 (826, 827) (Usufructuary mortgage for 55 years.) ** AIR 1916 Mad 940 (940) (DB) (Provision for payment by mortgagor on or before certain date is an indication to allow him to redeem even before the date, especially when the stipulation is made applicable only to balance of the mortgage debt.) ** AIR 1915 Mad 48, (48) (DB) ** AIR 1925 Nag 11 (14) ** (1910) 8 Ind Cas 707 (708) (Cal) ** AIR 1915 Cal 699 (700) 42 Cal 1146 (DB) (A mortgagor is not entitled to redeem before the debt becomes due even though he may offer to pay interest for the whole period.) ** (1825) 11 Bom HCR 283 (286) (DB) ** (1886) 1 CPLR 1 (2) ** (1889) 2 CPLR 241 (241, 242) (The receipt of a portion of the principal money before that time does not give a right to redeem prematurely any more than it gives a right to foreclose prematurely.) ** (1886) 8 All 95 (98) (DB) ** (1907) 29 All 471 (475) (DB) ** (1909) 4 Ind Cas 407 (408) (DB) (All) ** AIR 1917 All 318 (319) (DB) (*Held* the contract between the parties allowed redemption before the expiry of the period.) ** AIR 1928 All 131 (132) 108 Ind Cas 561 (DB) (The mere use of the words 'andar miyad' in the mortgage deed is not enough to evidence a contract to the contrary — Some such words as 'even before the expiry of the period the mortgagor will be entitled to redeem' are necessary for such a purpose.) ** (1902) 5 Oudh Cas 148 (149) ** AIR 1921 Nag 22 (22, 23) 17 Nag LR 202 ** AIR 1926 Oudh 552 (552) ** (1923) 72 Ind Cas 931 (936) (Pesh) (Where nothing more than a period is specified the onus lies on the mortgagor to prove that he can redeem before that period and not upon the mortgagee to show that the mortgagor cannot do so — The view that the simple expression "ba mayad" or "ta mayad" without qualification means that the time is the essence of the contract and that the mortgagor cannot redeem before the expiry of that term is one which must be taken as settled law for the North West Frontier Province.) ** (1935) 16 Lah 440 (441) (DB) ** AIR 1927 Oudh 199 (200, 201) 2 Luck 564 (DB) (Those who step into the shoes of the parties to the original mortgage contract are entitled to enforce the terms of the contract and are also bound by its terms exactly in the same manner as the original parties were. If the mortgagor makes a gift of the equity of redemption in favour of his daughter the latter is entitled to redeem as provided in the deed.) ** AIR 1924 Nag 208 (208) (The ordinary presumption that the rights of redemption and foreclosure are co-extensive may be negatived by a special provision in the mortgage deed in the interests of the mortgagor.) ** AIR 1928 Nag 223 (225) (DB) ** AIR 1915 Mad 425 (425) (DB) ** (1878) 2 Mad 45 (45) (DB) (In the case of Kanom and Otti mortgages it is not competent to the mortgagors to redeem before the arrival of the appointed time.) ** AIR 1929 Mad 339 (341) (DB) ** (1880) 5 Bom 22 (24) (DB) (Mortgage deed stipulating that mortgagor would pay the debt with interest within 10 years — **Held**, mere use of the word 'within' was not a sufficient indication of an intention of the parties that the ordinary principle that the right to redeem and the right to foreclose are co-extensive should not prevail with respect to the mortgagor and that he might redeem in a less period than 10 years.) ** (1909) 3 All 300 (303) (DB) (Where the condition was that the mortgagor should redeem within 7 years a mortgage by conditional sale, time runs from the completion of 7 years and not from the date of execution of the mortgage deed.) ** (1929) 117 Ind Cas 819 (820) (All) (Where a mortgage deed contained a stipulation that the mortgage-money should be paid within a certain time, held that in the absence of a contract to the contrary the mortgagor was not entitled to bring a suit for redemption before the expiry of the fixed period.)

[**See also** (1873) 5 NWPHCR 128 (130) (DB) ** (1903) 27 Mad 26 (28) (DB) (Period fixed 59 years — Suit before expiry of 59 years held premature.)]

Also see S. 67, Note 5.

7. AIR 1914 PC 36 (37) : 41 Ind App 84.

"Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem, during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the period specified But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property"

This view has now been affirmed by the Supreme Court(8). See also the undermentioned cases(9) to the same effect.

A provision in the mortgage deed authorising the mortgagor to redeem the mortgage before the principal money under the mortgage has become due is perfectly valid and the mortgagor is entitled to sue for redemption on the strength of the specific clause in mortgage deed Section 60 does not inhibit the parties from agreeing for earlier redemption even before the mortgage money has become due(10).

The view that the right of redemption ordinarily arose only on the expiration of the specified period was rested on the ground that 'the right to redeem and the right to foreclose were co-extensive' and arose simultaneously(11) and that consequently, if the mortgagee had no right to sue for the mortgage-money, neither was the mortgagor entitled to sue for redemption(12). This view has now been made clear by the amendment referred to above, so that where a mortgage-deed provides for a period for payment of the mortgage money, the mortgagor's right to redeem will arise only 'after' the expiry of the period and not before, inasmuch as before the expiry of such period the mortgage-money would not be "due", in the sense that the mortgagee could sue to recover it(13). Where under a mortgage which was an usufructuary and a simple mortgage, mortgagee is to enjoy the property in lieu of interest for five years and mortgagor is to repay the amount when he wanted in any year after expiry of five years money cannot be said to be due under personal covenant only

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8. AIR 1958 SC 770.

9. 1974 Ker LT 879 ILR (1974) 1 Ker 201 (221) ** (1968) 2 Mad LJ 445 ILR (1969) 1 Mad 566 (576) ** AIR 1963 Andh Pra 420 (422) ILR (1962) Andh Pra 1054 (DB) (Redemption by consent of mortgagees prior to stipulated period not precluded) ** AIR 1957 Andh Pra 30 (32) (DB) (Right of redemption is subject to specific contract between parties — AIR 1914 PC 36 Word 'within' can mean at any time before the fixed date) ** AIR 1954 Mad 193 (195) (The right arises in such a case as a result of the contract and not under this section) ** AIR 1949 East Punj 389 (390) ** (1948) 53 Mys HCR 406 (408) (Provision of a period of time within which payment is to be made has to be taken as giving mortgagor option and right to make payment within the time prescribed) ** AIR 1930 All 444 (445) (Unless the terms of the mortgage deed clearly state the contrary the period for redemption and the period for foreclosure are to be considered the same) ** (1922) 65 Ind Cas 273 (274) (DB) (Cal) (It was provided that the mortgagor may redeem before the expiry of the period) ** AIR 1940 All 29 (33) ILR (1939) All 990 (DB).

10. AIR 1982 Ker 327(330) : 1982 Ker LT 383.

11. See cases cited in foot-note (12) ** AIR 1955 Cal 194 (200) . ILR (1956) 2 Cal 822 (DB) (Where no time is stipulated for payment and the mortgagor is entitled to pay at any time no question of demand being necessary to make the amount became due arises)

[See also (1865) 2 Bom HCR 225 (230, 231) (DB)]

12. (1893) 16 Mad 486 (489) (DB) ** (1880) 5 Bom 22 (24) (DB) ** AIR 1925 Nag 11 (12) ** AIR 1921 Nag 22 (23) 17 Nag LR 202 ** AIR 1928 All 131 (132) (DB) ** (1886) 8 All 95 (98) (DB) ** (1929) 117 Ind Cas 819 (820) (All) ** (1876) 25 Suth WR 10 (11) (DB) ** (1869) 11 Suth WR 408 (409, 410) (DB) ** AIR 1930 All 444 (445) (DB)

[See also AIR 1925 Oudh 11 (13) (DB)]

13. 1964 Ker LT 153 (153, 154) ** AIR 1963 Punj 25 (26) ILR (1962) 1 Punj 464 (DB) (No period for redemption fixed but mortgagor to pay interest to mortgagee for whole year and year by year **Held,** mortgagor could not have redeemed mortgage until at least one year had expired — Intention of parties was that mortgage was to subsist for at least one year

on demand but is due both for redemption as well as sale on expiry of five years' period(**14**). Where after a simple mortgage there was a lease back to the mortgagee the lease period being co-expensive with the mortgage period but the mortgage period was later increased by agreement but not the lease period the mortgagor will be entitled to redemption of mortgage irrespective of the continuance of the lease(**15**). A suit for redemption of a mortgage before the amount has become due on the mortgage is, therefore, not maintainable even if the mortgagor has tendered the amount due with interest up to the expiry of the specified period(**16**), and even if the mortgagee (where the mortgage is one with possession), has done something which he was not authorised to do, but which did not destroy or permanently injure the property in any way(**17**). It has however been held by the Judicial Commissioner's Court of Kutch that the money becomes due, in the case of a usufructuary mortgage, at once or after the expiry of the time limit agreed upon by the parties to enable the mortgagor to redeem although due to the fact that the mortgagee has to remain in possession until redeemed he can have no right to realise the money by sale or otherwise(**18**).

The fact that the time fixed for redemption is very long, will not enable the right to be exercised before the expiry of such time, unless the provision for such a long time amounts to a clog on redemption or is for some other reason not binding on the mortgagor(**19**). It has, however, been

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before either any right of enforcement of security or redemption accrued AIR 1959 Punj 249, **Reversed.**) ** AIR 1959 Orissa 122 (123) (DB) (Right to redeem and right to foreclose are co-extensive.) ** AIR 1958 Pat 464 (Subject to any contract to the contrary a mortgagor is not in law entitled to redeem a usufructuary mortgage before the expiry of the due date of payment and the question of such a right by way of equitable relief does not arise in the face of the clear provision of law embodied in S. 60(1) the T. P. Act. AIR 1925 Cal 105, **Dissented from;** AIR 1927 Oudh 12 **Distinguished** ** AIR 1957 Andh Pra 30 (32) ** AIR 1956 Hyd 172 (173) ILR (1956) Hyd 545 ** AIR 1949 East Punj 389 (390) ** AIR 1954 Mad 193 (194) (Pr 8) ** AIR 1932 All 155 (155) (DB)

[**See also** AIR 1940 Oudh 428 (430) (Mortgage deed providing for redemption after two years — Mortgagee to enter into possession on default — **Held** limitation for redemption **ran two years after execution of mortgage.**)]

14. (1968) 2 Mad LJ 181 : 81 Mad LW 166 (169).

15. 1966 Ker LJ 1009 (1014)

16. (1845) 60 ER 424 (424) : 65 RR 618 Brown v. Cole ** AIR 1940 Cal 437 (438) (DB)

[**See also** AIR 1962 Mys 5 : ILR (1961) Mys 666 (Default clause in mortgage making entire money payable on failure to pay interest in any year — Entire money does not become 'due' automatican on mortgagor's default — Mortgage money in such cases becomes 'due' only when mortgagee in exercise of his option call for entire money ** AIR 1915 Cal 699 (700) : 42 Cal 1146 (DB)]

17. AIR 1936 Oudh 130 (131) (DB).

18. AIR 1953 Kutch 4 (7).

19. AIR 1958 Pat 464 (466) ** (1866-68) 3 Mad HCR 363 (367) (DB) ** (19,2) 15 Ind Cas 880 (881) (DB) (All) ** AIR 1925 All 42 (43) (The rule is not affected by the fact that the term fixed is such a long period as 60 years or that it is provided in the deed that even after the expiry of the term there should be no redemption.) ** AIR 1925 Cal 105 (106) : 51 Cal 935 (DB) (Mortgagee in possession — Period of 50 years — Mortgagor allowed to redeem after 26 years because the mortgagee's conduct had become such as to make it dangerous to allow him to be in possession for the full period — Relief was given on grounds of equity.) ** AIR 1919 Mad 819 (820) (DB) (Period fixed 37 years.) ** AIR 1936 Oudh 130 (131) (DB) (Period of 60 years.) ** AIR 1929 Oudh 54 (54) : 4 Luck 203 (DB) (Where there was a provision in a deed of usufructuary mortgage by which redemption was postponed for 99 years but otherwise the terms as to rate of interest, etc. were in no way unconscionable — **Held,** that the contract could be enforced and that the term as to redemption did not amount to a clog on the equity of redemption.) ** AIR 1914 Oudh 379 (380) : 17 Oudh Cas 313 (But where the effect is to unduly postpone redemption without any corresponding advantage to the mortgagor and there are circumstances to show that the covenant is unreason

held by the Madras High Court in the undermentioned case(**20**) that where the mortgagor covenants that he will pay the mortgage-money "by" a particular date he was entitled to redeem at any time before that date.

In the undermentioned case(**21**), where a mortgage deed of 1869 provided that if the mortgage-money was paid in any 'Jeth' month within ten years the mortgagor might redeem the mortgage it was held by the High Court of Allahabad that the right to redeem arose in the first 'Jeth' succeeding the mortgage Where no period for which the mortgage was to be in force was specified but the mortgage empowered the mortgagor to redeem at any time in the month of 'Jeth' it was held that the mortgagor was at liberty to repay the money on the first day of 'Jeth' following the date of the mortgage(**22**).

Where 'no' period is fixed in the mortgage deed for redemption, the right to redeem arises immediately after the mortgage is made(**23**).

By the custom of Malabar a 'kanom' enures for 12 years, unless the parties thereto provide by express contract for its redemption at an earlier date(**24**). So also an 'otti' mortgage could not be

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able and oppressive, redemption may be allowed irrespective of the covenant for the postponement) ** (1912) 15 Ind Cas 9, 7 (917) (Pesh) (Period of 150 years) ** AIR 1924 Lah 129 (129 129 130) (DB) (A mortgage for 51 years with interest on mortgage debt but no credit for rents and profits and with power to mortgagee to make improvements as he likes with interest on cost of improvements amounts to clog on redemption ** AIR 1936 Lah 168 (170) (DB) (Term of 25 years by itself is not clog on equity of redemption) ** (1923) 72 Ind Cas 941 (944) (Pesh) (A mortgage with possession which also carried interest, provided for redemption after the expiry of ten 'abad years that is to say ten years during which at least one-third of the mortgaged land should be cultivated — **Held,** that it being entirely within the hands of the mortgagee to cultivate all or any portion of the land or not, he could by cultivating just less than one third of the mortgaged land in each year deprive the mortgagor of his right of redemption altogether and that therefore the term in the mortgage deed postponing redemption till after the expiry of ten abad years amounted to a clog on the equity of redemption and was unenforceable , ** (1928) 11 Ind Cas 248 (250) (Oudh) (Term of 11 years) ** (1928) 110 Ind Cas 689 (690) (DB) (Oudh) (A condition to the effect that the mortgagee was entitled to construct buildings and then charge the mortgagor at the time of redemption that is after fifty years with the cost of the buildings together with 25 per cent compound interest — Condition held not enforceable — Mortgagor allowed to redeem before the expiry of the period) ** AIR 1921 All 143 (144) (DB) (Period fixed 40 yrs – Term held not binding on mortgagor as it was inequitable — **Held,** he could redeem earlier) ** (1882) 4 Mad 113 (118) (DB) (Illadarawara mortgage (for 60 years) in South Canara — Redemption before expiry of term not allowed) ** AIR 1929 Lah 523 (523) (DB) (Longer term does not make the bargain per se, an unconscionable one)

20. AIR 1941 Mad 484 (485) : ILR (1941) Mad 767 (FB).

21. AIR 1937 All 32 (33, 34, 35)

22. AIR 1949 East Punj 389 (391).

23. AIR 1963 Punj 25 (26) 64 Pun LR 724 (AIR 1959 Punj 249, **Reversed**) ** AIR 1955 Cal 194 ILR (1956) 2 Cal 822 (DB) ** **(1913) 35 All 227 (230) : 40 Ind App 74 (82) (PC)** ** (1907) 17 Mad LJ 177 (178) (DB) ** (1912) 39 Cal 828 (831) (DB) ** AIR 1929 Mad 339 (341) (DB) ** AIR 1941 Sind 158 (160) . ILR (1941) Kar 124 (DB)

[See also AIR 1933 Lah 84 (85) (Where no date is fixed for payment of the mortgage money limitation for a suit for recovery of the mortgage-debt commences from the date of the mortgage.)]

24. (1903) 26 Mad 727 (728) (FB) ** AIR 1952 Trav-Co 286 (287) ILR (1951) Trav-Co 414 (DB) (Provision in mortgage deed styled as Otti and Kuzhikanom, that if mortgagee planted trees that would be compensated for at the time of redemption on demand does not confer on mortgagee right to hold property for 12 years when there is provision for surrender on demand which allows mortgagor to ask for redemption at any time after execution of document) ** AIR 1951 Trav-Co 170 (171) (DB) (Mortgage deed not styled as Khunzikanom

redeemed before the lapse of 12 years(25). See also the undermentioned cases(26).

The principle that the right to redeem and the right to foreclose are co-extensive was held not applicable to cases falling under the Dekkhan Agriculturists' Relief Act and the mortgagor was held entitled to redeem notwithstanding a period was fixed before which he bound himself not to redeem, on the ground that such a contract would frustrate the object of the Act(27). Similarly under S 7, U P Debt Redemption Act 13 of 1940 a mortgage debt became due and redeemable from the commencement of that Act notwithstanding a condition in the mortgage restraining redemption for a period or up to a certain date which fell beyond the date of commencement of that Act(28).

A 'default on the part of the mortgagee' to perform his part of the contract may give rise to a right of redemption on the part of the mortgagor before the expiry of the period fixed This is based on the ground that by reason of such default, the mortgagor is entitled to rescind under Ss 39 and 54 of the Contract Act, the contract on his part to wait till the expiry of the period fixed and is entitled to claim redemption on such default(29). Thus, where the mortgagee undertakes to make certain payments towards dues payable by the mortgagor and defaults in doing so the mortgagor can redeem the mortgage, notwithstanding that the period specified in the mortgage has still to run(30). But it has been held by the Madras High Court that the mere fact that part of the mortgage

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document but provision therein made allowing mortgagee to plant trees and claim compensation therefor from mortgagor at certain rate Effect of provision is to confer on mortgagee right to remain in possession for 12 years and mortgagor's right to redeem would arise only after expiry of said 12 years) ** 1950 Trav-Co LR 137 (138, 139) (DB) ** (1902) 25 Mad 452 (453) (DB) ** (1878-80) 2 Mad 193 (193) (DB) ** (1882) 5 Mad 310 (313) (DB) (Clause in a kanom deed that property to be surrendered whenever money is ready refers to a period subsequent to expiration of usual 12 years period) ** (1887) 10 Mad 192 (193) (DB) ** (1906) 29 Mad 501 (506) (DB) (Deed held ordinary Malabar Kanom redeemable on expiration of usual kanom period of 12 years) ** (1907) 30 Mad 300 (302) (DB)

Also see S. 58, Note 37.

25. AIR 1952 Trav-Co 286 (287) ILR (1951) TC 414 (DB) (1950 Trav Co LR 137 Foll) ** 1950 Trav Co LR 137 (138, 139) (DB) ** (1862-63) 1 Mad HCR 261 (262) (DB) ** (1862-63) 1 Mad HCR 122 (123) (DB)

26. **AIR 1951 Trav-Co 71 (74) (Pr 7) : 1949 Trav-Co LR 264 (FB)** (Mortgage — Term for renewal — Effect — *Held* there was no renewal — Suit for redemption held not premature) ** 1957 Ker LT 690 (692) (Pandarapattom property — No clear provision for permanent occupancy — Provision for renewal and payment of Adukkvathu does not make it irredemable) ** AIR 1954 Trav-Co 445 (444) (DB) (Travancore Jenmi and Kudiran Act (5 of 1071 M E), S 3(1) The provision for renewal will not by itself be sufficient to create an irredeemable tenure That provision will be satisfied and exhausted with the grant of one renewal and thereafter the owner of the property will be entitled to enforce his right of redemption.)

27. (1882) 6 Bom 734 (736) (DB)

28. AIR 1951 All 392 (396) (DB) (Section does not affect the law embodied in the Limitation Act.)

29. AIR 1927 Oudh 12 (13, 14) : 2 Luck 279 (DB).

[**See also** AIR 1951 All 433 (434) (Usufructuary mortgage redeemable within sixty years — Mortgagee transferring the property claiming to be its owner — Mortgagor has to sue within 12 years from date of his knowledge of transfer to recover possession from transferee — Question whether on the date of transfer or before institution of suit he had become entitled to redeem as against original mortgagee is irrelevant.)]

30. AIR 1954 Mys 187 (189) ILR (1955) Mys 180 ** AIR 1927 Oudh 12 (13, 14) 2 Luck 279 (DB) ** (1912) 34 All 659 (662) (DB) (The property in dispute was mortgaged to defendants by way of conditional sale for Rs 599-15-0 for ten years and all but Rs 50-15-

money has not been paid by the mortgagee does not render the mortgage invalid nor does it entitle the mortgagor to rescind it at his option. Hence the mortgagor is not entitled to sue for redemption of the property before the time fixed therefor, on the allegation that the amount advanced by the mortgagee was less than the consideration specified by the mortgage deed(31). See also S. 58, Note 18, S. 4, Note 4 and S. 62, Note 5.)

Where under a foreclosure decree obtained by the first mortgagee, the mortgagor loses his right of redemption of first mortgage, the mortgagor's right to redeem could not be revived on the redemption of the first mortgage by second mortgagee(32).

It has been seen in Note 4, that the right of the mortgagor to demand possession from his usufructuary mortgagee after the mortgage has been paid off from the rents and profits of the property according to the terms of the mortgage, is not a right to 'redeem' and does not fall within this Section, but under S. 62, cl. (a). Such a right can be exercised as soon as the mortgage is so paid off, although a term has been fixed in the mortgage document for payment and such term has not expired(33) unless the term fixed forms the essence of the mortgage contract, in which case the mortgage debt will be deemed to be satisfied only on the expiry of the term fixed. (For a fuller discussion, see Note 5 on S. 62.)

6. Right of redemption, how exercised.

As seen in Note 4, the criterion of the right of redemption is the right of the mortgagor to recover back the property by discharging the mortgage-debt by 'payment' instead of being compelled to allow the mortgagee to continue in possession of the mortgaged property till the debt got satisfied out of the rents and profits of the property. As seen in that Note, the test is the 'right' to pay the mortgage-money and not the 'actual' payment or tender and in the peculiar circumstances of a case, a right of 'redemption' may arise although the debt has been satisfied out of the rents and profits of the property and there is no 'need' to make any payment. Where the redemption 'is' sought on the basis of a payment or tender of the mortgage-money, the following are the essential elements

(1) There must be a 'payment or tender'.

(2) Such payment or tender must be of the 'mortgage-money'

(3) Such payment or tender must be made at the 'proper time and place'.

(4) Such payment or tender must be made to the 'mortgagee'.

7. "Payment".

A "payment" must be made in the current coin of the realm or currency notes unless the mortgagee accepts some other form of payment(1). If the debt is contracted in any particular currency it

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were left with mortgagees for payment to prior incumbrancers. The mortgagees did not pay up the prior incumbrancers, and the plaintiffs, the vendees from mortgagors, sued for redemption of the mortgage before the expiry of ten years — *Held* that on equitable grounds the defendants not having performed what was a most reasonable part of the contract, the plaintiffs should be allowed to redeem before the expiry of ten years stipulated for.) ** AIR 1925 Mad 825 (827)

[But see (1866) 1 Agra 91 (93) (DB).]

31. AIR 1945 Mad 340 (342)

32. 1978 MPLJ 257 (259) : 1978 Jab LJ 394.

33. AIR 1918 Oudh 432 (434) (DB) ** AIR 1919 Mad 819 (821) (DB) (Where mortgage-money has not been paid off, the right cannot be exercised.)

Section 60 — Note 7

1. (1900) 24 Bom 619 (621) (DB).

[See also AIR 1954 Trav-Co 473 (476, 478, 483) : ILR (1954) TC 627 (FB). (Enforcement of claims for paddy or other commodities — They have to be commuted into current

must be re-paid in that currency or its equivalent(2). Where the contract was that the money which was borrowed in 'sikka' rupees should be repaid in British currency calculated according to the face value of the coin, it was held that the re-payment must be in such currency so calculated, and not the value of the metal in the 'sikka' coins borrowed(3). In the case of redemption of a mortgage, the consideration for which was paddy, it has been held by the Travancore-Cochin High Court, that as the mortgage, which continued to subsist in spite of the decree for redemption was sought to be extinguished only by the tender of the redemption price, that price was to be determined at the market rate of the paddy prevailing on the date of the tender(4). A settlement of accounts between A and B in which the amount received by A on behalf of B is given credit to and a balance is struck, is equivalent to payment of the amount by A to B(5). Where A received from B, as collateral security for a debt, a bill drawn by C upon D but failed to present in at maturity, it was held that A's laches made the bill equivalent to payment as between A and B(6).

The mortgagee may allow the mortgagor to satisfy the mortgage debt in some other way such as transfer of lands instead of by payment of money(7).

Where there was dispute as to correctness of amount, the prayer by mortgagor to permit the amount to be deposited in fixed deposit under protest with liberty to continue their claims regarding the correctness of amount due and to allow the mortgagee to withdraw the amount only after the adjudication of claim by decree, cannot be allowed. Such an offer or a deposit cannot be considered to be an unconditional after or tender of the amount entitling the mortgagee to receive the same and release the mortgage security(8).

Under the English law, the lapse of 20 years without any demand for the debt due will give rise to a presumption that the debt had been paid(9). There is no such rule in this country, but under S 114 of the Evidence Act, such a presumption may arise

Where no stipulation or covenant has been made between the contracting parties as to the payment of the sum borrowed, the lender is entitled both under the English as well as the Indian law to decline to receive the sum due to him in instalments : he can claim that the whole sum due be paid at one at the same time(10).

A memorandum on a mortgage document that a certain amount has been paid towards the mortgage does not require to be registered under S 17 of the Registration Act, 1908 and is admissible

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money at prevailing market rate for purposes of passing decree in terms of the currency of the country. 1949 Ker LT 187, **Overruled**.)

2. (1892) 16 Bom 599 (602, 603) (DB).

   Also see S. 84, Note 5

3. (1909) 2 Ind Cas 469 (471, 474) (DB) (Bom).

4. **AIR 1954 Trav-Co 473 (484) : ILR (1954) Trav-Co 627 (FB).** (1949 Ker LT 187 and AIR 1948 Trav LR 110 (FB), **Overruled**.)

   [**See also** AIR 1957 Trav-Co 246 ILR (1956) Trav Co 1162 , AIR 1954 Trav-Co 473 (FB), **Foll.**)

5. (1861) 30 LJQB 308 (313) 4 LT (NS) 547 Holand v Russell (A giving of such credit in an open account between *A* and *B* may however be a payment)

6. (1863) 143 ER 630 (631) : 11 WR (Eng) 834, Peacock v. Pursell.

7. AIR 1954 Nag 84 (89, 90) : ILR (1953) Nag 797 (DB).

8. AIR 1989 Ker 79 (79, 80) : 1987 Ker LJ 882.

9. (1786) 99 ER 1089 (1089) 1 TR 270, Oswald v Leigh, ** (1807) 170 ER 864 (864) 3 Camp 27 : 10 RR 621, Colsell v. Budd.

10. (1902) 24 All 461 (463) (DB).

    Also see S. 84, Note 7.

in evidence without registration(11). But an endorsement not only that a certain amount has been received but that the mortgage has been 'extinguished' must be registered(12).

8. "Tender".

See Note 5 on Section 84.

9. The payment or tender must be made at the proper time and place.

As to what is the 'proper time and place' for payment or tender, see Note 5 on Section 84

10. The payment or tender must be of the mortgage-money.

As to what is "mortgage-money", see generally Note 17 on Section 58

The 'interest' on the principal money is part of the mortgage money and is a charge on the estate(1). Both in a suit by mortgagor or mortgagee the Court has to determine the amount of money due by the mortgagor and such a declaration is not possible unless the Court decided the question of interest payable to the mortgagee(2). It will also include the costs incurred by the mortgagee under the provisions of section 72(3).

Parties may, however, by agreement exclude the interest from being a charge on the mortgaged property Thus, where the mortgagor stated, "I shall pay the interest from my own pocket," it was held that the interest was not a charge on the property(4). Similarly, where the deed provided for redemption on payment of the principal only and the provision for interest was disconnected from the clause regarding redemption, it was held that the mortgagor could redeem on payment of the principal only(5). A mortgage provided that "until delivery of possession" the mortgagor will pay interest. Possession was delivered at once. It was held that the interest referred to was only payable until delivery of possession and the mortgagor was consequently entitled to redeem on payment of

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11. (1886) 9 All 108 (115) (FB) ** AIR 1920 Mad 742 (744) 43 Mad 803 (DB) ** (1871) 7 Mad HCR (4, 5) (DB) (Per Innes, J.) ** (1904) 27 All 305 (307) (DB) (Endorsement showing receipt of part of mortgage-money and stating that the claim against a portion of the property is released — Endorsement does not require registration) ** AIR 1928 Mad 382 (383) (DB) ** AIR 1928 Mad 1050 (1051) (DB).

    [See also AIR 1932 Mad 141 (142) (DB)]

12. AIR 1927 Lah 237 (237). (Although unregistered endorsement that the debt is extinguished is inadmissible in evidence, other evidence as to the payment of full amount of mortgage amount is admissible.)

Section 60 — Note 10

1. See Note 17 on Section 58.

   (1926) 95 Ind Cas 134 (134) (Lah).

   [See also AIR 1959 Punj 249 (251) (Pr 7) · ILR (1959) Punj 254 (Where no interest is due or can be claimed, the only meaning of the expression "mortgage money" can be what is actually due under the mortgage and in that event it is no more than the principal money — Reversed on another point in AIR 1963 Punj 25 (DB)) ** ILR (1959) 9 Raj 319 (329) (DB) (Loan advanced on mortgage security was Rs 1,036 — Rs 415 were added to it for "Teekha Ankh" — Held, unless mortgagee was able to show that Rs 415 was included for interest he could not insist on its payment.)]

2. AIR 1967 Mys 41 (44) : (1966) 5 Law Rep 486.

3. AIR 1922 Lah 252 (254) (DB) ** AIR 1915 Mad 402 (403, 404) (Costs of defending suit)

4. AIR 1917 All 165 (165) (DB).

5. AIR 1924 Lah 273 (275) (DB).

   [See also AIR 1953 Trav-Co 533 (533) (DB) (Default by mortgagee in payment of mischavaram payable by him to mortgagor in kind — Mortgagor is entitled to adjust the arrears against mortgage money payable to mortgagee — Arrears to be valued at commutation rate prevailing on date of suit for redemption) ** AIR 1952 Trav Co 92 (95) 1950 Trav-Co LR 398 (DB) (Usufructuary mortgage and lease back to mortgagor — Interest

the principal money only(6). Where a usufructuary mortgagee is unable to get possession owing to the default of the mortgagor, he will be entitled to interest, whether described as interest or as damages for breach of the covenant to deliver possession(7). Where a usufructuary mortgagee entitled to possession or to interest in case he failed to get possession owing to any defect in the title of the mortgagor, allowed the mortgagor to remain in possession, it was held he lost his right to interest by his acquiescence(8). A mortgage bond provided that the mortgagor was entitled to redeem at the end of the second year by payment of the principal and interest. He brought a suit for redemption after the close of the second year alleging that in the first half of the second year he had deposited the principal money and that for the interest for both years decrees had been obtained by the mortgagee against him. It was held that this was not showing a valid tender or payment of the "mortgage-money", which included the interest due(9). See also the undermentioned case(10).

Where the mortgage provided that, on the happening of a particular contingency, the mortgage-money would become payable 'as if the due date had elapsed' it was held that this only accelerated the due date, and that the mortgagor was not bound to pay interest on redemption up to the original

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clause in lease deed — Mortgage and lease held did not form one transaction — Mortgagee could not demand interest on mortgage money.) ** AIR 1917 Lah 31 (33) : 1917 Pun Re No. 98 (DB). (Usufructuary mortgage for Rs. 700 — Interest on Rs. 420 to be recovered by the usufruct — Rs. 280 to carry interest to be paid half yearly — Mortgage redeemable simply on payment of mortgage-money — Interest is not charge on property — Mortgage is redeemable on payment of principal money only.) ** AIR 1925 Lah 182 (182) (DB).]

6. **(1902) 24 All 521 (531) : 29 Ind App 148 (PC).**

7. AIR 1944 Oudh 208 (210). (It is immaterial whether he did not obtain possession at all or whether after obtaining possession he was dispossesed by the mortgagor.) ** AIR 1925 All 377 (378) ** AIR 1932 Mad 175 (176, 177). (Even though the mortgagee has not taken immediate steps to get into possession.)

   [**See also** AIR 1921 Lah 351 (352) (DB). (Where the mortgagor under a usufructuary mortgage has prevented the mortgage from obtaining possession of the property mortgaged, the mortgagee is entitled to compensation for breach of the covenant as regards possession.) ** AIR 1919 Cal 46 (48) : 48 Cal 448 (DB).]

8. (1904) 27 All 313 (316) (DB). (Security diminished by dispossession of mortgagee of a portion of mortgaged property — Mortgagee remaining satisfied with the remaining property and taking no steps for a long time to regain possession — **Held**, mortgagee lost claim to interest for the portion lost by his own acquiescence.) ** (1909) 31 All 325 (327) (DB). ** AIR 1914 Oudh 140 (142).

   [**See also** (1912) 13 Ind Cas 156 (157) (DB) (All). (Where certain properties were usufructuarily mortgaged but a portion was sold in execution of a prior mortgage of the mortgagor and the mortgagee was thus deprived of possession but the mortgagee without taking any steps in respect of the property sold, remained in possession of the remaining property — **Held**, in a suit for redemption by the mortgagor that the mortgagee was not entitled to claim loss of interest sustained by the deprivation of a portion of the properties as the mortgagee had acquiesced in the loss.) ** AIR 1927 Oudh 595 (596) (DB). (Mortgagee by his own negligence not taking steps to obtain possession.)

   Also see S. 58, Note 35 and S. 68, Note 6.

9. **(1889) 16 Cal 307 (309) (PC).**

10. AIR 1950 Pat 201 (202). (Mortgagee to be put in possession or entitled to 10 per cent. per month interest — Mortgagee not put in possession — Mortgagor paying interest — After some years mortgagee put in possession of part — Suit for redemption — Mortgagee alleging fresh contract and claiming 10 per cent. interest on amount proportionate to portion not put in his possession — Fresh contract not proved — Mortgagee held entitled to fall back on original contract.)

date fixed(11).

A part-owner of mortgaged property though entitled to redeem his share only on payment of a proportionate part of the debt where the mortgagee had acquired a share of the mortgagor, must, if he deposits or tenders the amount to the mortgagee, deposit or tender the 'whole' amount due. The reason is that the amount of the proportionate reduction in the mortgage-debt is not ascertained at the time, by agreement or by the Court(12). If a co-owner redeems the whole mortgage and takes possession and other co-mortgagor obtains a decree for redemption against him while determining the amount to be paid to the co-owner redeeming the whole property improvements on the property cannot be claimed by the first co-owner(13).

At the time of redemption, when the mortgagor is required to pay the amount due from him under the mortgage, the mortgagee is also bound to give him credit for all payments which he is bound to make under it(14). Where the mortgagee retains part of the mortgage-money to redeem a prior mortgage but does not do so, a suit by the mortgagor will not lie for recovering that sum. Such non-payment will also disentitle the mortgagee from claiming the amount not paid(15). So also where a part of the consideration for a mortgage is the payment of a certain sum to the mortgagor's creditor and the mortgagee pays only a portion of such sum to the creditor and obtains a complete discharge in regard to the debt and the balance is written off by the creditors, the mortgagee is not entitled, in a suit for redemption by the mortgagor, to claim the full amount which was to have been paid to the mortgagor's creditor(16). (See also Notes 6 and 18 on Section 58.) If the mortgagee hands over the sum retained to the mortgagor sum from the purchaser of the equity of redemption(17).

In instant case the mortgagor has executed both simple mortgage and equitable mortgage by deposit of title deeds. As per agreement between the parties all amounts paid by debtor were tobe adjusted first against equitable mortgage and thensimple mortgage. On debt remaining outstanding, creditor was entitled to recover the amount by auction sale(18).

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11. (1908) 32 Bom 521 (529, 530) (DB).

12. AIR 1923 Mad 533 (534) : 47 Mad 7 (DB)

[See also AIR 1953 Trav-Co 283 (285) (No release on portion of mortgaged debt — No merger of interest of mortgagor and mortgagee in respect of portion — Owner of portion of mortgaged property cannot claim rateable abatement of the mortgage money)]

13. AIR 1967 Ker 247 (248) : 1967 Ker LT 189 (FB). ('A' co-owner redeeming whole mortgage and taking possession — B another co-mortgagor obtaining decree to redemption against 'A' Court determining amount to be paid by B — A effecting improvements on the property thereafter — A cannot claim cost of such improvements)

14. AIR 1959 Ker 163 (165). (25 Mad LJ 561 (562), Relied on.) **AIR 1953 Trav-Co 533 (633) (DB) (Mortgagee to pay michavaram to mortgagor — Suit for redemption — Mortgagor is entitled to adjust arrears of michavaram against michavaram due to mortgagee) ** (1913) 25 Mad LJ 561 (562) : 21 Ind Cas 701 DB).

15. AIR 1916 Oudh 110 (111) : 19 Oudh Cas 12.

16. AIR 1947 Mad 197 (198, 199) ILR (1947) Mad 411 (DB) (Amount reserved in mortgagee's hands to be paid to bank holding decree against mortgagor — Mortgagee arranging with bank for getting full discharge on paying a smaller amount)

[But see (1911) 9 Mad LT 79.]

17. AIR 1916 Oudh 110 (111) 19 Oudh Cas 12 (Purchaser must be held to represent the former mortgagor to the extent of rights which the latter had under the mortgage at the dates of the sale and no subsequent dealings between the former mortgagor and the mortgagee can effect the rights which the purchaser acquired by his purchase)

18. 2001 AIHC 2325 (2337) (Mad).

See also the undermehtioned cases(**19**). See also the case where Travancore Cochin Compensation for Tenants Improvements Act, 1956 is applicable(**20**).

In a suit for redemption by the mortgagor improvements are effected by a bona fide purchaser

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19. ILR (1960) Ker 102 (105) (Mortgage deed providing for payment of value of plantations only and not of any other improvements on redemption — **Held,** this was a contract though implied, which took away the right of the mortgagees to erect a building) ** 1958 Ker LJ 1027 (1030) (It is open to a mortgagor or mortgagee to include all transactions connected with the mortgage in the final settlement of accounts at the time of redemption) ** AIR 1957 Mad 191 (192) (Mere fact that payment has not been made in a lump sum but was obtained from and out of the income of the property spread for a period of time does not affect nature of payment which in any event is payment towards mortgage although not voluntarily but appropriated from and out of income of property) ** AIR 1956 Madh B 72 (Redemption on payment under protest the amount demanded by mortgagee — Mortgagor can sue to recover surplus amount from mortgagee — The right is connected with his right to redeem and not founded on mistake or fraud) ** AIR 1967 Mys 41 (44) (DB) (Mortgagor cannot avoid liability to pay interest on mortgage amount on ground that he forstalled mortgagee by instituting suit for redemption) ** 1956 Raj LW 84 (86) (Part of consideration only proved to have been actually received under the mortgage — Recital as to receipt of the balance gratuitous or fictitious — Mortgagor allowed to redeem on payment only of the actual amount received) ** AIR 1915 Lah 221 (223) (DB) (Mortgage with possession by A and B — Property leased back to only A — Mortgage making rent a charge on property — **Held,** that A alone was liable to pay rent — B having received no consideration for the same was liable only for principal money) ** AIR 1929 All 77 (78) (A sum of Rs 150 was advanced on a mortgage deed — The mortgagee was entitled to possession of the mortgaged property in lieu of Rs 100 and was further entitled to interest on the remaining Rs 50 at the rate of Rs 2 — Mortgagor undertook to pay entire mortgage-money in two years and to obtain redemption and in case of default of payment of Rs 50 together with interest at the stipulated rate the mortgagee was entitled to foreclose — The mortgagor sued for redemption on payment of Rs 100 only — **Held,** an express provision to the effect that redemption could not take place without payment of Rs 50 and interest was not necessary — As the payment of Rs 50 and the interest thereon formed part of the mortgage transaction the amount is mortgage-money within the meaning of S 60 and must be paid on redemption) ** (1908) 11 Oudh Cas 323 (325) (This was a suit for redemption of a mortgage deed, the material portions of which were as follows — "That I will pay interest year after year, and should there be a default in payment of interest for any year the mortgagee can at once take possession of the mortgaged property that whatever profits may be left after payment of the Government revenue, etc , will be appropriated by the mortgagee in lieu of the interest that whenever I pay off the principal sum and the remaining interest the mortgaged property will be redeemed" — The mortgagee did not take possession until several years after the first default — It was held that the mortgagee was entitled to get interest for the period he was out of possession) ** AIR 1937 All 762 (764) (DB) (Mortgage deed providing for stipulated interest and that mortgagee would set off usufruct against such interest — Property leased out to mortgagor for rent equal to that of interest — Rent not paid — Mortgagee can enforce covenant in deed and can recover not only principal but also interest.) ** AIR 1917 Oudh 186 (186).

20. (1987) 100 Mad LW 850 (854) (Under Travancore Cochin Compensation for Tenants Improvements Act, 1956, a mortgagee is deemed to be a tenant and he would be entitled to claim value of improvements until an order of eviction is made against him The order of eviction can be made only when the mortgage money and value of the improvements are deposited by the plaintiff Thus, where preliminary decree was passed directing the mortgagor to deposit the mortgage money and mortgagor herself admitted that she was liable to pay the value of improvements and she filed application for final decree it could not be said that the mortgagees would not be entitled to the value of improvements made subsequent to the date on which relationship of mortgagor and mortgagee ceased)

for value in the mortgaged property from the mortgagee he must pay the cost of improvements(21).

Where there was specific term in the usufructuary mortgage deed permitting the mortgagees to build a pucca shop in place of kachha shop and also to carry out repairs and further it was provided that the mortgagor would not be entitled to redeem without the payment of cost of reconstruction and repairs at the time of redemption, the mortgagees were entitled to add such cost to the principal sum for purposes of redemption under S. 60(22).

11. Assignment of mortgage — Equity between mortgagor and assignee.

Where the mortgagor, though he did not receive the full amount of the mortgage, granted a receipt for the full amount and left it in the possession of the mortgagee and the latter assigned the mortgage for the full amount to another, it was held that the mortgagor cannot be allowed to redeem merely on payment of the amount actually received by him(1).

Where A and B each owning half share in property is mortgaged by A alone usufructuarily and B thereafter takes an assignment of the mortgage right A could sue for redemption of his share, as the mortgage must be deemed of the half share belonging to A(2).

12. The payment or tender must be made to the mortgagee.

A payment or tender made to the authorised 'agent' of the mortgagee is a payment to the mortgagee One partner is the agent of the others and a payment to him is a valid discharge of the debt due to the partnership(1).

Where a joint Hindu family is the mortgagee, the 'karta' is the agent of the family and a payment to him is a valid discharge of the mortgage(2). A coparcener to whom the mortgaged property is allotted becomes its absolute owner and is entitled to redeem the mortgage and a transferee from such coparcener is also entitled to redeem(3). Where C executed a mortgage in favour of A and B and, subsequently, B, the junior member, gave notice to C that A had ceased to represent the family, a payment made to A alone is not a valid discharge of the claim of B(4). A payment to a Hindu minor mortgagee may be validly made to his 'de facto' and 'de jure' guardian(5); but no valid payment can be made to a 'de facto' guardian of Muhammadan minor(6).

A payment made to a junior member of the mortgagee's family made upon the express direction

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21. (1970) 1 Mad LJ 132 ILR (1969) 3 Mad 535 (536) (DB) (Bona fide purchaser for value of mortgaged property from mortgagee carrying improvements on the property — Suit for redemption — Mortgagor must pay cost of improvements under S 51, T P Act)

22. AIR 1984 (NOC) 297 (All).

Section 60 — Note 11

1. (1885) 34 WR (Eng) 141 (142) , 31 Ch D 151 (157), Bickerton v. Walker.

2. AIR 1974 Mad 340 (343) (1974) 2 Mad LJ 9 (A and B each owner of half share in certain property — 'A' usufructuarily mortgaging the entire property to X — B thereafter taking an assignment of the mortgage right from X A can sue B for redemption of his share — Mortgage must be deemed of half share belonging to A.

Section 60 — Note 12

1. (1909) 1 Ind Cas 200 (201) (DB) (Mad).

2. AIR 1941 Pat 246 (246) (Payment to brother of karta acting as his agent — Held discharged the mortgage) ** AIR 1924 Oudh 161 (161) 26 Oudh Cas 286 ** AIR 1928 Cal 125 (126) (DB).

3. AIR 1980 Pat 254 : 1981 BLJR 134

4. AIR 1914 All 450 (451) (DB).

5. AIR 1927 Lah 237 (237) (A payment made to widowed mother, a de facto and natural guardian is valid.)

6. AIR 1925 Lah 541 (541).

given by the mortgagee is a payment made to a person authorised to receive it, and is a good payment(7).

The payment made to a widow, who, under the Punjab Customary Law has succeeded only to a life estate, for redemption of the land which was held by her husband as a mortgagor validly discharges the mortgage debt(8).

A mortgagee cannot absolve himself of his liability as a mortgagee to the real owner if he allows himself to be paid off and redeemed by some one who is not entitled to do so(9).

13. "Mortgagee."

The word mortgagee includes, as stated in S 59-A persons deriving title from him(1). The assignee of a mortgagee cannot stand in a different position from that of the mortgagee himself although the mortgagor may not have been a party to the assignment(2). Where the mortgagor pays the money to the mortgagee without notice of the assignment, such payment is binding on the assignee(3). A purchaser of the equity of redemption is a stranger to the contract until the contract is completed and he cannot redeem the property(4). A trespasser by his adverse possession and prescribing against the mortgagee cannot, so far as the mortgagor is concerned be subrogated to the position of his mortgagee and hence the mortgagor cannot be compelled to claim redemption from the trespasser(5).

14. Payment or tender to one of several co-mortgagees.

There is a difference of opinion on the question whether a payment or tender to one of several co-creditors is a good discharge of the debt.

In the discussion of this question, it must be noticed that the principle applicable is the same whether the debt is a personal debt or is a secured debt(1). The contrary view expressed in the undermentioned cases(2) cannot be accepted as correct

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7. AIR 1942 Pat 408 (409)
8. 1913 Punj LR No. 136 Page (475, 476)
9. AIR 1952 Mys 12 (14) : ILR (1951) Mys 389

   [See also AIR 1952 TC 105 (111)]

   [But see AIR 1916 Upp Bur 5 (6) (Mortgage redeemed by stranger - Mortgage and the mortgagee's rights cease to exist.)]

Section 60 — Note 13

1. AIR 1957 Pat 136 (It is immaterial whether that title is derived by sale 'in invitum' or by private treaty, whether it is by act of parties or by operation of law) ** (1902) 26 Bom 643 (646) ** (1913) Pun Re No. 7.
2. (1866) 16 ER 151 (156) 35 LJ PC 30, Walker v Jones ** AIR 1928 Nag 223 (224 225) (DB).

   [See also (1889) 2 CPLR 9 (12, 13).]
3. AIR 1938 Pat 265 (266) (Alleged payment not proved — Question of notice does not arise — Transferee not bound by the payment) ** AIR 1920 Mad 742 (743) 43 Mad 803 (DB) ** AIR 1924 Nag 401 (405).

   Also see S. 130, Note 18
4. (1983) 1 Malayan LJ 193 (194).
5. AIR 1953 Pepsu 101 (102) (Trespasser continues to be as such against mortgagor and the latter can sue him for possession after redemption.)

Section 60 — Note 14

1. (1902) 25 All 155 (157, 158) (DB).
2. (1890) 3 CPLR 15 (16) ** (1905) 1 Nag LR 24 (26) (3 CPLR 15, Followed)

In *Barber Maran v. Ramana Goundan*(3) it was held by the High Court of Madras that such a payment was a good discharge It followed the English decision in *Wallace v. Kelsall*(4), and relied on S. 38 of the Contract Act which provides that a refusal of a valid 'tender' by a promisor under a contract will discharge him from liability for the non-performance of the contract and that a tender to one of several 'joint' promisees has the same effect as one made to all the joint promisees. *Wallace v Kelsall*, referred to above, decided that one joint creditor could receive payment and give a good discharge for the debt.

The correctness of the decision in *Barber Maran's case*(5) was doubted in some later decisions of that Court(6), but was approved in the undermentioned case(7) and also by a Full Bench in *Annapurnamma v. Akkayya*(8). That was a case relating to a negotiable instrument, but it was held that there was no difference in principle between the two classes of cases. White, C J., who was a member of the Full Bench, however, differed from the view of the majority and held that one joint creditor had no power to give a valid discharge for the debt He followed the view expressed in the English case of *Steeds v Steeds*(9) that co-creditors must be presumed to have distinct interests in the debt and to be in the position of tenants-in-common with reference to it In such a view one of them could not give a good discharge for the debt even according to the English law. As regards S 38 of the Contract Act, he expressed the view that the presumption was not affected by the Section which only dealt with a case of 'tender' and not the 'payment' of the debt. This Full Bench decision has been followed in later decisions of that Court(10), though its correctness has also been questioned in a case of the same Court(11). As regards the other High Courts, they have generally differed from the view that one co-creditor can give a valid discharge for the whole debt(12). Thus, it has been held that one co-mortgagee(13)

3. (1897) 20 Mad 461 (463) (DB).

4. (1840) 10 LJ Ex 12 (15) 7 M and W 264 4 Jur 1064 : 56 RR 707 8 DPC 841.

5. (1897) 20 Mad 461 (463) (DB).

6. (1902) 25 Mad 26 (38, 39) (DB) ** (1910) 5 Ind Cas 343 (347) (DB) (Mad) ** (1912) 35 Mad 685 (687) (DB).

7. (1909) 1 Ind Cas 219 (219) (DB) (Mad) (20 Mad 461, Followed)

8. **(1913) 36 Mad 544 (551) (FB).**

9. (1899) 58 LJ QB 302 (304) 22 QBD 537 60 LT 318 37 WR (Eng) 378

10. AIR 1957 Mad 191 ** (1913) 20 Ind Cas 792 (795, 797) (DB) (Mad) ** AIR 1925 Mad 261 (263) 48 Mad 693 (DB) ** AIR 1917 Mad 269 (270) (DB).

[See also AIR 1934 Mad 656 (657) (DB). (Principle of 36 Mad 544 (FB) applied where a co-mortgagee purchased the equity of redemption.) ** AIR 1928 Mad 933 (934) (DB). (Principle will not apply where there is fraud.)]

11. AIR 1913 Mad 29 (30) : 41 Mad 637 (DB).

[See also AIR 1943 Mad 407 (407) (DB) (Co-assignee of the mortgage is not entitled to give a complete discharge to the mortgagor on behalf of other co-assignees.)]

12. See cases cited in foot-notes (13) and (14) below.

See also *undermentioned case :*

AIR 1925 Bom 69 (78) : 49 Bom 245 (DB).

[But see (1886) 9 All 205 (209) (DB) (Co-mortgagee purchasing mortgaged property in auction sale — *Held*, this operates as discharge of the joint debt.)]

13. **AIR 1917 Lah 443 (446) : 1917 Pun Re No. 68 (FB)** ** 1956 All LJ 264 (271). The right to redeem does not consist in paying the entire mortgage money to anyone of the mortgagees and get back such property which is in the possession of that individual mortgagee) ** AIR 1948 Nag 279 (283) ILR (1947) Nag 553 (DB) (Dissenting judgment of White C J in 36 Mad544, Foll.) ** AIR 1943 Pesh 1 (3) (DB) (73 Ind Cas 692, **Held, not good**

or a co-creditor under a money bond(**14**) cannot give a good discharge for the debt. According to those decisions the decision in *Wallace v. Kelsall*(**15**) has been considerably shaken by the judgment of Farwell, J., in *Powell v. Brodhurst*(**16**).

The Madras view does not, it is submitted, appear to be correct. The question does not, as stated by White, C. J., in *Annapurnamma v. Akkayya*(**17**), seem to be capable of determination merely on the interpretation of Ss. 38 and 45 of the Contract Act. It must be decided by reference to general principles of law, and it is a well settled principle that co-creditors of a debt (secured or unsecured) should be presumed to be in the position of tenants-in-common and not joint tenants so that one of them cannot give a valid discharge for the debt. As pointed out by the High Court of Madras in the undermentioned case(**18**) this is the true position in equity'(**19**).

In the case of co-mortgagees, the above view would seem to be supported by the provisions of Section 45 of this Act, which provides that transferees under a joint transfer for consideration are entitled to distinct interests in the subject-matter of transfer(**20**). Co-mortgagees would therefore,

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law) ** (1911) 38 Cal. 342 (350) (DB). (Payment to one would not liberate the debtor against all the creditors.) ** AIR 1915 Cal. 528 (528) (DB). ** AIR 1927 Cal. 425 (429) (DB). (Discharge by one mortgagee as to whole debt is valid as regards his share only.) ** AIR 1934 Cal. 1 (3) (DB). (Special circumstances such as where co-mortgagees are partners must be alleged and proved to take the case out of general principle of law.) ** AIR 1921 Pat. 27 (28). 5 Pat. LJ 376 (DB). ** AIR 1920 Pat. 464 (468). 5 Pat. LJ 651 (DB). (Case of co-heirs of same mortgagee.) ** (1921) 3 Lah. LJ 502 (504). ** (1905) 1 Nag. LR 24 (26). ** AIR 1930 All. 98 (98, 99) (DB). ** AIR 1929 Pat. 704 (704). ** AIR 1919 Cal. 593 (596) (DB). ** AIR 1914 All. 518 (519) (DB). ** (1904) 26 All. 318 (320) (DB). (Joint holders of a mortgage decree.) ** (1910) 32 All. 164 (166) (DB). ** (1911) 14 Oudh Cas. 45 (48). ** AIR 1919 All. 275 (276). 41 All. 631 (DB). (Two mortgagees each having half share in two separate mortgages — One taking usufructuary mortgage of whole property and giving discharge for both mortgages — Discharge operative in respect of his share only.) ** AIR 1930 All. 634 (636) (DB). (Payments to one of two mortgagees into his private account cannot be considered as payments which would reduce the mortgage-debt due to the other mortgagee and moreso, where there is a definite separation between the two mortgagees.) ** AIR 1918 Oudh 91 (92). ** AIR 1918 Upp. Bur. 19 (21). 3 Upp. Bur. Rul. 42. (Evidence of the mortgagees being joint-tenants took the case out of general law.) ** AIR 1939 All. 600 (601) (DB). ** AIR 1922 Lah. 64 (64) (DB).

14. **AIR 1954 Madh. B. 193 (196) : ILR (1954) Madh. B. 415 (FB).** ** (1902) 25 All. 155 (157) (DB). ** (1906) 28 All. 252 (255) (DB). (One of the joint decree-holders.) ** AIR 1934 Cal. 1 (3) (DB). (Unless there are circumstances which take the case out of the general rule.) ** AIR 1924 Cal. 710 (713). 51 Cal. 566 (DB). (Adult decree-holders alone are not competent to give valid discharge when succession certificate is in the name of all the members including minors.)

[**But see** (1879) 4 Cal. 350 (354, 355) DB). ** 1893 Pun. Re. No. 60, p. 267 (270). (Rent paid to one of several co-sharer landlords — *Held*, tenant not liable to pay rent over again to the other landlords.) ** AIR 1917 Pat. 82 (84). 2 Pat. LJ 520 (DB). (One joint creditor in equity can give a valid receipt to a debtor in full discharge of the claims of himself and of the other joint creditors.)]

15. **(1840) 10 LJ Ex. 12 (15) : 56 RR 707.**

16. **(1901) 70 LJ Ch. 587 (589) : (1901) 2 Ch. 160.**

17. **(1913) 36 Mad. 544 (552) (FB).**

18. **(1897) 20 Mad. 461 (464) (DB).**

19. (1889) 58 LJ QB 302 (304). 22 QBD 537. Steeds v. Steeds: (1864) 146 RR 349 (352). 12 WR (Eng) 926. *Matson v. Deanes.*

20. **(1905) 1 Nag. LR 24 (26).**

be entitled to distinct interests in the mortgage, or, in other words, they are in the position of tenants-in-common with regard to the debt and the security.

Though some of the co-mortgagees induced co-mortgagors to make payment to them without obtaining consent of other co-mortgagees they are not estopped from pleading that the redemption was invalid(21).

A payment to one of two joint creditors between whom 'it has been agreed' that the 'other only' shall receive the sum cannot, when made with notice of the agreement, be treated as a good discharge of the debt(22).

15. Payment or tender to one of several co-heirs of a deceased mortgagee.

Co-heirs, except when they are Hindus governed by the Mitakshara law and inherit the property of the male ancestor, are in the position of tenants-in-common with regard to the property inherited by them As a geneal rule one of several co-heirs in such cases cannot give a valid discharge of a debt to which they have succeeded(1).

The principle that a payment to one of the heirs of a deceased creditor is not a valid discharge has been applied to the case of Hindu co-parceners, and it has been held that a payment to one of several co-parceners in respect of a debt in favour of the head of the family is not a good discharge(2).

16. Delivery of deeds.

The delivery of the mortgage deed and of all other documents of title by the mortgagee is one of the rights of the mortgagor on redemption. But a mortgagee is not bound to deliver the deeds until actual tender of payment of the mortgage-money(1).

Under the old Section the words used were "the mortgage deed, if any, to the mortgagor" The addition of the words in the present Section "and all documents relating to the mortgaged property which are in the possession or power of the mortgagee" brings the section in line with the provisions of O 34, Rr. 3 to 8 of the Civil Procedure Code which provide for the delivery of such documents on payment by the mortgagor after the passing of the preliminary decree

In England, a mortgagor or his transferee who is being paid has a right, until the transaction is completed, to prepare 'one' fair copy of the draft deed of re-conveyance or transfer and to charge the mortgagor for it But on payment, he is bound to hand over that and all other copies of documents relating to the mortgaged property(2).

In *Wakefield v Newbon*(3) the mortgagee handed over the deeds to his attorney The mortgagor paid the mortgage-money in full to the attorney but the latter refused to deliver the title deeds until moneys due to him by the mortgagee for expenses were also paid. It was held that he was not entitled to do so. "A mortgagee cannot" said Lord Denman, C J., "by handing over deeds to his

21. AIR 1974 Him Pra 11 (13, 14) : (1973) 3 Sim LJ (HP) 180.

22. (1896) 19 Mad 471 (475) (DB).

Section 60 — Note 15

1. (1902) 25 Mad 26 (39) (DB) ** AIR 1919 Bom 78 (79) 43 Bom 487 (DB) ** (1903) 27 Bom 292 (295) (DB) ** AIR 1916 Mad 1128 (1128) (DB) ** (1907) 6 Cal LJ 383 (395) (DB) ** AIR 1920 Pat 464 (468) 5 Pat LJ 151 (DB) ** AIR 1929 All 250 (250, 251) 51 All 589 (DB) (Mahomedan usufructuary mortgagee dying — Mortgage debt paid to one of his several heirs without concurrence of others, held, does not operate as valid discharge.) ** AIR 1915 Oudh 29 (30) : 18 Oudh Cas 154 DB).

2. AIR 1918 Mad 29 (31) : 41 Mad 637 (DB).

Section 60 — Note 16

1. AIR 1922 Bom 433 (435).

2. (1881) 50 LJ Ch 601 (603) : 17 Ch D 348, In re Wade and Thomas.

3. (1844) 115 ER 107 (108) : 66 RR 379.

attorney create a new lien against the mortgagor in respect of a debt of his own"(4).

A mortgaged certain property to B who assigned the mortgage to C. Subsequently under an arrangement between A and C, C re-conveyed the property to A and A remortgaged it to C. It was held that C was bound, on redemption by A, to give back the original mortgage deed and the re-conveyance also as title deeds(5).

Where the mortgagee is, by virtue of other transactions, interested in having the title deeds he can ask the mortgagor, as a condition of the delivery thereof, to execute a covenant that he would produce them when necessary(6). Again where a mortgagee was decreed to re-convey an undivided moiety of the mortgaged property to the mortgagor (a part of the debt being satisfied) it was held that the mortgagee was entitled to retain the title deeds of the whole property as his mortgage was not fully redeemed, but that he should execute a covenant to produce the deeds when necessary(7).

Where before redemption the mortgagee has destoryed the mortgage deed or other documents relating to title, the expenses of procuring fresh deeds and copies must be paid by the mortgagee and the amount so required must be set off against the mortgage-money(8). After redemption if the mortgagee is unable to deliver the deeds on the ground that they have been destroyed or lost the mortgagor is entitled to compensation for such loss or destruction (9) But the mortgagee cannot be compelled to give any security for it in the absence of a special provision in the decree to that effect(10).

The loss of the deeds will not, however, deprive the mortgagee of his right to recover his debt But where no such loss is established he cannot recover unless he produces the bond(11). In an old case(12), where the mortgagee had fraudulently destroyed the deed in order to deprive the mortgagor of the equity of redemption and it was impossible to determine in the absence of the document what amount was due, it was held that the mortgagor could recover the property without any payment.

Where the mortgagor gave the mortgagee six months' notice of his intention to pay off the mortgage, but did not pay the amount until after the time limited by the notice by reason of the fact that the mortggee had lost the title deeds and didn not furnish any indemnity in respect of it it was held that the mortgagee was not entitled to claim interest after the end of the six months the delay having been due to his default, and that he should give indemnity for the loss of his deeds(13).

It was held by the Madhya Bharat High Court that in the case of mortgage of zamindari property the mortgagor's right, on payment of the mortgage debt to the return of the deed of mortgage and also the other documents relating to the property was not lost by the fact of the property having

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4. **See also** (1844) 115 ER 169 (171) 6 QB 443 (447) Davies v Vernon ** (1891) 60 LJ Ch 732 (734) (1891) 3 Ch 145, In re Llewellin (Wakefield v New born (1844) 13 LJ QB 258, Ref. to.)
5. (1862) 10 WR (Eng) 720 (720), 125 RR 975 Hudson v Malcolm
6. (1844) 63 ER 340 (340) : 60 RR 19, Capper v. Terrington.
7. (1854) 65 ER 354 (354) : 97 RR 151, Yates v. Plumbe
8. (1848) 17 LJ Ch 471 472) : 60 ER 899, Hornby v. Marcham
9. (1853) 22 LJ Ch 1063 (1064), 90 RR 564 Brown v Sewell ** (1849) 60 ER 899 (900) 80 RR 82, Hornby v Matcham (Compensation may be granted for the damage done to the estate by such loss.) ** AIR 1922 Mad 299 (300) (DB) (This remedy he can pursue by separate suit or even under the mortgage decree where the decree contains provision for it.)
10. (1896) 12 Mad LJ 63 (63, 64) DB)
11. AIR 1926 All 741 (743) : 48 All 78 (DB).
12. (1864) 1 Bom HCR 177 (180) (DB).
13. (1847) 60 ER 725 (726) 74 RR 148 Midleton (Lord) v Eliot

vested in the State, free of all encumbrances, under the provisions of the Madhya Bharat Zamindari Abolition Act(14).

17. Delivery of possession.

Where the mortgagee is in possession of the mortgaged property, the mortgagor is, on redemption, entitled to get back the possession of such property(1) in the same state as it was at the time of the mortgage, the principle being that the mortgagee should, on redemption, place the mortgagor, in the same position in which he was immediately before the execution of the mortgage Thus, where the mortgaged property was a 'kotah' with an exit, the mortgagee cannot block it and deliver possession of the property in that state(2).

However, where a right to sue for redemption is exitinguished by lapse of time and the mortgagee is in possession, the mortgagor cannot sue for possession(3).

The obligation to give back possession on redemption ceases, however, if the mortgagee has himself been evicted by title paramount(4). It does not arise at all if the mortgagor had not delivered the property to the mortgagee under the mortgage(5), nor if the mortgagee has not received the whole mortgage-money(6). The mortgagee cannot be heard to say that he does not know what has become of the mortgaged property(7). If the property has been lost through his negligence, he is liable to account for it to the mortgagor(8). Where due to the fault of the mortgagee in possession the land was sold for recovery of land revenue in a suit for redemption though delivery of possession is not possible the mortgagee is held liable to pay damages equal to the value of the property lost(9). It has been held in England that if a mortgagee so deals with the mortgaged property as to

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14. AIR 1954 Madh B 193 (196)

Section 60 — Note 17

1. (1921) 63 Ind Cas 114 (115) (DB) (All).

   [See also 1957 Raj LW 433 (435) (Suit for recovery of possession — Plaintiff inheriting equity of redemption — Defendants deriving title through mortgagee — **Held**, plaintiff had no right to possession unless there was allegation that the mortgage had been redeemed) ** 1955 Raj LW 525, 526) (Mortgagee held not entitled to protection under Rajasthan (Protection of Tenants) Ordinance, 1949 against dispossession by mortgagor in execution of decree for redemption) ** 1954 Ker LT 383 (384) (Mortgagee is bound to surrender possession only where he is redeemed by a person competent to do so. Any stranger cannot offer mortgage money and seek redemption.)]

2. AIR 1963 Ker 261 (263) (Pr 6) (Mortgagee in possession — Kompura at time of mortgage — Same not existing at time of redemption — No evidence that same fell down to natural causes — Mortgagee is liable to pay damages for the Kompura to the mortgagor.) ** (1908) 4 Nag LR 57 (59) (Where an absolute occupancy tenant made a valid usufructuary mortgage of his holding and afterwards surrendered his rights in the tenancy to the landlord, it was held that the landlord acquired the equity of redemption of such holding and that the landlord's mere acceptance of rent from the mortgagee in possession did not extinguish his right of redemption.) ** AIR 1920 Lah 239 (240.)

3. AIR 1991 Punj & Har 85 (88).

4. (1913) 16 Oudh Cas 199 (202).(E.G., a prior mortgagee)

5. AIR 1919 Oudh 36 (37).

6. (1909) 31 All 318 (323) (DB) (Mortgagee in possession — Mortgagor cannot recover possession even after expiry of term until he pays or tenders to mortgagee principal money or deposits same in Court.) ** AIR 1920 Oudh 24 (24).

7. (1901) 3 Bom LR 152 (153) (DB).

8. AIR 1922 Bom 156 (157) 46 Bom 218 (DB) (The question as to what the liability of the mortgagee is to account for the properties of which he is given possession should be determined in the suit for redemption itself and not be left to be decided in a separate suit)

9. ILR (1971) 1 Mad 217 (240).

render it impossible for him to restore it on full payment, he will be prevented from suing at law to recover his mortgage-money(10).

A tenancy created by a mortgagee would come to an end with the redemption of the mortgage. A tenant inducted by a possessory mortgagee cannot continue as such on termination of the mortgagee's interest and is not entitled to protection under the Rent Act(11). Where in respect of urban immovable property the mortgagee is in possession and has granted a lease of the property on a suit for redemption by the mortgagor the lessee is not protected under a Rent Act(12). Where tenant is inducted by the mortgagee during mortgage and subsequently mortgage is redeemed, the mortgagor can either repudiate the tenancy and the tenant thereafter becomes a trespasser. However, if he recognises the tenancy, then relationship of landlord and tenant comes into existence between them. Mortgagor becomes landlord of tenant inducted by the mortgagee. If the tenant defaults in payment of rent and also denies title of the mortgagor, then he is liable to eviction(13). However, where the property was let by the mortgagee in possession by exercising an express power conferred upon him by the mortgage deed to induct a tenant and to recover rent therefrom, the only possession that could be decreed on redemption would be possession through the tenant(14). So also where the mortgagor redeems prematurely the property a tenant inducted by the mortgagee under the terms of the mortgage is not affected, by premature redemption(15). Where the father of the tenant was tenant under the mortgagor of the mortgaged property before the creation of the mortgage and the tenant is father and tenant himself after his father's death executed fresh rent notes in favour of mortgagor and mortgagee from time to time and retained possession till date of filing suit for redemption, he could not be required to vacate property on redemption(16).

A tenant inducted into possession of an urban building or premises by a usufructuary mortgagee does not retain his status as a tenant after the redemption of the mortgage and therefore he is not entitled to the protection under Rajasthan Premises (Control of Rent and Eviction) Act as against eviction by the redeeming mortgagor(17). A permissible settlement by a mortgagee in possession with a tenant in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period is, however, an exception to the above rule(18). It was held by the Judicial Commissioner's

10. (1859) 54 ER 136 (137) 27 Beav 349 28 Heav 341 122 RR 426 Palmer v Hendrie

Also see S. 68, Note 2.

11. AIR 1974 Kant 2 (3 4, 5) (1973) 2 Mys LJ 147 ** 1986 HRR 145 (146) 1986 (1) 89 Pun LR 591 (Tenants inducted by mortgagee during subsistence of mortgage were liable to be ejected when the mortgagor never authorised the mortgagee to induct the tenant beyond the redemption of mortgage.) ** (1985) 1 Cur CC 975 (977) (Punj & Har)

12. AIR 1976 Guj 161 (179) : 17 Guj LR 497 (FB)

13. AIR 1996 Mad 241 (251) : 1996 (1) Mad LJ 453.

14. AIR 1973 Guj 203 (206, 207) ILR (1972) Guj 1144 ** AIR 1972 Guj 37 12 Guj LR 980

15. (1984) 1 Ren CJ 323 (Punj) ** AIR 1972 Guj 37 (41 42 43 44 45 47 48) 12 Guj LR 980

16. 1989 Him Pra 45 (46) (Punj & Har).

17. AIR 1983 Raj 77 (83) 1982 Rajasthan LR 954 (AIR 1966 Raj 19 **held overruled impliedly by AIR 1972 SC 637.**)

18. **AIR 1952 SC 205 (206)** ** ILR (1967) 1 Mad 84 (89) ** AIR 1964 Punj 368 (370) (Pr 4)

[See also AIR 1956 Mad 303 (303) (Obligation of mortgagee to redeliver possession is not fulfilled by his issuing merely a direction to tenant to deliver possession or attorn to mortgagor.) ** AIR 1953 All 472 (474) ILR (1954) 1 All 147 (DB) (According to mortgage deed it was open to mortgagee to let out land for management — **Held**, in the circumstances handing over possession to mortgagor could mean such possession as the property was capable of at time of redemption.)]

Court at Kutch that the above general rule would not apply where the mortgagee in possession grants a lease not for any specific period or on a permanent basis. If the lease is not terminated as required by S 106 the tenant will not be bound by the decree for redemption and would not be bound to deliver possession to the mortgagor(19).

Where a mortgage is created in favour of a tenant and the two relationships namely, of landlord and tenant and of mortgagor and mortgagee cannot co-exist the first comes to an end and the mortgagee on redemption must restore possession to the mortgagor(20). Where previous mortgagees who were tenants under mortgagor became tenants under subsequent mortgagee on exemption of such mortgage by the mortgagor, their tenancy would come to an end when mortgage in favour of subsequent mortgagee was redeemed and on redemption of the mortgage in their favour, the mortgagor would be entitled to possession of mortgaged property and they cannot deny the relief of possession to the mortgagor on the plea that they were tenants on the property(21). The question whether upon redemption of usufructuary mortgage a tenant-mortgagee is required to give actual possession of the mortgaged property to lessor-mortgagor depends upon the intention of parties at the time of execution of the mortgage deed There is no automatic merger of the interest of a lessee with that of a mortgagee when the same person is the lessee as well as mortgagee, in the absence of proof of surrender of lease Unless there is merger of both rights in redemption of the mortgage the plaintiff is not entitled to recover physical possession of the property The right of lessee to continue in possession would survive after redemption(22). Where there was nothing to warrant inference of relinquishment of rights of tenants by obtaining mortgage deed of same property, the tenants right to possession would not cease on redemption of mortgage(23). Similarly where the property in

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19. AIR 1955 Kutch 11 (12)

20. **AIR 1970 Punj 109 (110) (FB).** (The rule that the mortgagee's tenant continues to be the tenant of the mortgagor relates to agricultural leases only) ** AIR 1983 (NOC) 177 (1983) 1 Andh LT 199 (DB) Where in a suit for redemption of mortgage and recovery of possession, defendants claim to be tenants of suit property and where there is no case at any time by defendants that their possession was adverse to that of plaintiff plea of adverse possession is not allowed and they are treated as usufructuary mortgages only and are liable to deliver the possession to plaintiffs) ** AIR 1982 All 503 (508) ** (1979) 1 Kant LJ 271 (277) (Where owner K had let the premises to U and later executed a possessory mortgage in favour of U and sold his right of redemption to the plaintiff who sued for redemption and possession, and U transferred his rights and delivered possession to H, and H's right became vested in the defenadnt 'U' would be held to have surrendered his rights as a tenant when he entered into possessory mortgage by relinquishing possession as a tenant Therefore on redemption by the plaintiff, they were entitled to physical possession) ** AIR 1973 Punj 273 (275) 74 Pun LR 999 ** AIR 1963 Madh Pra 296 (297, 298) (DB). (Tenant accepting usufructuary mortgage from his landlord — Redemption of mortgage tenancy cannot be said to have revived — Tenant not entitled to continue in possession S A No 168 of 1960 D/- 31-7-1961 (MP). **Reversed.**) ** AIR 1963 Raj 110 (113) ILR (1963) 13 Raj 568 ** AIR 1962 Punj 48 (49) (Mortgage of house with possession executed in favour of tenant — Determination of lease by merger in mortgage — Suit for redemption — Mortgagor held entitled to actual possession on redemption) ** AIR 1958 Mys 20 (22) ILR (1957) Mys 100 (The tenant mortgagee after the termination of the lease if continues in possession as a mortgagee, is a mortgagee who is in possession of the mortgaged property and is bound, in a suit for redemption, to deliver the property under S 60.)

21. (1989) 2 Rev LR 42 (43).

22. **AIR 1999 SC 947 (949, 950) : 1999 AIR SCW 515 (517) : 1999 (3) SCC 251.**

23. **1987 Supp SCC 87** ** (1984) 1 Ren CJ 564 (566) (Punj & Har) (Where the mortgagee was in possession of the property as a tenant before he took the property on mortgage, however, the recital in the mortgage deed that possession was delivered to him as mortgagee implied his relinquishment of possession as tenant and taking overpossession as mortgagee, the tenancy rights of mortgagee would not be revived on redemption of mortgage)

possession of lessee was mortgaged with him by executing a usufructuary mortgage and there was nothing in the mortgage deed from which it could be inferred that the lessee would remain in possession of property even on redemption of mortgage, the mortgagor could not be denied posssession of property on redemption on basis of oral agreement between parties to keep the leasehold rights in abeyance during the subsistence of the usufructuary mortgage as it would be against the recitals of the written mortgage deed(**24**). But, where the terms of mortgage deed showed that there was implied surrender of leasehold rights between the parties, on the date of mortgage deed, decree passed in suit for redemption holding that the plaintiff was entitled for possession of property, would be legal(**25**). There cannot be merger of lease and mortgage in respect of the same property since neither of them is a higher or lesser estate than the other. Even if the rights of the lessee and the rights of the mortgagee in respect of a property were to be united in one person the reversion in regard to the lease and equity of redemption in regard to the mortgage would be outstanding in the owner of property(**26**).

It is the duty of the mortgagee or those who have held as his assignees to 'identify' fully the property mortgaged and if he or they fail to do that, they will come within the principle of *Wake v. Conyers*(**27**), namely, that

> 'The Court in cases relating to the confusion of boundaries proceeds upon the same principle as it does where an agent or bailiff, or any other person, who is under an obligation express or implied to keep his own property separate from the property to another, mixes them together; for under such circumstances he will have the onus thrown on him of distinguishing his own property; and if he is unable to do so, the other person will be entitled to the whole property.' (**28**)

Section 63 provides that where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage received any 'accession,' the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to such accession. The mortgagee will be bound thus to deliver possession not only of the property originally mortgaged but also of the accession. In the undermentioned cases(**29**), it was held that a mortgagee in possession should hand over to the mortgagor on redemption all the lands of which he has got possession in his capacity as mortgagee even though some of them did not form part of the property originally mortgaged.

Where through mistake the mortgagee is put in possession of more land than that specified in the mortgage deed, the mortgagee is bound to deliver possession of the whole property placed in his possession(**30-31**). The principle of equity will come to the rescue of mortgagor to redeem the property mortgaged with any excess extent found also at the time of redemption so long as such excess extent was found to be part of the mortgaged property and the position and status of the mortgagee as such mortgagee. The mortgagee in instant case could not prove that the excess extent was attrib-

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24. (1988) 101 Mad LW 263

25. 2001 (3) Mad LJ 183 (188)

26. AIR 1984 SC 1728 (1729 to 1731) : (1984) 4 SCC 382.

27. (1759) 2 W and TLC 438 : 1 Eden 331 : 2 Cox 360

28. (1901) 3 Bom LR 152 (153) (DB), Ramchandra v. Mukund

29. AIR 1924 All 444 (2) (445) ILR 46 All 152 (DB) ** AIR 1923 Bom 42 (42)

[See also AIR 1951 Trav-Co 94 (96) (Rule will not apply where mortgagee can show that he acquired the advantage with the consent of mortgagor or after contest with him or otherwise so openly and boldly that he is equitably entitled to keep the accession.)]

30-31. AIR 1924 All 444 (2) ILR 46 All 152 (DB) (After redemption the mortgagee cannot retain possession of plots not mortgaged which they presumably took into possession in their capacity as mortgagees and they are bound to account for mesne profit in respect of such plots.) ** AIR 1923 Bom 42 (42).

utable to any lease hold of adjacent property and therefore the mortgagor was entitled to redeem the entire mortgaged property including the excess extent(32). However, no redemption can be granted in favour of mortgagors in a suit filed by mortgagee for possession of suit land which possession is wrongfully denied to the mortgagee by the mortgagors in usufructuary mortgage(33).

The mortgagee must restore possession to mortgagor not only lands originally mortgaged but also the land that have come into his possession as mortgagee(34).

Where though in the mortgage deed there was no stipulation to the effect that the mortgagee shall be placed in actual possession over the property but it was provided nonetheless that he shall be entitled to realise the rent from the tenants of the mortgagor and by taking advantage of such term the mortgagee could take possession of the mortgaged property, the mortgagor was entitled to claim possession on payment of sum due. A mortgagee in possession may be either in actual possession of the property or in receipt of rents and profits and thus depriving the mortgagor of control The position of the mortgagee thus gaining possession over the items of property mortgaged would be akin to that of a trustee(35).

The expression "where the mortgagee is in possession of the mortgaged property" means where the mortgagee is in possession 'by virtue of the contract of mortgage'. Where the mortgagee not being entitled to possession under the mortgage enters into possession wrongfully, he cannot insist that the mortgagor cannot sue for possession without redeeming the mortgage(36). In *Hub Ali v Wazinrunnissa*(37), a mortgagee by conditional sale took possession of the mortgaged property without instituting the necessary proceedings for foreclosure under the Bengal Regulation XVII of 1806, it was held that his entry into possession was wrongful and that the mortgagor could sue for ejectment without suing for redemption.

It has been held that, as the sale of property under a mortgage decree, obtained in a suit to which the person in whom the equity of redemption entirely vested was not a party, conferred no interest on the auction-purchaser, his possession was that of a trespasser and not of the mortgagee and hence the mortgagor was not entitled to ask for delivery of possession by him under this section(38).

(A) Mortgagee's right to crops.

As has been seen in Note 9 on S 51, a mortgagee in possession cannot be said to believe in good faith that he is 'absolutely' entitled to the mortgaged property. A usufructuary mortgagee, therefore, is not entitled, under the last paragraph of S 51, to claim the crops growing on the mortgaged land at the time of redemption. But in the undermentioned Burma case(39) the equitable principle underlying S. 108(1), which recognizes the lessee's right to crops in respect of leases of uncertain duration was held applicable in respect of usufructuary mortgages, which are similarly of uncertain duration, and the usufructuary mortgagee was held entitled to all the crops growing on the land at the time of redemption provided that such crops were sown or planted by the mortgagee or his tenant without notice of the intended redemption.

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32. 1997 (1) ICC 761 (763) (Mad).
33. 1985 Pun LJ 274 (276) (Where property was purchased by previous mortgagees and it was provided in the sale deed that they would redeem the mortgage by paying sum due to the subsequent mortgagee, which mortgage was still subsisting, the purchasers would become mortgagors qua such subsequent mortgagee and the subsequent mortgagee would have a right of possession of land for stipulated period.)
34. 1981 TLNJ 151 (152) (Mad).
35. AIR 1987 All 155 (160) : 1986 All WC 963.
36. AIR 1935 Pat 174 (175) (DB).
37. (1906) 28 All 496 (508) : 33 Ind App 107 (118) (PC).
38. AIR 1950 Pat 206 (208) (DB).
39. AIR 1920 Upp Bur 56 (58, 61) : 3 Upp Bur Rul 141.

See also the undermentioned case(40).

18. Re-transfer of mortgaged property.

In an English mortgage or a mortgage by conditional sale, the mortgagor has a right, on redemption to have the property re-conveyed to him(1). In England, even if the mortgagee cancels the mortgage the legal estate is not revested in the mortgagor in the absence of a regular transfer deed, even though the cancellation operates as a release of the mortgage(2). This principle does not apply in this country The mortgagor is the legal owner of the property whether it is re-conveyed to him or not. The re-conveyance is merely a useful protection for the mortgagor(3). It is held by Full Bench of Delhi High Court.(4) that retransfer is not necessary in every case In some cases only acknowledgment is sufficient.

As has been seen in the Notes on S 54, the buyer in a contract for sale must tender a conveyance for execution by the seller On this principle the mortgagor, who is entitled to a re-transfer, and who, therefore, stands in the position of a buyer must tender a proper conveyance to be executed by the mortgagee Where the conveyance tendered contains 'incorrect' recitals the mortgagee is entitled to refuse to execute the reconveyance so tendered Where, however there are no recitals at all and all persons interested in the equity of redemption, concur in the conveyance tendered, the mortgagee cannot refuse to execute(5).

This section deals with the right of the 'mortgagor' to obtain a re-conveyance on redemption Section 91, however, provides that persons other than the mortgagor, and referred to therein, are entitled to redeem Where in the case of an England mortgage or a mortgage by conditional sale, a person other than the mortgagor redeems the mortgage, he will also be entitled to claim a re-transfer of the property(6). Where the mortgagor transfers his equity of redemption to another and there is no personal liability to pay, he is no longer a "mortgagor" and cannot claim to redeem the mortgage(7).

In England, a mortgagee, after tender of the mortgage amount is not bound, after he has notice of a puisne mortgage to re convey the property to a nominee of the mortgagor without the consent of the puisne mortgagee(8).

The ordinary rule in England is that the mortgagor must bear the costs of the re-conveyance(9).

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40. **AIR 1952 All 251 (257) : ILR (1953) 2 All 500 (FB).** (Case governed by provisions of Agra Tenancy Act (3 of 1926) — Mortgage of zamindari property by one co sharer to another — Mortgage including joint sir land in his exclusive possession — Suit for redemption — Mortgagor or his transferee is entitled to claim back possession of his sir land so long as his ex-proprietary rights are subsisting.)

Section 60 — Note 18

1. (1866) 35 LJ PC 30 (36) 14 WR (Eng) 484 Walker v Jones ** (1803) 149 RR 7, 1 7 1 Sch and Lef 176, Schoole v. Sall.
2. (1738) 26 ER 328 (328) : 1 Atk 520, Harrison v. Oween
3. (1903) 25 All 446 (454) (DB)
4. **AIR 1988 Delhi 1 (9) : (1988) 26 Reports 58 (FB).**
5. (1868) 16 WR (Eng) 876 (876) : 3 Ch App 365, Hartley v Burton
6. (1869) 38 LJ Ch 566 (567) LR 8 Eq 217 21 LT 287 17 WR (Eng) 1001 Pearce v Morris
7. AIR 1921 Mad 51 (53) (DB).
8. (1915) 84 LJ Ch 814 (816), In re Magneto Time Co, Ltd, Molden v The Company (1900) 17 TLR 5 (5), Corbett v. National Provident Institution.
9. (1912) 81 LJ Ch 259 (264) (1912) 1 Ch 323 105 LT 867 Webb v Crosse ** (1886) 34 WR (Eng) 600 (602) 31 Ch D 582 55 LJ Ch 576 54 LT 696 National Provincial Bank of England v Games ** (1848) 67 ER 1251 (1252) 6 Hare 473 18 LJ Ch 43 12 Jur 1083 : 77 RR 193, King v. Smith

The reason is that the mortgagor asks in 'equity' to be relieved of the legal consequences of his own act (which has made the mortgagee absolute owner at law) and while, on the one hand, the Court of equity preserves the right to redeem, it will, on the other hand, allow redemption on terms which are fair(**10**). This section also requires that the re-conveyance is to be at the cost of the mortgagor(**11**).

19. "Mortgaged property."

"Mortgaged property" means such interest in specific immovable property as the mortgagor has offered as security, whatever that interest may be. It would include the mortgagee-right under a mortgage and consequently the "mortgaged property" in the case of a 'sub-mortgage' is the mortgagee-right mortgaged to him(**1**). The sub-mortgagee can sue to bring to sale the mortgagee right alone(**2**). It would follow that the mortgagee can sue for redemption of his sub-mortgage(**3**). A sued B, the mortgagee, and C, the sub-mortgagee, for redemption. B died and his legal representatives were not brought on the record. It was held that there was no privity between the mortgagor A and the sub-mortgagee C and that, therefore, the suit abated on the death of B(**4**).

20. Right to registered acknowledgment.

Instead of requiring the mortgagee to re-transfer the mortgaged property, the mortgagor may require him to execute an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished. Such acknowledgment should, if the mortgage is for more than one hundred rupees, be necessarily registered under S. 17 (1)(b) of the Registration Act, 1908 (**1**). If the mortgage is for 'less' than one hundred rupees, such acknowledgment is not compulsorily registrable under the Registration Act. This section, however provides that 'if the mortgage has been made by a registered instrument,' then the mortgagor is entitled to have a 'registered' acknowledgment, irrespective of the consideration for which the mortgage was executed

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10. (1912) 1 Ch 323 (329) : 81 LJ Ch 259 : 105 LT 867, Webb v. Crosse

11. AIR 1930 Bom 401 (406) (DB) ** (1902) 26 Bom 643 (648).

[See also AIR 1926 Sind 145 (149) : 20 Sind LR 277.]

Section 60 — Note 19

1. (1907) 29 All 385 (395, 401) (FB).

[**But see** (1895) 18 All 83 (86) (DB) (Prior usufructuary mortgage — Subsequent simple mortgagee suing for sale on his mortgage — **Held,** decree for sale cannot be in respect of equity of redemption only but must be a decree for sale of mortgaged property itself — Subsequent mortgagee's suit held premature as he brought the suit before the time when he could in it ask for redemption of the usufructuary mortgage. 13 All 432, **Followed.**)]

2. (1907) 29 All 385 (405) (FB). (13 All 432 **dissented from.**) ** AIR 1916 Upp Bur 5(6) : 2 Upp Bur Rul 89.

Also see S. 67, Note 21.

3. AIR 1922 Bom 424 (425, 426) (DB). (In a suit by a mortgagee to redeem his sub-mortgage the original mortgagor is not a necessary party but may be a proper party.)

4. (1896) 20 Bom 549 (552, 553) (DB).

Also see S. 58, Note 5

Section 60 — Note 20

1. (1884) 6 All 335 (339, 340) (DB) ** 1997 (1) ICC 767 (769) (P & H) ** AIR 1926 All 693 (694) : 48 All 705 (DB) ** (1876) 1 Bom 197 (200) (DB) (Case under Act XX of 1866.) ** (1877) 2 Bom 489 (492, 493) (DB) ** (1883) 7 Bom 123 (124) (DB)

[**See also** (1896) 19 Mad 288 (290) (DB) (A receipt given by a mortgagee purporting to extinguish the mortgage requires registration under S. 17 of the Registration Act.)]

[**But see** (1884) 4 Bom 235 (238) (DB). (Case under the Registration Act of 1877.) ** (1881) 5 Bom 181 (183) (DB) (Do.) ** (1907) 9 Bom LR 254 (257, 258) (DB) (Do.)]

Consequently, where the mortgage has been registered, the mortgagee cannot refuse to give a registered acknowledgment on the ground that the acknowledgment is not compulsorily registrable under the Registration Act by reason of the mortgage being for less than one hundred rupees. But where there was only the endorsement on the back of the registered mortgage deed to the effect that "received all money of the deed", and there was neither any re-delivery of possession or execution of any registered deed as required by S. 60 or S. 17 of Registration Act, the mortgage property cannot be held to be redeemed. In such a case, it could not be said that the endorsement itself was sufficient as parties were all related.(2)

21. Proof of redemption.

There is no particular form in which redemption is required to be made. It is not necessary that there should be a registered deed to that effect. It can be evidenced by the fact of the payment of the mortgage money and restoration of possession(1) or other facts and the conductof the parties. Thus, where the mortgagor sold his property to the mortgagee and the same price equal to the mortgage-money, due on the date, was appropriated by the mortgagee towards the mortgage in his accounts, it was held that the sale deed and the conduct of the parties were sufficient proof of redemption of the mortgage (2) An 'unregistered receipt, however, falling under S. 17 (1)(c) of the Registration Act, cannot be used as evidence of redemption of a mortgage. But it can be considered as evidence of the fact that on a particular date, a particular amount has been paid and coupled with other circumstances, such as delivery of possession, it can be good evidence to show that the mortgage has been redeemed in fact.(3)

A usufructuary mortgage by a document can be redeemed only by executing another document and not by setting up a story that it was orally redeemed (4)

22. Extinguishment of right to redeem by act of parties.

The act of the parties sufficient to extinguish the right to redeem must be such as shows a 'release' of the right of redemption by the mortgagor. A mere acquiescence or silence where the mortgagee is claiming as owner(1) or a mere mutation of names in the revenue registers(2) is not

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2. (1991) 1 Gauhati LR 236 (238)

Section 60 — Note 21

1. AIR 1956 Madh B 72 (73) (The payment of the money and the restoration of the possession are sufficient evidence of redemption of the mortgage.)
2. AIR 1934 Oudh 98 (99) (DB) ** AIR 1963 Andh Pra 420 (422) ILR (1962) Andh Pra 1054 (DB)
3. AIR 1919 All 94 (94).
4. (1990) 1 All WC 611 (613).

Section 60 — Note 22

1. AIR 1952 Kutch 1 (2) (Mortgage property sold as of ownership of mortgagee in Court sale - No objection to sale raised by heirs of mortgagor — It cannot be inferred that property was sold to mortgagee by mortgagor and equity of redemption was extinguished.) ** (1904) 4 All LJ 787 (790). (Overruled on another point in AIR 1915 All 70 (FB.) ** AIR 1915 All 203 (206) (Assertion by the mortgagee alone that he is owner is not sufficient.)
2. AIR 1954 Punj 86 (87) ILR (1954) Punj 355 (Mortgage of occupancy rights in favour of landlord — Mutation in favour of landlord — Right of redemption in mortgagor is not defeated.) ** AIR 1934 Oudh 246 (248) 9 Luck 657 (DB) ** (1911) 9 Ind Cas 431 (433) (Oudh) (Where no steps to foreclose a mortgage had been taken either under Regulation XVII of 1806 or underAct IV of 1882, held, that a suit to redeem could not be held as barred merely on the ground that the Settlement Officer had expunged the name of the mortgagor from the khewat.) ** AIR 1923 Nag 274 (277) ** (1929) 120 Ind Cas 789 (790) (DB) (Lah) (A mortgagee in possession cannot, by getting himself recorded in the revenue papers as owner, defeat the right of the mortgagor to redeem.)

sufficient to operate as an extinguishment of the right to redeem. Nor can a presumption as to the extinguishment of the right to redeem be drawn from the mere fact of mortgagor's delay, which falls short of the period of limitation, in enforcing the right.(3) In order to deprive the mortgagor of his right of redemption, it must be categorically and strictly established that either by acts of parties as the decree of competent Court, the right of redemption has been extinguished. Even an incomplete decree or decree not involving decision on merits will not constitute sufficient ground to extinguish the right to redeem.

Mere mention of that settlement had arrived at under the Bombay Agricultural Debtors Relief Act ipso facto is not sufficient to presume extinguishment of the right to redeem when there is no mention as to what kind of settlement was made (4) Mere admission by the mortgagor that there is default in payment on due date does not make the usufructuary mortgagee owner of the property Title by adverse possession cannot be claimed unless both parties are cognizant of their rights and there can be no acquiescence (5) Possession by a mortgagee whose mortgage has been discharged by the payment of mortgage money, does not by the mere act of extinguishment of the mortgage become adverse to the mortgagor (6) Further, the "act of parties" must mean acts to which both the mortgagor and mortgagee are parties.(7)

By mere re-occupying the suit lands without asserting a hostile title against the mortgagor it could not be said that the right of redemption, which was there with the mortgagor had extinguished. A trespasser would not extinguish the right of the real owner unless he enters upon the immovable property and physically ousts him from occupation as well as from possession and sets up an adverse title in himself.(8)

A deposit by the mortgagor of the mortgage-money under S 83 does not extinguish the

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[See also 1962 Jab LJ 962 (968) (Mutation in the name of mortgagee in Municipal records) ** (1912) 13 Ind Cas 852 (853) (Lah) (A person entering into possession of land as a mortgagee is not at liberty to set up adverse possession against the mortgagor.by merely obtaining in his favour mutation of name as owner) ** AIR 1926 Oudh 594 (600) . 1 Luck 529 (DB) (An order in mutation proceedings entering the name of the mortgagee in the place of the mortgagor cannot have the effect of altering the legal character of the possession as a mortgagee into that of an owner any more than a claim by the mortgagee himself) ** (1911) 11 Ind Cas 429 (431) (DB) (Lah) (Where a mortgagee has once got possession of the mortgaged property as mortgagee, he cannot alter the nature of his possession by a mere assertion, or by a wrongful decree or by getting himself recorded in the register of mutations, nor can be original character of the possession as mortgagee be changed by the assertion of an absolute purchase of the property, unless the alleged purchase is valid and binding) ** 1908 Pun Re No 65, p 312 (313) (DB) (A mortgagee, who has taken fruitless foreclosure proceedings, cannot be asserting himself to be the proprietor and getting mutation in revenue records in his favour, start possession adverse to the mortgagor so as to disentitle him from redeeming the mortgage) ** (1909) 5 Low Bur Rul 40 (42) ** (1911) 11 Ind Cas 853 (853) (Low Bur) (The mere fact that the mortgagees' names appear in the revenue registers as owenrs is not sufficient evidence of adverse possession so as to deprive mortgagor of his equity of redemption, or to shorten the period allowed to him to sue.)]

3. AIR 1952 Kutch 1 (3)
4. AIR 1994 Guj 8 (17).
5. AIR 1969 Pat 64 (69) : 1969 BLJR 109.
6. AIR 1974 Ker 102 (103) : 1973 Ker LT 212 (DB).
7. AIR 1915 All 202 (206) (Assertion of adverse title by mortgagee during continuance of mortgage does not extinguish the right to redeem) ** (1871) 15 Suth WR 353 (354) (DB)
8. 1977 MPLJ 245 (252).

mortgage where the mortgagee does not accept it (9)

If the mortgagor deposits the price of redemption fixed by the Court the mortgage comes to an end.(10)

Again, the act of parties extinguishing the right to redeem must be one which is independent of the mortgage transaction and not part and parcel of it (11) Otherwise, it will be a clog on redemption and consequently void Thus, a condition in the mortgage deed itself, on default of payment on a certain date, the mortgagee shall become the absolute owner, will not operate to extinguish the right to redeem on that date.(12)

In the instant case it was found that the sale deed was in reality executed as a supplement to the anomalous mortgage It was agreed that the loan would carry interest Possession of suit property was given to mortgagee, thus it was usufructuary mortgage period of 5 years was agreed or payment of balance amount, property would be reconveyed to mortgagor Thus it was not out and out sale but was usufructuary mortgage The mortgagee was therefore entitled to redeem mortgage on fulfilment of its terms.(13)

The Act of parties which may result in the extinguishment of the right of redemption under the proviso to Section 60 must be an act or transaction subsequent to the mortgage (14)

Where the property which is subject to usufructuary mortgage is sold by the mortgagor to third person, the mortgagor ceases to have any interest in the mortgaged property on execution of sale deed The purchaser third party acquires interest in the property including the right to redeem the mortgage Thus subsequent sale of the property by the mortgagor in favour of the mortgagee would be ineffective and of no consequence The limitation for redemption of mortgage would be governed by Art. 61 of the Limitation Act and not by Art 65 (15)

When the mortgage is extinguished by act of parties, the act must take the shape and observe the formalities which the law prescribes One method is by payment in cash In that event nothing is necessary beyond the payment But the agreement is to transfer immovable property exceeding Rs. 100/ in value, the writing and registration are necessary Mere delivery of possession under an oral agreement is not enough.(16)

A purchase by the mortgagee 'subsequent' to the mortgage of the equity of redemption will extinguish the right to redeem (17) In order that there can be valid extinguishment of right of redemption which creates a corresponding right in the immovable property in the mortgagee there

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9. AIR 1924 All 26 (28) : 45 All 592 (DB)

10. AIR 1967 Ker 247 (248, 249) : 1967 Ker LT 189 (FB).

11. AIR 1919 All 126 (128) (DB).

12. 1963 BLJR 174 (174) (Clause in a mortgage bond that if principal amount is not paid by a certain date creditor would be entitled to get foreclosure effected is a clog) ** 1996 AIHC 3981 (3982) 1996 (2) Kant LJ 4.8 ** 1962 Jab LJ 962 (964) (Section 60 T P Act not in force in Indore State — Principle applied as principle of equity) ** 1943 4 MLJ 155 (157) (DB) (A stipulation in a usufructuary mortgage that if mortgage is not redeemed within two years, mortgagee would become absolute owner of property is void) ** (188) 11 Mad 403 (404) (DB).

13. AIR 1997 Andh Pra 53 (67) 1996 (1) Andh WR 655 (AIR 1971 Orissa 58 **Dissented from.)**

14. ILR (1974) 2 Cal 584 (587).

15. 1997 AIHC 1751 (1758) : 1997 (2) BLJR 924 (Pat).

16. (1989) 2 Cal HN 325 (331).

17. AIR 1963 Andh Pra 420 (422) ILR (1962) Andh Pra 1054 (DB) ** AIR 1955 Mys 38 (41) · ILR (1955) Mys 234 (Though the mortgagee may choose to keep it alive for his own defence against a puisne mortgagee) ** AIR 1954 Madh B 67 (70) ILR (1953) Madh B 147 (Property owned by A and B as tenants in common — Sale of A's share to mortgagee extinguished the right of redemption relating to that part and severs the security B

has to be a registered document.**(18)** Where the mortgager borrowed fresh loan from the mortgagee in possession under usufructuary mortgage and executed a document providing that in case of mortgagor's failure to repay the loan within stipulated period, the mortgagor would sell the mortgaged property to the mortgagee, however the document was not registered, the suit for redemption by mortgagor on failure to repay the loan would be maintainable As the document was not registered the mortgagor's right to redeem the property could not be said to have been extinguished by it.**(19)** The right of the mortgagor to redeem cannot be defeated by a mere agreement for the sale of the mortgaged property to the mortgagee which has yet to ripen into a sale **(20)** After executing mortgage if the mortgagor enters into agreement to sell the mortgaged property to the mortgagee, the right of redemption of the mortgagor is not thereby lost. He can redeem the mortgaged property notwithstanding agreement to sell the property to the mortgagee **(21)** However in the undermen-

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cannot claim to redeem A's share) ** AIR 1919 All 126 (128) (DB) ** AIR 1919 Pat 574 (577) (DB) ** AIR 1934 Pat 301 (302).

[**See also** AIR 1949 Nag 354 (357) ILR (1949) Nag 284 (DB) (But though a purchase by the mortgagee may put an end to the security and consequently the right to redeem such purchase does not extinguish the debt where there is a personal covenant by the mortgagor to pay the debt and where the acquisition of the property by the mortgagee was not for the purpose of putting an end to the debt as well) ** (1887) 11 Bom 174 (176, 177) (DB) (In pursuance of the stipulation in a mortgage deed that on the mortgagor's failure to redeem within the time specified in the deed it should become a sale, the mortgagor executed a razinama without any reservation surrendering the property in favour of the mortgagee The razinama was under the circumstances held to have extinguished the mortgagor's equity of redemption irrespective of any ignorance or mistake of law on the part of the mortgagor as to his rights as such) ** AIR 1953 Bom 408 (412) ILR (1953) Bom 773 (Alleged conduct of mortgagor in having permitted mortgagee to adopt a device impeding or preventing his right to redeem cannot be mortgagor from relying on doctrine of clog.) ** AIR 1952 Cal 749 (750) (**Held** purchase by mortgagee of entire property from owner of ½th share extinguished the right of redemption — Mortgagee not getting possession of ½ share — His remedy is to sue vendor mortgagor for failure of consideration) ** AIR 1920 UB 41 (41) 3 UBR 192 (Subsequent sale by mortgagor — Suit for redemption — Plaintiff cannot impugn validity of sale.)]

18. AIR 1979 Andh Pra 156 (157) (1978) 2 APLJ 353 (The extinguishment of the right of redemption creates a corresponding right in the immovable property in the mortgagee and hence must be effected by a registered deed.)

19. AIR 1986 Kant 221 (223) : ILR (1985) Kant 3835.

20. **AIR 1950 FC 1 (7) : 1949 FCR 484.** (Mortgagor agreeing to convey mortgaged properties to mortgagee — Conveyance not executed — Right of redemption is not extinguished) ** (1980) 49 Cut LT 297 (301) ILR (1980) 1 Cut 79 ** AIR 1956 Assam 17 (20) ILR (1955) 7 Assam 489 ** AIR 1954 Nag 84 (89, 90) ILR (1953) Nag 797 (DB) (Mortgagee agreeing to accept conveyance of certain lands in satisfaction of mortgage decrees — Mortgage debt or security would become discharged only by payment in redemption or by actual conveyance of the lands to the mortgagee) ** AIR 1925 Oudh 114 (115) 28 OC 100 (DB) (Subsequent contract of sale to mortgagee in possession — Contract not perfected by formal deed of sale — Possession of mortgagee did not become adverse from contract of sale and mortgagor was entitled to redemption.)

[**See also** AIR 1952 Madh B 6 (7) (Mortgage of part of property to A and other part to B — Agreement between A and B that if one of them purchased the whole property he would transfer the portion of the property to the other the portion mortgaged to him — A purchasing the whole property from mortgagor filing suit for redemption against B — **Held** the agreement between A and B was merely one to reconvey which could not extinguish the right of redemption which A had purchased in respect of property mortgaged to B)]

21. 1996 (2) CTC 500 (506) (Mad)

tioned case(22) Supreme Court held that when the mortgagor/vendor agrees to sell the mortgaged property to the mortgagee/putative vendee in possession, the mortgagee's status is subsumed or merged in his rights as a putative vendee under S 53 A against the transferor provided of course the pre-conditions for the application of S 53 A are fulfilled In such a situation enquity of redemption in mortgagor/vendor is lost He cannot reclaim possession of mortgaged property If the agreement is to transfer immovable property is extinguishment of the debt and the property is worth more than hundred rupees an instrument in writing and registered are necessary to pass title A mere oral agreement and delivery of possession under such agreement will not be sufficient to achieve that purpose (23-24) Where under an agreement of sale between the mortgagor and the mortgagee in possession mutation of the mortgagee's name is effected as owner in part performance of the contract it may have the effect of extinguishment of the right (25) In granting relief under S 53-A the question whether a contract is specifically enforceable or not has no bearing at all Where the mortgagee is in possession of the mortgaged property in pursuance of the agreement for sale executed by the mortgagor in his favour, and the mortgagee has performed his part of the contract under the said agreement, the right of redemption of mortgage under S 60 would not be available to the mortgagor and that right would be deemed as extinguished (26) Where under an agreement of purchase the mortgagee purchases the property the Deed can be relied upon to prove part performance leading to extinguishment of the right to redeem (27) Where, once a mortgage is admitted, the 'onus' will, however, be on the mortgagee to show that the mortgage has been extinguished by a subsequent sale.(28)

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22. 2000 AIR SCW 4354 (4357) : 2001 (1) SCC 414

23-24. AIR 1951 Nag 171 (173) : ILR (1950) Nag 618

[But see 1955 All LJ 752 (754) The words act of parties in S 60 do not mean only transfer of equity of redemption by regular sale deed A subsequent oral agreement made freely and voluntarily by parties to mortgage whereby mortgagee agrees to release of equity of redemption in favour of mortgagee will operate as extinguishment of the right of redemption)]

25. AIR 1974 Raj 188 (189) 1973 WLN 890 ** AIR 1970 Mys 203 (204) (1970) 1 Mys LJ 34

26. 1999 (2) WLC 450 (460, 461) (Raj)

27. AIR 1979 Andh Pra 156 (158) : (1978) 2 APLJ 353

28. AIR 1930 PC 91 (92) : 11 Lah 199 : 57 Ind App 86 ** AIR 1923 Lah 243 (244) ** AIR 1915 Mad 1150 (1151) (DB) ** (1905) 3 Low Bur Rul 5 (6) ** (1901) 20 Ind Cas 666 (667) (Low Bur) (Where the transaction between the parties admittedly began by a simple mortgage and there was subsequently a transfer of possession to the mortgagee it lies upon him to prove his right to resist redemption If he alleges an outright sale he must prove it)

[See also AIR 1925 Rang 377 (379 380) 3 Rang 367 (DB) (Where land is mortgaged without possession and subsequently possession passes to the mortgagee, the burden of proving that the transfer in which possession was given was an outright sale lies on the person alleging it) ** AIR 1928 Rang 44 (46) 5 Rang 668 (DB) (When land is mortgaged without possession and possession is subsequently given to the mortgagee the burden of proving that the transaction in which possession was given was an outright sale lies in the first instance, on the mortgagee But in case of long possession the onus should be on the party out of possession) ** (1909) 5 Low Bur Rul 40 (42) (When land is mortgaged without possession, and possession is subsquently given to the mortgagee the burden of proving that the transaction in which possession was given was an outright sale lies in the first instance on the mortgagee) ** (1910) 8 Ind Cas 610 (611) (DB) (Low Bur) (Do) ** (1901) 1 Low Bur Rul 215 (216) (DB) (When a transaction begins as a mortgagee then even though since the date of the mortgage there has been a transfer of possession from the mortgagor to the mortgagee, and although the mortgage deed provides for forfeiture of the property on failure to repay on demand the amount secured with interest due there still must be sufficient evidence to show that the intention was to transfer the ownership of the

See also the undermentioned case(29).

The right to redeem, given to a mortgagor under this section, does not come to an end when the mortgagee having a power of sale under the mortgage deed enters into a contract of sale in the purported exercise of that power, the right to redeem comes to an end only when the conveyance in pursuance of the contract is executed The mortgagor can therefore redeem the mortgagee at any time before the completion of the sale (30) Mortgagor has right to redeem mortgage before confirmation of auction sale by Court (31) However, where the property was sold and sale deed was executed and registered, pending disposal of suit, the mortgage would be extinguished and suit for redemption could not be decreed.(32)

The right to deposit the amount due to the mortgagee and avert sale of mortgaged property is conferred on the mortgagor-judgment debtor under scheme under O. 34 as substituted in Kerala, only prior to the sale itself and not subsequent to the sale.(33)

Illustrations

(1) Where the parties to a mortgage settled their claims under it by a compromise under which the mortgage debt was to be thenceforward extinguished and the property itself was to be devided among the parties in specific shares, and a decree was passed in terms of such compromise, it was held by their Lordships of the Privy Council that a subsequent suit for redemption was barred.(34)

(2) Where a foreclosure decree in the form of a preliminary decree was passed to the effect that if the

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property. If this be alleged by the mortgagee the burden of proof of such outright transfer is on the mortgagee resisting redemption)]

29. AIR 1997 Mad 74 (77) (Property coming to the share of one co-sharer on partition was mortgaged by him Period of redemption was fixed The mortgagor died before he could redeem the mortgagor On his death his heirs were entitled to redeem the mortgage A stranger has no right to redeem it on death of the mortgagor) ** (1984) 86 Bom LR 254 (263) (DB) (Where a decree fixed date of redemption and ordered mortgagees to deliver up all deeds relating to mortgaged property to the mortgagor company on the date of payment, the unregistered charge of mortgage created by company was kept alive even subsequent to winding up of company and in view of S 125 of Companies Act, it would be void against official liquidator such unregistered charge would have no effect upon property of company in liquidation)

30. **AIR 1977 SC 774 (780) : (1977) 1 APLJ (SC) 19.** (Mortgaged property put to auction — Mortgagor does not thereby lose his right of redemption — He can exercise it till sale is complete by registration ILR (1967) 3 Mad 161, **Overruled.**) ** AIR 1949 Bom 154 (155) (DB) ** AIR 1944 Bom 156 (158, 159) . ILR (1944) Bom 549 (DB).

[See also AIR 1951 Nag 171 (174) · ILR (1950) Nag 618 (Simple mortgage — Subsequently mortgagee taking possession of mortgaged property under oral agreement in satisfaction of his debt — Subsequent vendee from mortgagor can bring suit for redemption.)]

31. 1998 AIHC 538 (544) : 1998 (1) Rent LR 326 (Cal).

32. (1982) 95 Mad LW 213 (218).

33. AIR 1998 Ker 215 (219) : 1997 (2) Ker LJ 397.

34. **AIR 1914 PC 27 (29) : 42 Ind App 1.**

[See also AIR 1957 Pat 502 (507) ILR 36 Pat 753 (Suit by landlord and usufructuary mortgagee and mortgagor for arrears of rent and enhancement of rent — Compromise — By compromise mortgagors admitting that mortgage deed was treated as sale deed — Mortgagee entered as vendee in landlord's record at the instance of both mortgagor and mortgagee and continuing in possession as absolute owner for more than two decades — **Held** assuming compromise was invalid and did not amount to a valid transfer of property to mortgagee it wiped out and extinguished the right of redemption of mortgagor since it was a consensual act of the parties.)]

mortgagor failed to pay within six months the mortgage will be foreclosed and the mortgagor not being able to find funds gave up possession to the mortgagee, who remained in unchallenged possession for over forty years it was held that the mortgagor acquiesced in the position that the mortgagee was entitled to hold possession of the property as his own and that the right of redemption was thereby lost (35)

(3) Where a mortgage document provided that the mortgagee was to become absolute owner after the expiry of five years from the date of the execution of the mortgage if the mortgage-money was not paid by then and, after that date the mortgagee applied for mutation and the mortgagor consented to it, it was held that the right to redeem was extinguished (36)

(3A) In instant case 10 years time was fixed for seeking redemption However the mortgagor did not seek redemption for 26 years The mortgagee spent huge amount towards new constructions in the mortgaged property because of inability of the mortgagor to pay money and utter indifference shown in the matter In the circumstances it was held that the mortgagor could be said to have lost the right of equity of redemption.(37)

(4) A razinama executed by the mortgagor relinquishing all his right in the property in favour of the mortgagee under the Bombay Land Revenue Code and a complementary kabuliyat executed by the mortgagee in favour of the Government may or may not operate as a transfer from the mortgagor to the mortgagee In the former case, the deed of relinquishment coupled with the kabuliyat will operate as an extinguishment of the equity of redemption In the latter case it will not (38) See also the undermentioned case.(39)

(5) A purchase of the mortgagee right by a co-mortgagor may or may not extinguish the mortgage It depends upon the intention of the mortgagor acquiring it If he intends to keep the mortgagee right separate, the mortgage is not extinguished (40)

(6) In a case before the Act when an oral transfer was valid, the handing over by the mortgagor to mortgagee under a conditional sale, of an *ekrar* which reserved a right of redemption to the mortgagor was a surrender of the equity of redemption and extinguished the right of redemption (41) See also the undermentioned case before the Act to a similar effect (42)

(7) Where the auction sale of the mortgaged property is found to be void there is no foreclosure of the mortgage The equity of redemption is not extinguished The mortgagor is entitled to redemption of the mortgage on deposit of the amount due with the mortgagee Financial Corporation (43)

(8) Usufructuary mortgage was created in favour of tenant There was a specific statement in the mortgage deed that on redemption, the mortgagee should deliver possession to the mortgagor There was

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35. AIR 1929 PC 61 (62, 63). (AIR 1926 Bom 273 Affirmed.)

[But see AIR 1955 Hyd 190 (192) ILR (1955) Hyd 451 (Note The decision in this case appears to be incorrect inasmuch as it is contrary to AIR 1929 PC 61 which has not been noticed.)]

36. (1913) 21 Ind Cas 87 (87) (All).

[See also AIR 1959 Madh Pra 221 (222) (DB) (Mortgage by conditional sale — Amount not paid within stipulated time — Subsequent execution of release deed surrendering all his rights by mortgagor — Operates to extinguish right of redemption) ** AIR 1958 Andh Pra 541. (Simple mortgage — Mortgagee taking possession subsequently on certain date as owner under oral arrangement and continuing in possession for more than 12 years — Mortgagors' claim to redeem became barred by limitation)]

37. 1998 AIHC 3635 (3638) : 1998 (3) Andh LT 61.

38. AIR 1926 Bom 40 (41) 49 Bom 847 (DB) (AIR 1914 Bom 123 and AIR 1914 Bom 124, Dissented from.)

39. AIR 1960 SC 85 (89).

40. AIR 1934 Lah 143 (144).

41. (1869) 11 Suth WR 151 (152) (DB).

42. (1868) 10 Suth WR 478 (482) (DB).

43. AIR 1997 Ker 75 (84) : 1996 (1) Ker LJ 755.

no indication in the mortgage deed as to how rent payable by the mortgagee qua lessee was to be adjusted between the parties The absence of any leasehold rent implies that it was not intended that despite the said mortgage, parties intended that the leasehold interest was to continue It could not also be contended that there was a case of holding over by the lessee Thus the mortgagor was entitled to redemption of the mortgage and take delivery of the mortgaged property **(44)**

See also the undermentioned cases.**(45)**

In order to exercise the right of redemption the mortgagor must have subsisting right in the mortgaged property at the time of seeking redemption In instant case the property was mortgaged with a Bank by deposit of title deeds A money decree was passed against the mortgagor in a suit filed by the creditor firm The property was purchased by the creditor firm in auction sale. Thus the firm obtained title of the mortgagor and it became substituted mortgagor On auction sale of the mortgaged property, no subsisting interest existed in the original mortgagor and he could not there-

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44. **AIR 1997 SC 2127 (2128) : 1997 AIR SCW 1979 : 1997 (9) SCC 244.**

45. **AIR 1972 Ker 37 (38) : 1971 Ker LT 440 (FB).** (Merely by registry of a land under rules for assignment on the registry of Kandukrishy land in favour of a mortgagee of leasehold interest does not determine the interest of the mortgagor In order that mortgagor's leasehold interest would be determined there must be a notice to quit given by a person in whose favour the registry has been granted and if it is not given the mortgagor's right to redeem mortgage and recover the possession is intact AIR 1961 Ker 123 and (1961) 2 Ker LR 407, **Overruled.**) ** ILR (1976) 2 Mad 329 (334) (Usufructuary mortgage — Sub-mortgages found invalid in law — Sub-mortgagees could prescribe title by adverse possession only to the status of mortgagee and not to the status of owner — Mortgagor's right to redeem not extinguished) ** 1975 Ker LT 372 (374) (Where under a usufructuary mortgage the payment of mortgage money due on the mortgagor comes to an end, it cannot be said to be due thereafter when the mortgagee has to perform certain acts mentioned in S 60) ** 1974 Ker LT 879 ILR (1974) Ker 201 (DB) (By purchase from some of the mortgagors by the mortgagee the mortgage is not extinguished with reference to other mortgagors) ** AIR 1973 Mys 28 (32) (1973) 1 Mys LJ 186 (A mortgagor s right to redeem can be extinguished only by act of parties or a decree of the Court and the fact that usufructuary mortgagee was able to maintain possession as such by instituting his suit against the mortgagor's decree-holder cannot deprive the mortgagor of the equity of redemption) ** AIR 1972 Punj 285 (Where a mortgage is effected in favour of a tenant of the land and he purchased equity of redemption there is no redemption as such and such a purchaser cannot defeat a suit for pre-emption in view of S 17-B Punjab Security of Land Tenures Act) ** AIR 1953 Bom 424 (427-428) ILR (1953) Bom 1055 (DB) (Execution of a mortgage decree against a minor judgment-debtor — mother, acting as guardian ad litem, entering into compromise with decree-holder without sanction of Court — Mortgaged properties sold to decree-holder in full satisfaction of decree — Suit by possession by redemption of mortgaged properties brought by minor after three years from date of his attaining majority without setting aside the transfer — **Held,** transfer was binding and as a result of transfer of equity of redemption, right to redeem became extinguished by act of parties) ** 1954 Mad WN 620 (622) (Where in a suit for redemption, by consent of parties rights of mortgagors to redeem properties had been settled by allowing mortgagors to redeem one of the properties and denying their rights to redeem other properties it was held that by reason of the agreement which was the act of parties right of redemption in respect of other properties was extinguished) ** AIR 1940 Bom 225 (228) (Mortgagee, prior to redemption, allowing stranger to receive additional advance from him on same security and attorning to him — Mortgagor not deprived of right to redeem) ** AIR 1934 Lah 242 (243) (Mortgage by conditional sale — Foreclosure proceedings not taken — Mortgage held could be redeemed) ** AIR 1923 Nag 161 (161) (Simple mortgage — Possession given to mortgagee by way of additional security — Right of redemption not lost) ** AIR 1945 Bom 161 (162). (Agreement by charge-holder to postpone charge to rights created by equitable mortgage on same property — Agreement does not extinguish charge-holder's right to redeem the equitable mortgage)

fore exercise the right of redemption The firm having become the substituted mortgagor was entitled to redeem the mortgage with the Bank (46)

Where a mortgage is executed in favour of two persons advancing equal amounts and mortgagor acquires the interest of one of the mortgagees and a suit for redemption of the remaining house is filed the amount advanced by the mortgagee whose interest was not acquired would be the principal amount for redemption and in such a case the integrity of the mortgage could not be held to be broken.(47)

The right of the non-redeeming co-mortgagor would not be extinguished on the ground that he did not contribute the requisite share in the money paid by the redeeming co-mortgagor and failed to bring a suit within 12 years of the date of redemption Non-redeeming mortgagor can get possession over his share of mortgaged property from the redeeming co-mortgagor within 60 years from the date of the mortgage.(48)

23. Purchase by mortgagee at court sale, if extinguishes right to redeem.

A mortgagee may —

(a) obtain a decree on his mortgage and, at the sale in execution thereof, purchase the property with the leave of the Court;

(b) obtain a decree on a money claim 'unconnected' with the mortgage, and at the sale in execution of such decree, purchase the mortgaged property with the leave of the Court

(c) purchase without the leave of the Court the mortgaged property where it has been brought to sale in execution of a decree for money obtained by a third party against the mortgagor

Case (a) — It has been held by their Lordships of the Privy Council in *Mahabir Prasad v Macnaghten*(1) that the position of the mortgagee is the same as that of a stranger purchaser that he gets an irredeemable title and that the equity of redemption is extinguished by the purchase (2)

The right of redemption could subsist in case only where the conveyance was not completed by execution of sale deed and registration of same in pursuance of the auction Where sale had been completed and the conveyance had been effected the mortgage itself had become extinguished then there remains nothing for plaintiff to redeem.(3)

In such a case the prior mortgagee as an assignee of the equity of redemption has a superior right to redeem the subsequent mortgage and not the mortgagor who has lost his right to redeem (4)

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46. 1998 (1) Mad LW 724 (733, 736)

47. AIR 1970 All 188 (190) (Joint mortgage in favour of two persons — Mortgagor purchasing interest of one mortgagee — Right of redemption to the extent of interest that such mortgagee had is extinguished.)

48. 1984 All LJ (NOC) 25 : 1984 All WC 109 (113).

Section 60 — Note 23

1. (1889) 16 Cal 682 (692) : 16 Ind App 107 (PC).

2. AIR 1961 SC 1353 (1356) ** AIR 1965 Ker 132 (134) (DB) (12 Trav LT 1151 held overruled by AIR 1961 SC 1353).

[See also AIR 1948 Nag 316 (321) ILR (1947) Nag 912 (DB) (Landlord having under S 9, C P Tenancy Act, charge for rent on holding — Landlord bringing to sale holding and purchasing it — He does not redeem it and so he is not entitled to subrogation but the charge is extinguished by the sale.)]

[Also see (1899) 23 Mad 227 (233): 27 Ind App 17(PC) ** (1901) 24 Mad 96 (110) (DB) ** (1904) 32 Cal 296 (316) : 32 Ind App 23 (PC). (Mortgagee purchasing mortgaged property benami under a mortgage decree passed on a decision of arbitrators on reference to them by the parties during the proceedings of the suit on mortgage))

3. (1982) 1 Mad LJ 425 : (1982) 95 Mad LW 213 (214)

4. AIR 1973 Bom 300 (301) · 74 Bom LR 757

Case (b).— Section 99 of the Transfer of Property Act, as it stood prior to 1908, prohibited a sale of the mortgaged property in execution of a money decree obtained by the mortgagee, whether the decree was upon a claim connected or unconnected with the mortgage This was also the law under the Civil Procedure Code of 1859 **(5)** The present O 34, R. 14 of the Code of Civil Procedure, 1908, provides that a mortgagee shall not be entitled to bring the mortgaged property to sale in execution of any decree obtained by him for money in satisfaction of a claim 'arising under the mortgage' It is, therefore, clear that in the class of cases contemplated in case (b) above, the mortgagee will get an irredeemable title and the right to redeem would be extinguished.**(6)**

Case (c). In this case also the mortgagee will get an irredeemable title to the property **(7)**

Where the mortgagee purchases the mortgaged property at a Court sale in execution of his 'own decree, but without the leave of the Court,' the sale is not 'void', but is only 'voidable', and may be 'set aside' on an application under O 21, R 72 sub-r (3) of the Code of Civil Procedure The mortgagee will be regarded only as a trustee for the mortgagor in such cases and the right of redemption will not be extinguished A sale in contravention of O 34, R 14 of the Civil Procedure Code is also not void but is only a voidable one**(8)** and the position of the mortgagee purchaser at such a sale until confirmation of the sale is, similarly, that of a trustee for the mortgagor.

A sale may also be set aside if the mortgagee had availed himself of his position as a mortgagee to procure some facility or advantage leading to the purchase or connected with it **(9)** Thus, if a mortgagee in possession, who is bound to pay the revenue, rent or other public charges, commits default in paying such amount, and at the revenue or rent sale purchases the property himself or in

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5. (1909) 3 SLR 17 (21 22) (DB) (Case decided before S 99 T P Act was extended to Sind.) ** (1870) 4 Beng LR (OC) 83 (88) ** (1875) 24 Suth WR 210 (210) (DB)

   [**See also** (1870) 5 Beng LR 460n (462n) (An injunction against the mortgagee to proceed against the equity of redemption was prayed for and obtained)]

6. AIR 1923 Cal 121 (129) (DB).

   [**See also** (1913) 7 Sind LR 11 (15) (DB) (Section 99, T P. Act, had never been applied to Sind)]

7. **AIR 1961 SC 1353 (1356)** ** AIR 1965 Ker 132 (134) (DB) (12 Trav LT 1151 **held overruled** by AIR 1961 SC 1353) ** 1956 BLJR 495 (497) (Mortgagor responsible for payment of rent — Default by mortgagor — Decree for sale — Purchase by mortgagee — Right of redemption is extinguished) ** 1955-2 Mad LJ 132 (134) (Sale due to default of mortgagor in paying Govt revenue — Fact that mortgagee himself has become purchaser does not make any difference) ** *(1904) 7 Oudh Cas 307 (311) (DB) ** **(1904) 32 Cal 296 (316) : 32 Ind App 23 (PC).** (Mortgagee contrived to get the property by purchasing it in the name of a third person first and then getting it transferred to the son and gomasta of the mortgagee) ** (1904) 27 Mad 428 (429) (DB) ** (1901) 24 Mad 96 (111) (DB). (23 Mad 377, **held not good law** — Note — This case was **overruled** by AIR 1942 Mad 685 on another point.)

   [**See also** AIR 1953 Trav-Co 375 (377) ILR (1953) Trav-Co 388. (Decree obtained by third party — Sale of mortgagor's property in execution of — Third party decree-holder himself the purchaser — Mortgagee subsequently purchasing property from purchaser — Mortgagor has no right of redemption until sale remains.)

8. See Note 7 on O. 34, R. 14 in the Appendix.

9. AIR 1965 Ker 132 (134) (DB) (12 Trav LT 1151, **held overruled** by AIR 1961 SC 1353.) ** AIR 1958 Ker 230 (235) (Section 90, Trusts Act, 1882, does not strike down every advantage gained by a mortgagee For attracting S 90 advantage should have been gained by him availing himself of his position as a mortgagee or because he was mortgagee and it must have been gained in derogation of the right of the mortgagor) ** AIR 1957 Pat 497 (498) ** (1864) 46 ER 456 (457) 13 WR (Eng) 374, Shaw v Bunny ** AIR 1916 Bom 108 (109) : 40 Bom 483 (DB).

some other person's name on his behalf, the right to redeem is not extinguished **(10)** That would be so even where the mortgagor was also liable to pay the rent and his default equally contributed to the passing of the rent decree and the execution sale at which the defaulting mortgagee purchased

[**See also** AIR 1958 Pat 649 (651) (DB) (Purchase by mortgagee in execution sale under a rent decree — Sale not procured by mortgagee — Right of redemption held extinguished) ** AIR 1957 Pat 452 (454) (Revenue sale of property — Mortgagee under no duty to pay — Mortgagee has not gained advantage of her position to gain an advantage)

10. AIR 1961 SC 1353 (1356) ** (1866) 10 Moo Ind App 540 (558) (PC) (Fraud by mortgagee.) ** **AIR 1916 PC 227 (228) : 44 Cal 573 : 44 Ind App 30.** (Fraud by agent of minor mortgagee) ** AIR 1997 Pat 59 (63) 1996 (1) Pat LJR 132 (Mortgagee fraudulently purchasing equity of redemption — Right of redemption not lost) ** AIR 1965 Ker 132 (134) (DB) ** AIR 1963 Assam 176 (178) ILR (1963) 15 Assam 315 (DB) (Usufructuary mortgage — Right to redeem — Extinction of by sale for arrears of land revenue — Subsequent sale by auction purchaser in favour of mortgagee — No evidence to establish revenue sale benami for mortgagee — Section 90 Trusts Act not applicable — Suit for redemption held not maintainable) ** AIR 1960 Pat 423 (424) ** AIR 1959 Ker 94 (97, 98) (DB) ** AIR 1958 Ker 230 (235) (DB) ** AIR 1957 Andh Pra 430 (432) ** AIR 1957 Pat 136 (136) ** AIR 1956 Orissa 61 (63) ILR (1955) Cut 697 ** (1955) 2 Mad LJ (2) 34) ** AIR 1954 Mys 187 (188) ILR (1955) Mys 180 ** AIR 1953 Nag 259 (260) ILR (1952) Nag 366 (DB) (No contractual or statutory obligation on the mortgagee to pay revenue — His mere right to pay and save property from sale cannot be converted into an obligation — Failure to do so is not a default on his part and if he purchases the property the principle stated cannot apply to the case) ** AIR 1953 Pat 27 (29) (DB) ** AIR 1953 Trav-Co 563 (567) (But if rights of a purchaser at a sale under the Revenue Recovery Act for arrears of land become vested in another person whose default occasioned the sale then obligations again attach to the property) AIR 1952 Pat 476 (477, 478) (Usufructuary mortgage of holding — Holding sold for arrears of rent due to default of mortgagee himself — Mortgagee himself purchasing and subsequently transferring property — Transferee cannot resist claim of mortgagor for redemption) ** AIR 1952 Pat 286 (288) 31 Pat 365 (DB) ** AIR 1952 Trav-Co 53 (55, 56) (Mortgagee bound to pay michavaram due — omitting default — Mortgaged property sold in execution sale to recover michavaram due — Mortgagee purchasing property benami — Right of redemption is not affected) ** AIR 1951 Pat 566 (568) 39 Pat 391 (DB) ** (1910) 7 Ind Cas 772 (774) (DB) (Cal) ** (1898) 22 Bom 271 (274, 275) (DB) (Mortgagee purchasing in the name of another) ** (1884) 7 Mad 1 (112) (DB) ** (1896) 20 Bom 492 (494) (DB) ** AIR 1927 All 747 (748) 50 All 36 (DB) ** AIR 1918 Cal 192 (193) (DB) ** 1889 Bom PJ 160 (DB) ** (1897) 21 Bom 396 (399) (DB) (Certain lands had been mortgaged by the plaintiff to the deceased brother of their present holder H — The Forest Department wanted to acquire the lands of which H admitted he was only the mortgagee — It was arranged between H and the Forest Department that he should allow the assessment to fall into arrears upon which Government would forfeit the holding, and that then H should receive another plot in exchange — The present suit was by the mortgagor's heir to redeem the land so acquired in exchange — The High Court held that by non-payment of the assessment the whole holding became liable to forfeiture, and such forfeiture extinguished the rights of the mortgagor who could no longer maintain his equity of redemption against Government in whom the land became vested — He was, however, a trustee for the mortgagor of the latter's equity of redemption which he had caused to be lost out of his hands by his own fraud — He obtained the plot now sought to be redeemed as the compensation or price of the original holding and as the rights of the parties in the latter lands were thereby transferred to the former he obtained the former only to hold it just as he held the latter viz as mortgagee for the plaintiff and his heirs who were therefore entitled to redeem the said land taken in exchange) ** AIR 1916 Bom 108 (109) : 40 Bom 483 (DB)**

[**See also AIR 1954 SC 336 (337).** (Sale of mortgaged tenancy in execution of decree for rent — Purchase by mortgagee in possession — Right of tenant to redeem — **Held** in absence of any special statutory provision to the contrary case was governed by S 90, Trusts

the property (11) it was however held by the Supreme Court in the undermentioned case (12) Where the real effective cause for the rent sale was the default in payment of rent by the mortgagor and not the default of the mortgagee in the payment of a very small portion thereof, that the right of redemption stood extinguished by the sale and hence his suit for redemption against the mortgagee-purchaser was to be dismissed. According to the High Court of Patna, however, a right of redemption once extinguished by the sale, cannot be revived by the subsequent purchase by the mortgagee, unless the rent or revenue sale is *'fraudulent.'*(13)

A mortgage of land was created by executing zarpeshgi deed The mortgagee obtained a decree in mortgage suit fraudulently by suppressing material facts and by playing fraud upon the Court The mortgagee himself purchased the land in auction sale. Subsequently he sold it to third party Held that all that the third party had really purchased was the zarpeshgi interest of the mortgagee In the eye of law it amounted to purchase of equity of redemption Thus the mortgagor was entitled to seek redemption.(14)

Where however property subject to mortgage is sold at the instance of a third party on account of default both of the mortgagor and the mortgagee, the mortgagee's default being substantial and the mortgagee purchases the property at the Court auction the mortgagor is entitled to redeem the mortgage.(15)

Act 1882 and tenant s right to redeem was not extinguished) ** AIR 1964 Ker 225 (227) (Purchase by mortgagee at sale resulting from his own breach of contract) ** AIR 1961 Pat 439 (442) (Liability to pay rent on both mortgagor and mortgagee — Both committing default — Property sold in execution of rent decree — Purchase by mortgagee — Section 90, Trusts Act, not applicable — Right to redeem held lost) ** AIR 1960 Pat 250 (252) (Mortgagee contrary to his undertaking executing instalment decree and purchasing property in execution **Held** mortgagor was entitled to redeem) ** AIR 1951 Nag 254 (255) ILR (1950) Nag 862 (Sale of property for realising Government demand Purchase by mortgagee in possession — Right to redeem would depend on whether mortgagee was bound in law to pay Government dues) ** (1940) 190 Ind Cas 40 (41) (DB) (Pat) (Mortgagee in possession from tenant suffering dispossession by his default and obtaining new settlement from landlord cannot change his character as mortgagee — The new lease enures for mortgagor tenant s benefit) ** AIR 1919 Cal 314 (315) (DB) (Assumed) ** AIR 1934 Pat 307 (308) (Mortgagee omitting to pay rent to the zamindar) ** AIR 1927 Bom 540 (541) (DB) (The grandfather of plaintiff granted a mortgage with possession in 1872 of the land in suit — In 1884, as the assessment was not paid, an order of forfeiture was made by the Collector and this land was sold under S 56, Bombay Land Revenue Code, as it then stood, and it was purchased by the mortgagee — In 1921, the plaintiff sued to redeem the mortgage — **Held** that the effect of the forfeiture and sale was to extinguish the right to redeem and the plaintiff must show that the forfeiture and the revenue sale were due to the default of the mortgagee in not paying the assessment and that, in order to do this, he must show that the income of the land was sufficient to pay the assessment, or that in some other way the mortgagor put the mortgagee in possession of funds wherewith to pay these moneys.)]

Also see Note 27

11. **AIR 1964 SC 1707 (1708, 1709) : ILR 43 Pat 570 **** AIR 1983 Pat 217 (219) 1983 BLJR 405 (DB). (AIR 1939 Pat 382 **held no longer good law** in view of AIR 1961 SC 1353 and AIR 1964 SC 1707.)

12. **AIR 1966 SC 126 (127) : ILR 45 Pat 90.**

13. AIR 1939 Pat 382 (385) 18 Pat 133 (DB) (AIR 1936 Pat 434, **Relied on.** (Note— AIR 1936 Pat 434 is **Dissented from** in AIR 1957 Andh Pra 430.)

14. **1997 (1) Pat LJR (HC) 255 (259)**

15. **(1967) 2 SCWR 542 (543).**

The purchase by the mortgagee of a 'part' of the mortgagee property has not, in the absence of fraud, the effect of extinguishing the whole mortgage-debt, even where the value of the property purchased is equal to the amount due on the mortgage decree. The part of the property purchased is only chargeable with a proportionate part of the mortgage-debt and the purchase has the effect of extinguishing that portion only.(16)

A purchaser of a part of the mortgaged property who is not made a party to the suit on the mortgage by the mortgagee retains his right of redemption only with respect to portion of the property purchased by him and not the entire property.(17)

In case of successive mortgages a prior mortgagee who purchased the mortgaged property becomes entitled as assignee of the equity of redemption to redeem the subsequent mortgage. If there is a conflict between the right of the prior mortgagee as assignee of the equity of redemption to redeem the puisne mortgagee and the right of the puisne mortgagee to redeem the prior mortgagee the right of the prior mortgage takes priority. In such a case the transferees of the prior mortgagees were also held entitled to possession of the property.(18)

24. Subsequent mortgagee purchasing at sale held by prior mortgagee under his power of sale.

In *Shaw v. Bunny*(1) where a first mortgagee duly exercised his power of sale, a subsequent mortgagee who purchased the property at such sale, in the absence of anything to impeach the 'bona fides' of the transaction, was held to acquire the same irredeemable title as if he were a stranger. "If, indeed, he had availed himself of his position as a mortgagee" said Lord Justice Knight Bruce, "to procure some facility or advantage leading to the purchase or connected with it, that might have made a difference."(2) Where the property was brought to sale under the prior mortgage owing to the failure of the subsequent mortgagee to pay it off as agreed to by him and the subsequent mortgagee bought the property at the sale it was held that the mortgagor's right to redeem the property was not affected.(3)

25. Mortgagee purchasing at sale held by himself under his power of sale.

In the undermentioned case of the Bombay High Court(1) it has been held that a purchase by the mortgagee himself at a sale held by him under a power of sale given to him on his mortgage is a 'nullity.' In an earlier case(2) of the same High Court, however, it was held that if the mortgagor agreed in such a case that he would not dispute the sale, the mortgagee would get an unimpeachable title.

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16. AIR 1920 Mad 375 (377) : 43 Mad 372 (AF). (22 All 284 (FB) Followed. 26 All 23 (FB) (Distinguished. 12 Ind Cas 130 Overruled.) ** (1901) 26 Bom 88 (95, 98) (SB) ** AIR 1940 Pat 45 (46) (DB) ** AIR 1924 Mad 364 (364) (DB)

    [See also AIR 1921 All 301 (304) : 43 All 539 (DB).]

    Also see Note 44 and S. 82, NOte 18

17. AIR 1968 Bom 106 (111) : 69 Bom LR 504 (DB)

18. AIR 1981 SC 160 (161) : 1980 UJ (SC) 890.

Section 60 — Note 24

1. (1864) 46 ER 456 (457) : 34 LJ Ch 257 : 2 De GJ and Sm 468 : 11 Jur (NS) 99 : 11 LT (NS) 645 : 13 WR (Eng) 374 : 139 RR 190.

2. See also (1901) 24 Mad 96 (110) (DB). (1864) 46 ER 456 Followed. Note : This case was overruled on another point in AIR 1942 Mad 685.

3. AIR 1957 Andh Pra 430 (432)

Section 60 — Note 25

1. AIR 1929 Bom 24 (26, 27).

   Also see S. 69, Notes 27 and 29.

2. (1886) 10 Bom 49 (54, 55, 56) (DB).

Where power is reserved in the mortgagee to sell the property without intervention of the Court, in selling the property the mortgagee does not act as an agent of the mortgagor and until the sale is complete by registration the mortgagor has a right to redeem.(3)

26. Extinguishment of right to redeem by decree of Court.

The decree of Court referred to is the final decree in a foreclosure suit under O 34, R 3 and the final decree in a redemption suit under O 34, R 8 of the Code of Civil Procedure (1) The corresponding old Ss 87 and 93 of the Transfer of Property Act used the word "*Order*" and the present section also uses the word "order". In view of the use of the word "*decree*" instead of "*order*" in O. 34, Rr 3 and 8, this section has also been amended by substituting the word "decree" for the word "*order*" A decree for '*possession*' in favour of a mortgagee who is entitled to such possession under the terms of his mortgage does not extinguish the mortgagor's right to redeem (2) In a decree for redemption the Court declares the amount due to the defendant at the date of such decree for the principal and interest on the mortgage, the cases of the suit, if any awarded to him and other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage security together with interest thereon and if the plaintiff pays into Court the amount so found or declared within the stipulated period, the defendant is barred to deliver up to the plaintiff etc. all documents in his possession or power relating to the mortgaged property and also retransfer the property to plaintiff at his cost free from mortgage. Only on passing should decree and on the mortgagor deposing in Court the price of redemption as directed by the decree it can be said that the right of redemption got extinguished by decree of Court.(3)

(A) Final decree for redemption or for foreclosure.

Where under a mortgage with possession, the property is leased back to the mortgagor and the mortgagee obtains a preliminary decree on the mortgage but there is no application for final decree the mortgagee only loses his right to recover money by sale of the property but otherwise the security remains intact The leasing back of the property arises because of the mortgage with possession. If the security is good and considered to be sufficient by the mortgagee he should not be driven to file a suit on his mortgage when he can file a suit for realisation of the monies due under the rent note Under the provisions of Order 34, Rule 4, Civil P C the mortgagee cannot deprive the mortgagor of his right to redeem excepting by proceeding on his mortgage So long as the mortgagor has a right to redeem the mortgage he can always pay off the mortgagee and get back possession. This position would continue so long as the property is not sold under a final decree for sale under the provisions of Order 34, Civil P C. The rights of a mortgagee do not merge in his rights

3. **AIR 1977 SC 774 (780). (ILR (1967) 3 Mad 161 and AIR 1974 Mad 158 Overruled.)**

Section 60 — Note 26

1. AIR 1954 Mad 650 (653) ILR (1954) Mad 664 (DB) (A decree which is not one of foreclosure and proceedings taken in execution of such decree cannot extinguish right of redemption) ** AIR 1930 Bom 401 (405) (DB) ** AIR 1920 Oudh 204 (206, 207) (DB) ** (1911) 10 Ind Cas 748 (752) (Bom) (A decree *nisi* in itself from its nature is provisional and requires the party seeking to have it enforced to make it absolute — Whether the decree be procured by the mortgagor or the mortgagee, it is in the option of either party to enforce it and have it converted into a decree absolute but until one or the other party does so, it never can be a final decision or constitute a *res judicata*) ** AIR 1916 Nag 120 (123) 13 Nag LR 69 (Every contract of mortgage by conditional sale, since the passing of the Transfer of Property Act must be taken subject to the condition that in default of payment on the due date, ownership will not be vested until there is a decree absolute for foreclosure.)
2. AIR 1943 Nag 271 (272, 273) ILR (1944) Nag 40 (Anomalous mortgage — Suit by mortgagee for possession — Decree for possession until satisfaction — Mortgagor's right to redeem is not lost — Mortgagor can bring a suit for redemption)
3. (1987) 2 Ker LT 733 (DB).

under the preliminary decree for sale. If the right of the mortgagee arose on the strength of the rent note which continued to be in force notwithstanding that the period for applying for a final decree for sale had expired, there could be no extinction of his right to sue for possession because of Section 28 of the Limitation Act.(4) Where a final decree is passed under O. 34, R. 3, sub-r. (2) or* under O. 34, R. 8, sub-r. (3), 'declaring that the mortgagor is debarred from all' rights to redeem the mortgaged property, the right to redeem is clearly extinguished (5) Until the final decree is passed, however, the right to redeem is not lost even if the time fixed for payment in the preliminary decree has expired (6) Nor will the right be extinguished, where the final decree for redemption or foreclosure *omits* to make such a declaration (7) And so long as such right exists a suit for redemption

4. **AIR 1971 SC 310 (315) : (1971) 1 SCJ 171.** (AIR 1958 Bom 8 and AIR 1957 Pat 24 and AIR 1944 Pat 5, **Overruled, AIR 1963 Raj 69, Approved.**)

5. **AIR 1950 PC 88 (90) : ILR (1951) 1 All 199 : 77 Ind App 53** (Anomalous mortgage — Final decree for foreclosure in accordance with agreement passed — Court has no jurisdiction to reopen decree and to extend time for redemption on equitable grounds.) ** ILR 1955 Punj 830 (836) ** (1912) 10 ALJ 36 (38) (Right to redeem continues until it is expressly taken away by some decree of a competent court which has effect of extinguishing the right.)

   [**See also** AIR 1930 Lah 74 (75) (Payment of mortgage money under preliminary decree for redemption — Final decree for possession passed but not executed — Subsequent suit for redemption held did not lie as relationship of mortgagor and mortgagee had merged in the final decree.) ** AIR 1945 Bom 307 (310) (DB) (Consent instalment decree for redemption passed before Act extended to Bombay — On default right to redeem to be barred — Default committed — Application for foreclosure — Fresh order to make foreclosure absolute held unnecessary — Fresh suit for redemption after forty years held barred.)]

6. ILR (1967) 2 Mad 124 (139) ** AIR 1959 Orissa 122 (125) (DB) (Preliminary decree only passed in prior suit for redemption — Right to redeem is not extinguished — Subsequent suit for redemption is not barred by *res judicata*.) ** 1957 Ker LT 237 (Final decree not passed — Right to redeem not extinguished — Second suit for redemption held maintainable.) ** AIR 1953 All 503 (504) (A preliminary decree passed under O. 34, R. 7 as it stood before its amendment in 1929) by itself does not put an end to a mortgagor's right to redeem even if it purports to say so.) ** AIR 1953 Orissa 17 (19) ILR (1952) Cut 493 (DB) (Suit brought as one for possession from trespasser — Decree in suit allowing plaintiff to recover possession on payment of mortgage money due to defendant — Decree not one as contemplated by O. 34, R. 7, Civil P.C. — No final decree dismissing suit on plaintiff's failure to comply with condition — **Held** subsequent suit by plaintiff for redemption was not barred by *res judicata*.) ** AIR 1950 All 88 (89) ILR (1951) 1 All 117 (Where in a prior suit on the mortgage a preliminary decree is passed but no final decree is passed a subsequent suit for redemption would not be barred.) ** AIR 1929 All 231 (231) ** (1910) 7 Ind Cas 50 (50 (DB) (All) ** AIR 1931 Oudh 121 (122) 6 Luck 610 (DB) ** AIR 1931 All 223 (223) (DB) ** (1922) 70 Ind Cas 152 (153) (DB) (Cal) ** (1903) 25 All 231 (233) (The fact that the mortgagee had obtained possession of the property otherwise than by an order under S. 87 will not affect the mortgagor's right to redeem.)

   [**See also** AIR 1927 All 305 (305, 306) (Suit for redemption continues till the period of limitation prescribed for applying for final decree expires.)]

7. **AIR 1950 FC 1 (6) : 1949 FCR 484.** (When right of redemption is alleged to have been extinguished by decree the decree should run strictly in accordance with the form prescribed for the purpose.) ** AIR 1965 Ker 153 (154) ** AIR 1957 Raj 321 (326) ILR (1957) 7 Raj 964 (DB) ** AIR 1956 Hyd 107 (108) ILR (1956) Hyd 339 ** AIR 1955 Hyd 190 (191) ILR (1955) Hyd 451 ** AIR 1929 All 231 (231) ** (1889) 16 Cal 248 (249) (DB) ** (1900) 27 Cal 705 (708) (DB) ** (1909) 1 Ind Cas 71 (72) (DB) (Cal) ** (1909) 36 Cal 122 (127) (DB) (The deposit made after the period fixed by the decree but

would not be barred by *res judicata* **(8)** Even where no payment is made in accordance with decree passed in an earlier suit for redemption the mortgagor is not debarred from right to redeem and second suit is not barred **(9)** Thus, in the absence of a clear indication in the decree passed in an earlier suit for redemption debarring the mortgagors from all rights to redeem the mortgaged property, the right to redeem the mortgage subsists and a second suit to redeem the mortgage is maintainable. It is neither barred by S. 47 of Civil PC nor it is barred by principles of res judicata **(10)** Similarly where in the previous suit the redemption was claimed in respect of two properties and also the instant suit property, and no decree of redemption was granted in that suit in respect of instant suit property Subsequent suit for redemption of suit property would not be barred by res judicata **(11)** Before the decision of their Lordships of the Privy Council in *Raghunath Singh* v. *Mt Hansraj Kumwar*,**(12)** there was, however, a conflict of opinions on the point, one set of cases holding that

before making the final order is valid and effectual) ** AIR 1936 Pat 420 (420, 421) : 15 Pat 607 (DB) (Suit for redemption) ** (1904) 3 Cal LJ 533 (535, 536) (DB)

[**See also** AIR 1954 Mad 650 (653) ILR (1954) Mad 664 (DB) (Suit by sub-mortgagee against his mortgagor — Original mortgagor made only a pro forma party — Decree not adjudicating rights of parties under original mortgage — Decree could not be read as declaring right of redemption of original mortgagor and neither the decree nor the execution proceeding has effect of extinguishing original mortgagor's right to redeem) ** AIR 1927 Bom 87 (90) (DB) (Order dismissing redemption suit Mere dismissal does not extinguish equity of redemption — Clear intention to do must be expressed — Case before amendment when section used the word "order" instead of "decree") ** (1910) 32 All 215 (218) (DB) (Conditional decree passed in redemption suit — Mortgagor is not prevented from bringing fresh redemption suit because he does not fulfil conditions of first decree, unless he is expressly barred.)]

8. **AIR 1950 FC 1 (6) : 1949 FCR 484** ** 1980 Rev Dec 77 (81) (All) (Mortgagee of occupancy tenancy — Bound to restore possession on consideration of mortgage being paid — He cannot prescribe title to the mortgaged property unless he had delivered back possession to the mortgagor and has thereafter started prescribing adverse title to the mortgaged property) ** AIR 1959 Orissa 122 (125) (DB) ** AIR 1957 Raj 321 (326) ILR (1957) 7 Raj 964 (DB) ** 1957 Ker LT 1237 ****AIR 1955 Trav-Co 9 (12) : ILR (1954) Trav-Co 675 (FB)** ** AIR 1953 Orissa 17 (19) ILR (1952) Cut 493 (DB)

[**See also AIR 1937 Mad 214 (216) : ILR (1937) Mad 548 (FB).** (25 Mad 300 (FB). Held **Overruled** by AIR 1934 PC 205) ** AIR 1965 Ker 153 (154) (Mortgagor not executing redemption decree obtained by him — Mortgagor subsequently assigning equity of redemption — Assignee's suit for redemption wrongly dismissed on the ground that it was barred by *res judicata* — Still dismissal would operate as *res judicata* in all future suits) ** AIR 1957 Raj 321 (325, 326) ILR (1957) 7 Raj 964 (DB) (The principle applies even in places where T P Act is not in force) ** 1954 Mad WN 620 (622) (Suit for redemption of several items of property — Compromise — Relief for possession confined to one item only — **Held** the order in the circumstances had effect of extinguishing right of redemption in respect of the other items) ** AIR 1953 Trav-Co 335 (336) (Suit for redemption by two co-mortgagors A and B — B selling his equity of redemption to C — C obtaining redemption of entire properties — Suit by A for redemption of his half share of properties on partition by metes and bounds — Suit held not barred on account of previous joint action by A and B for redemption) ** AIR 1940 Mad 577 (578).

See Note 40 on S 11 of the AIR Commentaries on the Code of Civil Procedure 10th (1985) Edn.

Also see Note 48

9. AIR 1977 Bom 341 (344) : 79 Bom LR 375
10. (1991) 2 Civ LJ 504 (509) (Kant)
11. ILR 2002 (3) Kant 4231 (4246).
12. **AIR 1934 PC 205 (207, 208) : 56 All 561 : 61 Ind App 362.**

a second suit would not be barred and another set holding that it would **(13)** The conflict has now been set at rest by the said decision in *Raghunath Singh's case*(**14**) where a decree for redemption had been passed in the following terms:

> "It is ordered and decreed that the plaintiff is entitled to a decree for possession by redemption of mortgage in the following terms, namely that he should pay Rs 4 208 6 0 by the 15th November 1896, that if he will pay the said sum he will get all costs and that in case of default *his case will stand dismissed* "

No payment was made, but a fresh suit for redemption was instituted It was held by their Lordships that the decree was not in terms of the old Ss 92 and 93 of the Act that the right to redeem was a right conferred on the mortgagor by *enactment of which he can be* deprived only by means and in manner enacted for that purpose and strictly complied with that the above decree did not extinguish such right and that a second suit for redemption was maintainable

It has been held that an order under S 12 U P Agriculturists' Relief Act releases the mortgaged property from the burden of the mortgage inasmuch as it has the effect of both a preliminary and final decree passed in an ordinary redemption suit and therefore there is no right to redeem after such an order has been passed **(15)** So also where after the passing of a decree for redemption the mortgaged property vested in the State under the Bihar Land Reforms Act it was held that the mortgagor lost his right to the property and the decree became infructuous as by the vesting of the

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13. AIR 1918 Oudh 364 (365) (DB) (There can be no second suit for redemption when once a decree has been passed though it does not fix time for payment and the consequences of non-payment.)

[**See also (1886) 10 Bom 461 (468) : 13 Ind App 66 (PC)** (Case before the T P Act was applied to Presidency of Bombay) ** AIR 1927 All 305 (305) (Mortgagor who has failed to comply with terms of a decree in a redemption suit filed by him is not entitled during continuance of that suit or before final decree in that suit has become incapable of execution to maintain a second suit for redemption of same mortgage) ** AIR 1926 All 20 (21) ILR 48 All 17 (DB) (Compromise decree in redemption suit — Plaintiff to get possession of property on payment of certain sum within month — After that period plaintiff to execute the decree only after payment of amount — Failure of plaintiff to pay amount in time or to execute decree within limitation — He is not barred from filing second suit for redemption) ** AIR 1925 All 484 (485) (Though order does not purport to extinguish the right if it has the effect of doing it then second suit would be barred — Decree in first suit directing mortgagee to take the money in deposit and deliver property to mortgagor — Application for delivery by mortgagor dismissed — Second suit for redemption held barred) ** AIR 1925 All 323 (324) (If in a suit for redemption the Court finds that the mortgage had been satisfied and that a surplus amount was due to the plaintiff the decree passed by the Court is really a decree for possession together with a decree for the surplus amount After the passing of that decree the rights of the mortgagor and the mortgagee become merged in the decree and the mortgage no longer subsists) ** (1900) 3 Oudh Cas 371 (382) (DB)]

See Note 40 on S 11 of the AIR Commentaries on the Code of Civil Procedure 10th (1985) Edn.

14. AIR 1934 PC 205 (207, 208) : 56 All 561 : 61 Ind App 362.

[**See also 1983 Pak LD 243 (249) (SC)** ** (1912) 10 All LJ 36 (37) (Decree in previous suit for possession subject to condition involving declaration of relationship of mortgagor and mortgagee — Plaintiff though left without a decree by his failure to fulfil condition is not barred from filing fresh suit for redemption) ** (1910) 32 All 215 (218) (DB) (Conditional decree for redemption — Mortgagor not fulfilling conditions — Fresh suit for redemption by mortgagor is maintainable unless he is expressly barred)]

15. AIr 1956 All 237 (240).

property in the State it became free of all encumbrances.(16)

The mortgagees were in possession of the mortgaged property for more than fifty years, the decree for redemption of mortgage had become final against them and during the execution proceedings S 4A of the Kerala Land Reforms Act came into force, the decree-holder mortgagor deposited the mortgage amount and value of improvements and the executing Court ordered delivery of property to mortgagor. On such payment thereafter the mortgagees continued to remain in possession only as judgment debtors illegally stricting to the land. The relationship of mortgagor and mortgagee between the parties got shaped. If the mortgage money has been received by the mortgagee and thereafter he refuses to perform the acts which he is bound to do under S 60, the mortgagor can enforce his right to get back the mortgaged documents, the possession of mortgaged property and the reconveyance of that property through Court, thus the mortgagee in the instant case could not invoke S 4A of the Kerala Land Reforms Act for claiming to be deemed tenant (17)

Even though a suit under Sec 12 of the Redemption of Mortgages (Punjab) Act of 1913 is dismissed it does not affect the right of the mortgagor to redeem the mortgage by having resort to a suit in the Civil Court.(18)

Even after the foreclosure if the mortgagee sues on the personal covenant to pay he thereby opens the foreclosure and the mortgagor may thereupon redeem (19)

(B) Final decree for sale.

The old S 89 of the Act providing for an *order absolute for sale* in a suit for sale on a mortgage provided that on the passing of such order, the defendant's *right to redeem and the mortgage security became both extinguished* (20) This really was against the principle of law that a decree for sale is only a judgment on the debt and though the debt merges in the judgment, the collateral security does not so merge. As observed by Lord Ellenborough in *Drake v. Mitchell* (21)

> "A judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party, and, therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have"

The Courts thus naturally found difficulty in applying the rule in S 89, and several views inconsistent with that section were expressed Thus, the mortgagor was held entitled, notwithstanding an order absolute for sale, to apply to stop the sale under the provisions of the old Code of Civil Procedure corresponding to O 21, R 69 of the present Code(22) or to apply to set aside the sale

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16. **AIR 1962 SC 914 (916) : ILR 41 Pat 746.** (Remedy under S 14 of that Act alone was available to the mortgagor thereafter.)

17. **AIR 1997 SC 208 (210 to 213) : 1996 AIR SCW 4377 : 1997 (1) ICC 311 (315).**

18. **AIR 1976 Punj 310 (313) : 78 Pun LR 728 (FB).** ((1974) 76 Pun LR 418. **Overruled.**)

19. (1846) 50 ER 378 (380) 9 Beav 349 15 LJ Ch 347 10 Jur 532 73 RR 379 Lockhart v Hardy ** (1911) 10 Ind Cas 748 (751) (Bom).

20. **AIR 1918 PC 34 (35) : 45 Ind App 130 ** (1902) 25 Mad 244 (289) (FB).** (But until the passing of the order absolute the right is not extinguished) **** (1898) 25 Cal 703 (709) (FB)** ** AIR 1920 Mad 1026 (1029) (DB) (Security did not remain alive in respect of puisne mortgagee not made party) ** (1891) 18 Cal 139 (142) (DB) ** AIR 1924 Oudh 56 (60) ** AIR 1920 Oudh 253 (254) 23 Oudh Cas 334 (AIR 1918 PC 34, **Foll.**)

21. **(1803) 102 ER 594 (596) : 7 RR 449 : 3 East 251.**

22. (1898) 20 All 354 (356) ** (1897) 19 All 205 (208) (DB) ** (1908) 31 Mad 354 (358) (DB) (Decree for sale under S 88 — Mortgagor can pay decree amount at any time after decree and before sale is completed — Right is not lost at the expiry of the period limited) ** (1911) 9 Ind Cas 158 (159) (DB) (All) ** (1905) 28 All 28 (29) (Where the sale of mortgaged property has been directed by an order absolute under S 89 it is open to the person holding the equity of redemption in such property to pay into Court at any time

under the provisions corresponding to the present O. 21, R. 89 **(23)** This view was inconsistent with the view that the right of redemption was extinguished by the order absolute for sale. In some cases**(24)** it was even held that it was the actual sale and distribution of proceeds that extinguished the right to redeem, and not the order absolute for sale.

The words as to the extinguishment of the right to redeem and of the mortgage security have now been omitted in O. 34, R. 5 of the Code corresponding to the old S. 89, and it is now definitely laid down in *Mt. Sukhi v. Ghulam Safdar Khan*(**25**) by their Lordships of the Privy Council that the law under the present O. 34, R. 5 is the same as it was before the Transfer of Property Act was passed, namely, that a decree for sale does not extinguish the debt **(26)** The amendment of O. 34, R. 5 relating to the payment of the mortgage-money *at any time before the confirmation of the sale* **also makes this view perfectly clear.(27)**

Where in a redemption suit though the preliminary decree for payment and then a final decree for sale of property was passed, however, the mortgagee did not execute the final decree and continued to remain in possession of property a second suit for redemption of mortgage would be maintainable and it could not be said that there was merger of mortgage debt in the decretal debt(**28**)

But where in pursuance of the mortgage decree the properties are sold and the sale is 'confirmed', the right to redeem would be extinguished **(29)** The sale would be binding on the parties to

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before the sale the amount of the decretal debt and costs and thereupon the execution proceedings will cease — It is not necessary that the person holding the equity of redemption **should wait until the property is actually put up for sale**)

23. (1909) 31 All 346 (348) (DB) (Section 310 A applied to sales in pursuance of an order absolute for sale under S. 89, T.P. Act.) ** AIR 1921 Cal 169 (170) 48 Cal 69 (DB) ** (1901) 25 Bom 104 (106, 107) (DB) ** (1899) 22 Mad 286 (288) (DB)

[See also AIR 1917 Mad 997 (1006) (DB).]

24. (1904) 31 Cal 863 (868) (FB) ** AIR 1924 Pat 530 (534) (DB) ** AIR 1933 Cal 39 (42, 43) 59 Cal 1464 (DB) ** AIR 1920 All 136 (136) 42 All 5, 7 (DB) It is the actual sale that extinguishes the right to redeem) ** (1908) 3 Mad L. Tim 202 (2) (DB)

[See also (1905) 2 Cal LJ 202 (206) (DB)]

25. AIR 1922 PC 11 (13) : 43 All 469 : 48 Ind App 465

26. See also ***the following cases to the same effect :***

AIR 1956 Cal 510 (511) (Prs 6 and 7) ILR (1957) 2 Cal 10 ** AIR 1940 All 416 (420) ILR (1940) All 580 (DB) ** AIR 1927 Nag 345 (345, 346) ** AIR 1914 Bom 200 (200, 201) 39 Bom 41 (DB) (Preliminary decree does not extinguish right to redeem) ** **AIR 1918 Bom 1 (2, 6) : 43 Bom 334 (477) (FB)** (Do.)

[See however AIR 1926 Mad 816 (818, 819, 820) 49 Mad 691 (DB) (Final decree for sale extinguishes the right of redemption AIR 1925 Mad 1191, **Reversed** — Submitted not correct.)]

27. AIR 1963 Bom 230 (232) : ILR (1963) Bom 45 (DB) (Principle of R. 5 applied to sale in execution of award by Registrar, Co-operative Societies — Right of redemption held not extinguished by mere sale) ** AIR 1937 Nag 196 (196) ILR (1939) Nag 310 ** AIR 1933 Lah 361 (362) ** AIR 1936 Lah 562 (564) (DB).

[See however AIR 1968 Punj 473 (474, 475) (AIR 1948 Pat 208, Relied on) ** AIR 1948 Pat 208 (212, 213) 26 Pat 97 (DB) (In this case, the view taken was that the final decree for sale is not only a judgment on the debt but is one in which the mortgage security necessarily merges in the decree vis-a-vis the defendant in the suit Hence, after the passing of the final mortgage decree for sale, neither the right of total redemption nor the right of partial redemption conferred on the mortgagor by this section survives the final decree for sale All that remains thereafter is the different right of total redemption conferred by O. 34 R. 5, Civil P.C.)

28. AIR 1988 SC 1200 (1204) ** (1988) 2 Civ LJ 388 (AIR 1948 Pat 208 **Overruled.**)

29. (1907) 29 All 339 (346) : 34 Ind App 102 (PC) ** ILR (1954) Trav Co 1050 (1054) **

the action, even though the decree, in execution of which it was held, was passed in a defectively constituted mortgage suit, and, for that reason, would not affect the rights of redemption of the persons interested in the equity of redemption but had not been made parties to the action.(**30**) In *Lala Ganpat Lal v Bindbasin* (**31**) A mortgaged certain properties to X which mortgage was binding on M as being a member of a joint Hindu family, of which A was the head. In a suit upon the mortgage, M was, however, not made a party In execution of the decree X purchased the property himself After the sale, M without impeaching the mortgage and the decree claimed that his right of redemption was unaffected by the decree. It was held by their Lordships of the Privy Council that, the right to redeem was extinguished by the sale, unless the sale was set aside in a properly constituted suit. See also the undermentioned cases.(**32**)

Where a subsequent mortgagee, who had been impleaded in the suit on a prior mortgage, failed to redeem that mortgage and allowed the property included in the first mortgage to be sold, it was held that his security in that property ceased and he could no longer claim to redeem that mortgage.(**33**)

Where the property was sold in auction, to which the mortgagee filed objection and the same was rejected, and the JD a Karta of HUF did not file any objection, the minor son of the Karta, could not on becoming major, file suit for declaration that the suit property belongs to joint family and for redemption.(**34**)

Auction of mortgaged property was not confirmed by Court. Auction purchaser did not file appeal and he one was not been to pursue the matter. Decree-holder showing willingness to accept the offer of the judgment-debtor. In the circumstances the judgment debtor was entitled to redeem the mortgage.(**35**)

Where a part of the mortgage property is purchased but the purchaser is not impleaded in the suit on mortgage he can redeem his share of the property as auction purchaser (**36**)

(B) Bar of fresh suit under provisions of C.P.C.

Under O 23, R 1, Civil PC , where a suit is withdrawn without the permission of the Court,

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AIR 1929 Pat 323 (324) (DB) ** AIR 1920 Oudh 204 (207) (DB) ** AIR 1931 Oudh 69 (71) (DB) (But where after passing of a decree for sale mortgagee enters into possession of the property, his possession is adverse and the right to redeem is extinguished after 12 years even if no final decree is passed.)

[See also AIR 1916 Pat 375 (380) (DB) (Sale of equity of redemption in execution of decree on second mortgage — Mortgagor not entitled to redeem first mortgage)]

30. AIR 1956 SC 593 (603).

31. AIR 1920 PC 1 (3) : 47 Cal 924 : 47 Ind App 91.

[See also AIR 1952 Nag 202 ILR (1949) Nag 526 (DB) (Mortgage by father on his own behalf and on behalf of his minor son — Suit on mortgage — Minor son's share excluded from suit — Decree against father — In execution property purchased by mortgagee himself — Minor son cannot redeem mortgage unless and until he sets aside sale)]

32. AIR 1989 SC 2113 (2121). (There is nothing in State Financial Corporation Act or in any Rule or Order made thereunder which may be inconsistent with S 60 of Transfer of Property Act Therefore, where the debtor industry had filed an appeal against the order dismissing its application for setting aside confirmation of sale of properties mortgaged to the Financial Corporation in execution of the order of sale of mortgaged properties, the right of redemption of debtor would not be extinguished as the order of confirmation of sale had not become final due to pendency of appeal)

33. AIR 1953 All 147 (148)

34. 1996 (5) Bom CR 303 (311).

35. 1998 AIHC 538 (547) : 1998 (1) Rent LR 326 (Cal).

36. (1974) 1 Mad LJ 350 (351) : 87 Mad LW 454 (2)

a fresh suit on the same cause of action is barred. It was held by the Madras High Court that where a suit for redemption is withdrawn without the leave of the Court, a fresh suit for redemption with regard to the same mortgage cannot be brought and that O. 23, R. 1, Civil P.C. must be taken to override the provisions of this section in this matter.(37) But a Full Bench decision of the Bombay High Court which ran counter to the reasoning of the above decision, and which was with reference to O. 22, R. 9, Civil P.C., held that the general terms of the Rule cannot override the specific provision of this section and that so long as the relationship of mortgagor and mortgagee continues and so long as the mortgage has not been extinguished by the decree of the Court or by the act of the parties the mortgagor is entitled to go to a Court of law to enforce his right (38) The conflict now stands resolved by the decision(39) of their Lordships of the Federal Court who impliedly approved the Bombay High Court's view in the undermentioned cases(40) and reversed the Madras High Court's decision. Their Lordships observed :

> "If the right of redemption is not extinguished provisions like O. 9, R. 9 or O. 23, R. 1 will not debar the mortgagor from filing a second suit because, as in a partition suit, the cause of action in a redemption suit is a recurring one."

See also the undermentioned Madras decision to the same effect (41)

Even an incomplete decree or a decree not involving a decision on merit will not constitute a sufficient or legal ground to extinguish the right to redeem. Therefore, a previous suit was withdrawn and there was no order in terms of O. 23, R. 4(6) of Civil P.C. an alleged settlement filed in suit, subsequent suit for redemption would not be barred (42)

See also the undermentioned cases.(43)

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37. AIR 1945 Mad 225 (228) : ILR (1945) Mad 803 (DB)

38. AIR 1948 Bom 226 (227, 228) : ILR (1948) Bom 189 (FB). (First suit for redemption abating by reason of death of mortgagor — Second suit for redemption by heirs of mortgagor is not barred.)

39. AIR 1950 FC 1 (7) : 1949 FCR 484. (Redemption suit — Date fixed for argument — Court on such date informed that plaintiff was not proceeding with case — It was held that the case was governed by O. 9, R. 8 and not by O. 9, R. 9 or O. 23, R. 1, Civ. P.C. AIR 1945 Mad 225, **Reversed.** AIR 1948 Bom 226 (FB), **Approved.**)

40. AIR 1929 Bom 116 (119) (Dismissal of suit under S. 127 of the Civil P.C. of 1859 corresponding to O. 10, R. 4 of the Code of 1908.) ** AIR 1928 Bom 67 (67, 68) (DB)

41. 1954 Mad WN 620 (522) (If the right of redemption is not extinguished in the manner provided in S. 60 the provisions of O. 23, R. 1 Civil P.C. are no bar to a second suit for redemption. AIR 1950 FC 1. **Foll.**)

42. AIR 1994 Guj 8 (17)

43. AIR 1987 Him Pra 29 (31) : 1987 Sim LC 52 (The dismissal of an earlier suit for redemption whether as abated or as withdrawn or in default would not debar the mortgagor from filing second suit for redemption. Such second suit for that matter every successive suit for redemption to redeem the same mortgage can be brought so long as the mortgage subsists and the right of redemption is not extinguished by efflux of time or by a decree of the Court passed in the prescribed form.) ** (1986) 99 Mad LW 795 (798) (Where only a preliminary decree was passed in previous suit for redemption of portion of mortgage and one of the mortgagees was taken away from the array of partner in that suit a subsequent suit for redemption against such mortgagee would not be hit by O. 2, R. 2 of Civil P.C.) ** AIR 1962 Orissa 162 (163) (Parties can settle form of decree by which right of redemption can be extinguished — Consent decree providing 8 months for redemption — No clog on redemption.) ** AIR 1959 Bom 172 (174, 175) : ILR (1958) Bom 756 (Hindu widow mortgaging certain property with possession — Suit by third party against widow — Widow admitting his title by consent decree but remaining in possession in lieu of her maintenance during her lifetime — Widow does not lose her right to redeem her mortgage.) ** AIR 1956

27. Extinguishment of right of redemption by operation of law.

The section does not refer to extinguishment by operation of law Nevertheless the extinguishment of the equity of redemption may take place by operation of law as where the mortgagee acquires the equity of redemption by inheritance or by adverse possession.(1) or the mortgagor acquires the mortgagee right by inheritance. A revenue sale for arrears of Government revenue may extinguish the right of redemption (2) But a fraudulent revenue sale of the mortgaged property (the fraud being committed by the mortgagee) and purchase by the mortgagee himelf do not extinguish

Bom 237 (238) (Heir stepping into shoes of mortgagor — Decision of Revenue Court negativing her claim — Does not deprive the heir of her right to redeem the mortgage) ** AIR 1921 Bom 284 (285) 45 Bom 1335 (DB) (Decree reserving plaintiff's right of redemption — Second suit not barred) ** (1903) 5 Bom LR 1036 (1038 1039) (Consent decree declaring mortgagee to be the absolute owner but reserving as concession to the mortgagor a right to purchase the property — **Held,** right of redemption was put an end to by decree) ** AIR 1917 Low Bur 99 (99, 100) (A Court cannot without the parties' consent extend the time fixed by a compromise between the parties for redemption) ** (1899) 26 Cal 734 (737) (DB) (A mortgagor is not entitled to redeem, when the property mortgaged has been purchased by a third party at a sale in execution of an ex parte mortgage-decree and confirmed while the same was in force, notwithstanding the fact of the decree being set aside and subsequently reaffirmed after trial)

Section 60 — Note 27

1. (1963) 2 Mad LJ 528 (530) (Right of redemption lost by adverse possession) ** 1985 BLJR 725 (729) (Where it was found that the mortgagors had no knowledge of the execution of sale deed of mortgaged property by their co-mortgagor and it was not proved by the purchasers that they exercised possession upon lands as owners thereof hostile to title of mortgagors and to their knowledge the case of adverse possession cannot be accepted) ** (1984) 1 Ren CJ 328 (325) (Punj & Har) (Mortgagor s right to sue for possession accrues for the first time when after redemption he is unable to take possession of part of mortgaged property which he finds to be in possession of a trespasser who denies title to it.) ** 1982 Pun LJ 126 (127) (Where the land was redeemed by co-mortgagor, he would be holding the land as mortgagee qua the non-redeeming co-mortgagor and there would be no question of adverse possession by him) ** AIR 1962 Pat 198 (201) (DB) (Mortgagee in possession under an invalid sale for more than 12 years — Right to redeem held lost) ** AIR 1961 Punj 202 (203) . ILR (1960) 1 Punj 679 (Mortgagee acquiring equity of redemption by lapse of time) ** AIR 1958 Andh Pra 541 (545) (Simple mortgage — Subsequent oral agreement between the parties to the effect that the mortgagee could take into possession the land and hold it as an owner in lieu of debt — Mortgagee in continuous possession from date of taking possession for more than 12 years — **Held,** right of mortgagor to redeem became barred by prescription) ** AIR 1949 Pat 197 (208) 26 Pat 717 (DB) (Invalid sale of equity of redemption by mortgagor to mortgagee — Adverse possession by mortgagee under invalid rule for statutory period — Right of redemption is extinguished) ** AIR 1914 Mad 578 (579) 37 Mad 545 (DB) ** AIR 1921 Mad 82 (84) 44 Mad 253 (DB) (AIR 1915 Mad 573 Held **overruled** by AIR 1919 PC 44) ** AIR 1923 Lah 495 (496) 4 Lah 249 (DB) (It is to be decided on facts of each case whether circumstances established adverse title) ** AIR 1923 Mad 213 (216) (DB) ** AIR 1929 Mad 16 (18, 19) (DB) ** AIR 1921 Oudh 124 (125) 24 Oudh Cas 155

[**See also** AIR 1963 Pat 384 (389) ILR 44 Pat 391 (DB) (Onus is on mortgagee to prove adverse possession — Adverse possession for full period not proved — Mortgagor is entitled to redeem) ** AIR 1957 Ker 117 (119) (Right of redemption lost by operation of law of limitation — Mortgagor's right to property is also lost)]

2. **AIR 1952 Nag 341 (347) : ILR (1952) Nag 211 (FB).** (A purchase is free from encumbrance only when property is sold for recovery of arrears of public revenue for which the land is the first security and in all other cases the purchase is not free from encumbrance) ** AIR 1958 Pat 649 (653) (DB) (Rent sale of mortgage property — Purchase by mortgagee — Mortgagor found defaulter — Mortgage held was extinguished and right of re

the right of redemption (3) he stands in the same position as that of private purchaser (4) There is an exception to the general rule that a Government sale for arrears of land revenue gives a title against all the world and that exception is where the revenue sale is the result of possessory mortgagee's failure to discharge his obligation of paying arrears of revenue In such a case the mortgagor's right to redeem is not lost as the mortgagee cannot take advantage of his own wrong It is deemed in this case that the mortgagee himself is a purchaser of the property.(5) The same principles apply to the sale of the property at a rent sale also (6) A resumption by Government of inam land which has been mortgaged by the inamdar to a third person does not destroy the right of redemption where such resumption does not operate as a forfeiture of the land (7) It has been held that as the Madhya Bharat Zamindari Abolition Act did not bar the right of the mortgagor to bring a suit for redemption to compel the mortgagee for accounts or for obtaining other ancillary reliefs based on the relation of mortgagor and mortgagee, a suit for redemption, pending on the date when the Act came into force, was not liable to be dismissed on the ground that the mortgaged property having vested in the State free of the mortgage it was not possible to restore possession to the mortgagee(8) Where the mortgagees obtained the grant of lands after abolition of watans by Govt by incorrect representation to the Govt. that they were permanent nivasi tenants although they were only mortgagees they were liable to surrender the advantage they had obtained even if the order of grant had become final and surrender the land to the mortgagor on payment of mortgage money and expenses incurred by mortgagees in seeming the grant (9) Where the mortgagee succeeds the mortgagor as a heir, the property if sold in execution of a money decree subject to mortgage there is no

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demption did not subsist) ** AIR 1957 Pat 452 (454) ** (1955) 2 Mad LJ 132 (134) ** AIR 1953 Nag 259 (261) ILR (1952) Nag 366 (373) (DB) Purchaser at sale of property under S 141(c) Berar Land Revenue Code obtains an absolute title free from all encumbrances, grants and contracts unless made by him, but a purchaser under S 141(d) gets only the right, title and interest of the defaulter.)

3. AIR 1963 Assam 176 (178) ILR (1963) 15 Assam 315 (DB) (Usufructuary mortgage — Right to redeem Extinction of by sale for arrears of land revenue subsequent sale by auction purchaser in favour of mortgagee No evidence to establish revenue sale benam for mortgagee — Section 90 Trusts Act not applicable — Suit for redemption held not maintainable) ** AIR 1957 Andh Pra 430 (432, 433) (Payment of public taxes on prior mortgages made duty of mortgagee - Defaults by mortgagee Sale of property — Property purchased by stranger and then sold to defaulting mortgagee — Mortgage is revived on such sale to mortgagee — AIR 1936 Pat 434 **Dissented from**) ** (1955) 2 Mad LJ 132 (134) ** AIR 1954 Mys 187 (188) ILR (1955) Mys 180 ** (1884) 7 Mad 111 (112) (DB)

[**See also** AIR 1916 All 226 (227, 228).]

Also see Note 23.

4. (1866) 10 Moo Ind App 540 (557) (PC) ** (1889) 37 WR (Eng) 234 (235) 39 Ch D 636 : 59 LJ Ch 905 : 59 LT 433, Kinnaird v. Trollope.

5. AIR 1974 Kant 128 (129) : (1974) 1 Kant LJ 1.

6. AIR 1957 Pat 497 (498) (Rent sale — No fraud or collusion — Landlord purchasing property — Subsequent settlement of land on mortgagee Mortgagor's suit for redemption must fail because equity of redemption had been extinguished by sale) ** AIR 1956 Orissa 61 (63) ILR (1955) Cut 697 ** AIR 1953 Trav-Co 563 (567) ** AIR 1951 Pat 566 (568) 30 Pat 392 (DB) (Case of fraud and collusion — Mortgagee cannot plead extinguishment of right of mortgagor to redeem.)

7. (1912) 36 Bom 539 (542) (DB).

[**See also** (1900) 24 Bom 482 (483) (DB).]

Also see S. 64, Note 5.

8. AIR 1954 Mad B 193 (196) (FB).

9. AIR 1985 SC 1646 (1649) : (1985) 4 SCC 162.

merger and the mortgagee is entitled to recovery the amount **(10)**

Once the right of redemption is extinguished the mortgagee will be entitled to seek possession by prescription of time Where on the date when the suit for redemption was filed, the period of 30 years of mortgage had already elapsed the mortgagee would acquire ownership by prescription.**(11)**

Where the mortgagee was in continuous possession of the property for fifty years, he would become 'deemed tenant' under Kerala Land Reforms Act, 1964 and a suit for redemption of mortgage would not be maintainable**(12)**.

See also the undermentioned cases.**(13)**

(A) Bar under provisions of C.P.C. — See Note 26

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10. AIR 1972 Mad 174 (175, 178) : (1971) 2 Mad LJ 436

11. 1991 Har Rent R 634 (639) (Punj & Har).

12. AIR 1992 SC 146 (147) : 1991 AIR SCW 2843 : 1992 (3) Supp SCC 29.

(See also **AIR 1992 SC 1135 (1137 to 1139) : 1992 AIR SCW 1025 : 1992 (2) JT 130.** (Where the mortgagee had not had the continuous minimum of 50 years' possession immediately proceeding the commencement of Amendment Act of 1969 which amended Kerala Land Reforms Act, merely because he remained in possession of hypotheca even after the decree for redemption of mortgage but for payment of compensation for improvement made by him in view of Kerala Compensation for Tenants Improvements Act, 1958, he cannot acquire the status as deemed tenant under Kerala Land Reforms Act tagging the period from deposit of mortgage money together with improvements till date the Amending Act came into force and thereafter to compute continuous possession as mortgagee for not less than 50 years immediately preceeding Amendment Act The Amendment Act would not denude the right to repossession of mortgagor under S 60 of Transfer of Property Act without assent of President of India 1978 Ker LT 459 **Reversed.** 1984 Ker LT 713. **Overruled.**)

13. AIR 1971 Ker 290 (292) : 1971 Ker LT 284 (FB). (Even where a mortgagee in possession acquires the status of a deemed tenant under S 4-A of Kerala Rent Reforms Act of 1964 the mortgagee s obligation for accounting till the date of acquisition of this status is enforceable by the mortgagor) ** (1979) 92 Mad LW 236 (237) (1979) 2 Mad LJ 95 (Though the hypotheca is situate in a part of inam village notified and taken over under the Tamil Nadu Act 26 of 1963, still for the purposes of redemption the jural relationship between the mortgagor and mortgagee remains unaffected The question whether a person is entitled to redeem the property or not is totally outside scope and provisions of Tamil Nadu Act 26 of 1963) ** AIR 1974 Orissa 196 (198) 40 Cut LT 267 (In view of S 17 of the Orissa Money-Lenders Act 3 of 1939 a possessory mortgage can be redeemed even before the period stipulated for payment) ** AIR 1972 Orissa 33 (35) 37 Cut LT 553 (If the usufructuary mortgage stands extinguished by operation of law as under S 17 Orissa Money-Lenders Act the question of filing a suit for redemption does not arise but only a suit on title for recovery of possession is maintainable) ** 1970 BLJR 756 (759) (DB) (If the mortgage land is sold for arrears of rent and is purchased by the landlord and settled afresh with the mortgagee the mortgagor has no right to redeem, it being lost on sale in rent recovery proceedings) ** AIR 1969 Punj 193 (196) , 71 Pun LR 106 (DB) (Where equity of redemption is purchased by a Muslim on the basis of a mortgage transaction between Hindus but the purchaser is declared an evacuee the mortgage is extinguished if the custodian becomes the owner) ** AIR 1955 Trav-Co 192 (192) ILR (1954) Trav-Co 1182 (Escheat proceedings do not destroy mortgagor's right to redeem the mortgage) ** (1954) 7 Sau LR 70 (78) (Mortgaged property in possession of legal representative of mortgagor without obtaining probate according to law in force in the State (Jind State before formation of Saurashtra) — Property forfeited to State — State recognising right of legal representative to redeem — Property resold to legal representative — Forfeiture, held did not involve extinction of mortgage and the mortgage was kept alive — Reselling of property to the legal representative did not make any difference.)

28. Clog on redemption — General.

As has been seen in Note 38 on S 58, the mortgagee in England became *at law* the absolute owner of the estate immediately the mortgagor committed default in payment of the mortgage money on the date specified The Courts of Equity considered this rule harsh, and this harshness was relieved by declaring it to be against conscience and unreasonable that the mortgagee should retain as owner, what was intended as a mere security and by adjudging that the breach of the condition should not prevent the mortgagor from redeeming his property So that even though the mortgagor lost the *legal right* to redeem, he, nevertheless, had an *equity to redeem* on payment of the mortgage-money.

No sooner, however, was this equitable principle established, than its evasion began to be attempted by introducing in the deed various stipulations against the right of redemption It was necessary for the Courts of Equity if the right to redeem subsequently to the legal forfeiture was to be maintained, to hold, and they accordingly held that the debtor could not even by the most solemn engagements entered into *at the time of the loan* preclude himself from the equitable right to redeem The ground on which this was rested was that the debtor, at the time of the loan being distressed, the mortgagee cannot be allowed to take advantage of his necessities and introduce stipulations hampering redemption In *Toomes v Conset*(1) it was observed as follows

> "The policy of this Court is not more complete in any part of it than in its protection of mortgagees and, as a general rule for that purpose a mortgage once redeemable continues so till some act is done afresh by the mortgagor to extinguish the redemption and a man will not be suffered in conscience to fetter himself with a limitation or restriction of his time of redemption It would hurt the distressed and unwary and give inconscionable advantage to greedy and designing persons

In *Spurgeon v Collier*(2) the Lord Keeper observed

> "It puts the borrower too much in the power of the lender who being distressed at the time is too inclinable to submit to any terms proposed on the part of the lender"

In *Vernon v. Bethell*(3) the Lord Chancellor observed :

> This Court, as a Court of conscience is very jealous of persons taking securities for a loan and converting such securities into purchases And therefore I take it to be an established rule that a mortgagee can never provide, *at the time of making the loan*, for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute And there is great reason and justice in this rule for necessitious men are not truly speaking free men but to answer a present exigency, will submit to any terms that the crafty may impose upon them (4)

It became, therefore established as a principle, not to be departed from, that "once a mortgage always a mortgage" in other words, that an estate could not at one time be a mortgage and at another time cease to be so *by one and the same deed* As a consequence of this principle it came to be held that a "clog on the equity of redemption was void and unenforceable This means that any provision in the mortgage deed which attempts to deprive the mortgagor of his right to redeem

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Section 60 — Note 28

1. **AIR 1954 Trav-Co 142 (143) : ILR (1953) TC 999 (FB)** (Stipulation that on default of payment of mortgage money on fixed date mortgagor shall sell property to mortgagee at a fixed price or price fixed by an umpire) ** (1745) 26 ER 952 (952 953) 3 Atk 261
2. **(1758) 28 ER 605 (606) : 1 Eden 55.**
3. (1762) 28 ER 838 (839) 2 Eden 110 ** AIR 1962 All 422 (422 425 (Mortgage made redeemable after 49 years — Mortgagee given right to rebuild and effect repairs without limit on expense and to pay taxes and recover the amount with a high rate of interest at the time of redemption — **Held** that the conditions made redemption practically impossible and amounted to clog on redemption - **Held** tests laid down by AIR 1933 All 70 **No longer good law.**)
4. **See also** (1905) 8 Oudh Cas 132 (138) (DB)

absolutely and *at any time*, after the mortgage-money has become payable, is void.(5)

It will be seen from the above discussion that in order that a particular condition or stipulation may amount to a clog on redemption it is necessary that—

(1) it must seek to prevent the mortgagor from *redeeming absolutely* or *at any time* after the money has become due;

(2) it must be part of the *same transaction* as the mortgage deed,

(3) it must have been entered into by the mortgagee in his character of mortgagee.

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5. **AIR 1965 SC 225 (227).** (Clog on equity of redemption — Mortgage of shop with possession — Stipulation that if mortgage is not redeemed within 15 years the shop would be deemed as an absolute transfer 'Maia Kalam' — **Held,** amounted to clog — ILR (1958) 8 Raj 811. **Reversed.**) ** **AIR 1958 SC 770 (772)** ** AIR 1987 Madh Pra 134 (138) 1987 MPLJ 358 (Where in violation of the express stipulation in the mortgage deed for usufructuary mortgage that the mortgagor shall have no liability for payment of interest he shall charge any rent from the property The mortgagee proceeded to enforce his right to recover rent due payable by the mortgagors under the alleged rent note executed by the mortgagors and purchased the property on basis of decree obtained on basis of rent note Such a rent note was device to block redemption by the mortgagors of the mortgage by purporting to reduce their interest in the said property to that of the tenant) ** ILR (1967) 3 Mad 161 (179) (**Overruled** in AIR 1977 SC 774 on another point) ** (1964) 1 Mad LJ 86 (90) (When hypotheca is sold to mortgagee, it must be a truly independent transaction, free from the environments of previous relationship between parties, a mere affirmance of a term amounting to a clog in mortgage transaction in the form of a separate transaction would not validate the clog and confer better and further rights on parties than under mortgage instrument) ** AIR 1962 Andh Pra 274 (288) ** AIR 1958 Ker 245 (246) (DB). (Mortgaged property in possession of tenants of mortgagor — Mortgagee to obtain possession by evicting tenants by filing suits within six months — Mortgage to run for 12 years after mortgagee had reduced property to his possession — Supervening legislation preventing obtaining of possession — Frustration — No provision in the deed as to what was to happen if mortgagee failed to get possession — In that event, mortgage would become irredeemable and for that reason, the term was bad — Term of 12 years when to run) ** AIR 1954 Trav-Co 165 (166) ILR (1953) Trav-Co 871 (DB) ** AIR 1935 Pat 157 (158) (If, however, the parties agree to certain terms as part of the contract of mortgage and these terms are fair and advantageous to both parties and are not inconsistent with or repugnant to the contract itself, such a condition would not necessarily be construed as a clog on the equity of redemption) ** (1681) 22 ER 1064 (1065) Freeman 69, Jason v Eyres ** (1892) 61 LJ Ch 49 (53) 1892 AC 1 65 LT 765 40 WR (Eng) 529, Salt v Northempton ** AIR 1925 All 643 (644) (DB) (Right of redemption postponed for 96 years — Stipulation for payment of interest along with the principal sum only — Conditions were held to be "clog") ** AIR 1927 Oudh 237 (238) (DB) ** AIR 1925 Oudh 720, (721) (A mortgage provided for redemption after 75 years and if no redemption took place in the 76th year it should enure for another period of 75 years — The profit secured was 25 per cent — **Held,** the provisions amounted to a clog on the equity of redemption, as the bargain was unconscionable) ** AIR 1920 Pat 144 (145) 5 Pat LJ 423 (DB). (An agreement allowing mortgagee to retain possession as lessee on nominal rent after redemption is a clog) ** AIR 1923 Oudh 209 (210) . 26 Oudh Cas 1209 ** AIR 1925 All 42 (43) ** (1904) 26 All 559 (563) (DB) ** (1900) 22 All 238 (241) (DB). (A covenant in the mortgage-deed which simply gave the mortgagee a right to purchase the property as a specified price held not a clog.)

[**See also** (1890) 3 CPLR 115 (116) (Where the terms of a mortgage instrument preclude from all possibility of redeeming the mortgage and are most unfair and unjust and such as no man with his eyes open would consent to, the terms would not be enforced by the Court) ** (1742) 26 ER 698 (699) 2 Atk 494, Mellor v Lees ** (1687) 23 ER 611 (611) : 1 Vern 488, Willet v. Winnell ** (1897) 14 TLR 3 (4), Booth v Salvation Army Building Association.]

This principle of clog on redemption applies in this country also This section is not prefaced by the words "in the absence of a contract to the contrary" and this indicates that the mortgagor cannot contract himself out of his right of redemption.**(6)** A contract which amounts to a *clog on the equity of redemption* may be regarded as opposed to public policy and consequently as void under S 23 of the Contract Act **(7)** The principle once a mortgage always a mortgage is recognised in several provisions of the Act. It is founded upon an equitable view of the primary object of a contract of mortgage. The object of this section is to legalise the equitable right to redeem and permit redemption even when the right is expressly abandoned or even postponed by the contract of mortgage which is the subject-matter of the suit for redemption **(8)** The landlord had by registered deed executed simple mortgage of the rented property in favour of tenant who was already in possession of the property The terms of the registered deed were sought to be varied by executing unregistered deed But the same could not be taken into consideration in view of S 92 of the Evidence Act The landlord was entitled to decree for redemption but was not entitled to recover possession since the mortgagee was already in possession in capacity as tenant **(9)** The undermentioned cases to the contrary cannot be regarded as good law **(10)**

It has been held in some cases**(11)** that it is not possible to lay down any hard and fast rule as to what should and what should not be regarded as a clog on redemption and that each case must be decided on its own facts and circumstances The observations must be understood as subject to the three requisite stated above

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6. AIR 1958 SC 770 (772). (Court will ignore any contract which in effect deprives the mortgagor of his right to redeem) ** ILR (1967) 3 Mad 161 (179) (**Overruled** in AIR 1977 SC 774 on another point) ** AIR 1963 Pat 114 (116) ILR 42 Pat 733 (DB) (This statutory right cannot be fettered by any condition impeding or preventing redemption) ** AIR 1962 Andh Pra 274 (288) ** AIR 1958 Raj 298 (302) ILR (1958) 8 Raj 258 ** ILR (1954) 1 Cal 220 (229) (DB) (Mortgage of movables — Option given to creditor to appropriate shares given as security for loan in case of default — Option held a clog) ** AIR 1953 Bom 408 (410) ILR (1953) Bom 773 (DB) ** AIR (1917 Low Bur 39 (39) ** AIR 1924 Rang 83 (83) : 1 Rang 419 (DB).

[**See also** AIR 1954 Trav-Co 7 (9) ILR (1952) Trav Co 438 (DB) (Provision in compromise decree though embodied in decree is nonetheless a contract and decree cannot bar parties from pleading that the agreement is illegal and unenforceable)]

7. AIR 1944 All 204 (206) ILR (1945) All 301 (DB) (Clog on the equity of redemption is a convenient and compensation way of describing some of the covenants to which a mortgagor may agree and which in the opinion of the Court are unconscientious or unconscionable and so opposed to public policy — It will not be found difficult to apply to it one of the sections in Chapter 2, Contract Act (1872), e g S 19A or S 23 particularly the provision in the latter section, if it is insisted that a contract must be brought within the four corners of the relevant sections of the Contract Act before it can be interfered with by the Courts.)

8. (1964) 1 Mad LJ 86 (90) ** AIR 1953 Bom 408 (412) ILR (1953) Bom 773 (DB) ** AIR 1951 Pat 327 (328) (DB) (The right to redemption is a statutory right which is of the very nature and essence of a mortgage inherent to the thing itself and therefore one which cannot be controlled by any agreement made as a part of the transaction of mortgage itself.) ** AIR 1924 Oudh 193 (198, 202) : 27 Oudh Cas 4.

9. AIR 2001 Mad 343 (346) · 2001 (3) Civ LJ 115

10. AIR 1943 All 380 (383) 53 All 580 (DB) ** AIR 1929 All 411 (413) ** AIR 1933 All 70 (71) . 54 All 1041 (DB) ** AIR 1921 Bom 51 (52) · 45 Bom 117 (DB)

11. AIR 1953 Bom 408 (481) ILR (1953) Bom 773 (The amount advanced under mortgage nature of security offered by mortgagor circumstances in which mortgagor was compelled to secure the amount, terms and conditions on which amount was in fact advanced and other alternatives to which mortgagor could have taken recourse for obtaining sum ad

In determining whether a particular clause in a mortgage deed is a clog on redemption, the Court has to look, not to events as they have or have not happened, but only to the possible or probable effect of such clauses on the right of redemption **(12)**

Long period for redemption together with factors such as financial condition of mortgagor, the clause obliging the payment of interest even in case of usufructuary mortgage not periodically but at a time of ultimate reduction imposing burden on mortgagor to redeem, clauses permitting construction of building and debiting the mortgagor with an obligation to pay for the same, would amount to clog on equity.**(13)**

The circumstances in which the mortgagor was compelled to secure the amount, terms and conditions on which the amount was in fact advanced and other alternative to which the mortgagor could have taken recourse for obtaining the sum advanced are relevant factors for determining whether particular term of redemption amounts to a clog on equity of redemption **(14)**

(A) Right to redeem absolutely.

A right to redeem absolutely may be said to be clogged by any stipulation 'which prevents the mortgagor from getting back the mortgaged property as free and unfettered as if there was no mortgage This test was stated by *Lord Macnaghten in Noakes and Co v Rice*(**15**) in the following words :

> "When the money secured by a mortgage of land is paid off the land itself, and the owner of the land *in the use and enjoyment of it* must be as free and unfettered to all intents and purposes as if the land **had never been made the subject of the security."**

This test was applied by their Lordships of the Privy Council in *Mehrban Khan v. Makhna* **(16)** In that case a mortgage provided that the mortgagee was to be in possession for 19 years If at the end of the period the mortgagor paid off the mortgage money the property was to belong as to a *limited interest* therein only to the mortgagor, and as to the other interest to the mortgagees It was held that this provision constituted a clog on redemption and was as such void It follows that a provision in the mortgage deed or in a document forming part of the same transaction that the mortgagee should, even after redemption, continue in possession as a tenant or in some other capacity will be a clog on redemption **(17)** Stipulation in mortgage deed that mortgagee would con-

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vanced, would have to be considered before it is held that a particular term amounts to a clog because it is unreasonably long) ** AIR 1914 All 334 (336) 36 All 551 (DB) ** AIR 1929 Oudh 30(31) 4 Luck 147 (DB) ** AIR 1914 Oudh 379 (381) 17 Oudh Cas 313 ** AIR 1925 All 643 (644) (DB) ** AIR 1931 All 380 (384) 53 All 580 (DB)

[**See also** AIR 1954 Ajmer 53 (53) (Any decision on question whether particular conditions of mortgage deed amount to a clog on equity of redemption or not can only be a decision on particular facts of the appeal in which it is given and cannot be a decision as to the law)

12. AIR 1958 Raj 298 (302) ILR (1958) 8 Raj 258 ** AIR 1933 Oudh 460 (461) 9 Luck 151 (DB).

13. AIR 1989 SC 436 (448) : (1989) 1 SCC 458 ** (1987) 1 Cur LJ (C Cri R) 177 (179) (Punj & Har) (Term for long duration of 59 years' mortgage could not be said to be clog on equity of redemption as it was separable from other terms of mortgage)

14. (1992) 1 RRR 246 (247) (Punj & Har) ** AIR 1992 Punj & Har 193 (194) (1992) 1 Pun LR 609 (Clause inserted in mortgage deed that mortgage was for 95 years taking advantage of poverty and helplessness of mortgagor amounts to clog on right of redemption)

15. (1902) 71 LJ Ch 139 (142) 1902 App Cas 24 86 LT 62 66 JP 147 50 WR (Eng) 305 18 TLR 196

16. AIR 1930 PC 142 (144) : 11 Lah 251 : 57 Ind App 168.

17. AIR 1973 Punj 94 (98) 1973 Pun LJ 108 (If the covenant is clearly a clog on redemption the circumstances that mortgagor was or was not in an embarrassing position is immaterial because any fetter that after redemption mortgagee should continue in possession as a ten-

tinue in possession of mortgaged property for even is clog on redemption **(18)**

A stipulation that the right of redemption shall be *extinguished* on default in payment,**(19)** or that the mortgage should be *converted into a sale***(20)** is clearly a clog on redemption

The limitation imposing a condition that the mortgages could be redeemed within a specified

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ant is a clog) ** ILR (1988) Kant 1987 (1996) (DB) ** 1985 Rajasthan LR 250 (254) ** ILR (1967) Andh Pra 1341 (1335, 1356) (DB). (A term allowing the mortgagee to continue in possession as tenant even after redemption is a clog) ** AIR 1957 Andh Pra 30 (34) (A condition which enables the mortgagee to continue in possession after the mortgage is redeemed entrenches upon and impedes his right to redeem It is not collateral advantage given to the mortgagee after the discharge of the mortgage It is really a restriction imposed upon the mortgage contract itself and is therefore void as a clog on equity of redemption) ** AIR 1951 Sau 53 (54) (A condition that after redemption mortgagee should continue in possession as a permanent tenant is invalid.) ** (1910) 6 Ind Cas 707 (709) (All) ** AIR 1925 All 427 (428, 429) 47 All 582 (DB) (Stipulation that even after redemption to mortgagees should be allowed to retain possession is a clog) ** AIR 1934 Pat 397 (398) (Stipulation that the ra,yati lands which formed part of the mortgaged property would remain in the possession of the mortgagee and would not be restored to the mortgagor on redemption was held to be a clog) ** 1886 Pun Re No 32 Page 58 (59) (DB) (Condition in mortgage that even after redemption the mortgagor to accept mortgagee as a tenant on payment of normal rent is a clog) ** 1891 Bom PJ 241 ** 1980 Bom PJ 211 (DB) ** (1885) 9 Bom 524 (525) (DB) ** AIR 1925 Nag 26 (27, 28) 11 Nag LR 180 ** (1897) 21 Bom 793 (796) (DB) ** AIR 1922 Bom 277 (278) 46 Bom 409 (DB) ** AIR 1923 Nag 115 (115) ** AIR 1937 Lah 49 (51, 52) (DB) ** (1911) 35 Mad 744 (749) (DB) ** 1895 Pun Re No 99 page 467 (469) (DB).

[See also AIR 1933 All 70 (72) · 54 All 1041 (DB) (Note — Held no longer good law in AIR 1962 All 422.)]

18. AIR 1986 Raj 44 (49) : 1985 Rajasthan LR 250.

19. AIR 1980 Madh Pra 111 1981 MPLJ 473 ** ILR (1974) 2 Cal 584 (587) ** AIR 1972 Mad 185 (186) (DB) (1972) 2 Mad LJ 181 ** 1971 Sim LJ (HP) 127 1972 Cur LJ 386 (392) ** ILR (1969) 3 Mad 535 (541) · (1970) 1 Mad LJ 132 (A condition that the mortgagee shall enjoy as absolute owner if the mortgage is not redeemed within seven years is a clog) ** AIR 1962 Punj 478 (479) (Sub mortgage — Deed containing clause that mortgagee will lose right to redeem if not redeemed in five years — **Held** it amounted to a clog) ** AIR 1954 Trav-Co 7 (9) ILR (1952) Trav-Co 438 (DB) (Agreement that mortgagee would acquire title to the property if there is default in payment of value of improvement held a clog.) ** AIR 1925 Oudh 11 (13) (DB).

20. AIR 1965 SC 225 (227). (Mortgage of shop with possession — Stipulation that if mortgage is not redeemed within 15 years shop would be deemed as an absolute transfer 'Mala Kalam' — **Held,** amounted to clog — ILR (1958) 8 Raj 811, **Reversed.**) ** AIR 1985 Punj & Har 189 (190) 1985 Pun LJ 351 (Clause in mortgage deed that property would be redeemed within a period of mortgage would be turned into sale is clog on equity of redemption and therefore void) ** 1985 Pun LJ 279 (280) (Stipulation in mortgage deed that if the mortgagor failed to redeem the land within one month of the date of agreement he shall be liable to execute sale deed in favour of mortgagee is nothing but a clog on redemption.) ** AIR 1969 Pat 64 (67) 1969 BLJR 109 (Usufructuary mortgage — Sudbama bond providing that in default of payment on due date of repayment the money covered by the bond is to be treated as consideration money for sale deed Stipulation is a clog on equity of redemption and is void — Rights and title of parties are not changed Relations of mortgagor and mortgagee continue, after due date as creditor and debtor) ** AIR 1959 Pat 230 (235) 1958 BLJR 738 (DB) ** AIR 1957 Ker 75 ILR (1957) Ker 492 ** AIR 1957 Andh Pra 511 (512) ** AIR 1956 Madh B 83 (84) ILR (1955) Madh B 348 ** AIR 1955 Vind Pra 4 (5) (AIR 1921 Mad 12 (FB) and AIR 1922 PC 17 Ref to) ** AIR 1954 Trav Co

period being a clog on equity of redemption must be treated as an invalid condition of the document of mortgage.(21)

It is, however, only the *subject-matter of the security* that the mortgagor is entitled to get back on redemption free from all obligations relating to the property and arising under the contract of mortgage. Where the property mortgaged is *already subject to any obligation*, the mortgagor cannot on redemption get back the property free from such obligation and such obligation cannot be considered as clogging redemption. Thus, in *De Beers Consolidated Mines v. British South Africa Co. Ltd.*(22) *A* advanced to *B*, a Chartered Company, a certain sum of money to be repaid as provided. It was also provided that *B* should grant to *A* an exclusive right to work for a certain number of years diamodifersous mines in *B*'s territory, and that *A* should be entitled to take as security, certain debentures contemplated to be issued by *B*. Subsequently, *A* took the debentures but they were paid off before the expiry of the period fixed for woking the mines. *B* in an action claimed that the payment of the debentures put an end to the contract for exclusive rights which was a clog on redemption. It was held that what was mortgaged was only the assets *subject to the already existing contract* for grant of exclusive rights, that the redemption of the mortgage could only release the *property charged, i.e. the property subject to the contract* and that the contract did

165 (167). ILR (1953) TC 871. (Stipulation that in the event of failure to pay within a particular time the mortgage shall become a sale cannot affect the right of mortgagor even though there is default in repayment within the stipulated period.) ** **AIR 1954 Trav-Co 142 (143) : ILR (1953) Trav-Co 999 (FB).** (A stipulation in a mortgage, that in default of payment of mortgage money on date fixed, mortgagor shall sell property to mortgagee at a fixed price or a price to be settled by an umpire is invalid as a clog.) ** AIR 1952 Assam 19 (21). ILR (1950) 2 Assam 444 (DB) ** 1950 Ker LT 109 (110). (Provision that in default of redemption on expiry of term fixed mortgagee to become owner as purchaser — Invalid and unenforceable as clog on equity of redemption.) ** 1950 Trav-Co LR 496 (498) (DB). (Othi mortgage for specified period — Provision that if redemption is not effected when period expires, mortgagee may treat transaction as sale, is clog on redemption. 1948 Trav LR 556 (FB). Foll.) ** (1943) 1 MLJ 155 (157) (DB). (Stipulation in usufructuary mortgage that mortgagee would be owner on failure to redeem in two years held void.) ** AIR 1944 Mad 237 (238) ** 1894 Pun Re No. 131 p. 497 (499) (DB) ** AIR 1941 Mad 666 (669) (DB) ** (1898) 21 Mad 110 (112) (DB). (An agreement to sell the mortgaged property at a price to be fixed by umpires in default of payment of mortgage debt on a due date is a clog.) ** (1865) 2 Mad HCR 420 (421) (DB) ** AIR 1918 Mad 572 (573) (DB) ** AIR 1918 Mad 1332 (1333) (DB) ** AIR 1921 Mad 517 (517) (DB) ** AIR 1926 Mad 386 (387) (DB). (There must be separate transaction to prove that mortgagor has re inquished or disposed of his equity of redemption.) ** AIR 1915 Mad 33 (33) (DB) ** AIR 1925 Mad 366 (366) (DB) ** AIR 1918 Cal 638 (639) (DB) ** AIR 1914 Mad 42 (44). 38 Mad 667 (DB).

[**See also** (1872) 7 Mad HCR 395 (399) (DB). (The question of intention *extra* the documents does not arise.) ** AIR 1925 Oudh 386 (387). (Where under a mortgage of property consisting mainly of trees a term of 60 years was provided and it was provided that the mortgagee might cut dried and green trees indifferently and it was further provided that redemption could be had only within one year after the 60 years period and that in the 62nd year the mortgage was to be converted into sale these provisions constitute a clog on the equity of redemption and cannot be binding on the mortgagor who can bring his suit for redemption even before the 60 years' period provided in the deed has elapsed.) ** AIR **1918 Upp Bur 32 (33, 34) : 2 Upp Bur Rul 141.**)

21. **AIR 1977 SC 242 (244) : 1977 UJ (SC) 51.** Condition in a mortgage by conditional sale giving four years' time to the mortgagor to repay the sum but providing that on the mortgagor receiving notice of re-entry from the Land and Development Officer or other authority for breach of the covenant of the lease before expiry of period of four years the transfer shall be absolute is a clog on the equity of redemption.) ** AIR 1981 Pat 172 (176). 1981 BLJR 361.

22. (1912) 81 LJ Ch 137 (146) : 1912 App Cas 52. 105 LT 683 : 56 SJ 175. 28 TLR 114 (**Reversing** (1911) 80 LJ Ch 65 which affirmed (1910) 79 LJ Ch 345.)

not affect or transfer the equity of redemption.

(B) Right to redeem at any time after the due date for payment.

Any condition or stipulation which prevents the mortgagor from redeeming *at any time* after the date fixed for payment of the mortgage-money will be a clog on redemption (**23**) Thus, where a mortgage document provided a period of five years for redemption and further stated that if the mortgagor did not redeem by that time, the mortgagee was entitled to take the possession of the mortgaged property for twelve years during which period the mortgagor was not entitled to redeem, it was held by their Lordships of the Privy Council that the stipulation postponing redemption was a clog on redemption and was void (**24**) The contrary view expressed in the cases noted below(**25**) cannot be considered to be good law Where in a usufructuary mortgage it was provided that the mortgagor was entitled to redeem after sixty years on one particular day only it was held by the Allahabad High Court that the stipulation limited the right of redemption in a most unreasonable manner and was therefore a clog on redemption (**26**)

A usufructuary mortgage redeemable within period of 8 years was created The mortgage deed further stipulated that if the mortgage money is not repaid on expiry of the stipulated period the mortgage deed will be treated as 'absolute sale deed' The obvious purpose of the said stipula-

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23. 1972 Cur LJ 386 (392) ** 1963 BLJR 174 (174) (A clause in a mortgage bond that if principal amount is not paid by a certain date then creditor would be entitled to get a foreclosure effected is a clog) ** AIR 1962 Andh Pra 274 (288) ** AIR 1957 Hyd Pr 46 (48) (Condition that mortgagor could redeem within the first ten years but not later held a clog) ** AIR 1953 Trav Co 570 (571) (A clause in a mortgage deed denying right of mortgagors to ask for redemption is a clog on equity of redemption 1948 Trav Co LR 586 (FB) **Foll.**) ** 1950 Trav Co LR 496 (498) (DB) ** AIR 1925 All 334 (335) (DB) Where not only was the mortgage one a period of 82 years but even at the end of that time only one day was allowed for redemption and unless the money was paid on that particular day the mortgage was to become a sale and the mortgagor was to lose his title altogether **Held,** the stipulation amounted to a clog) ** AIR 1914 All 334 (336) 36 All 551 (DB) (Redemption allowed after 40 years on one day and on failure not for another 40 years — Condition held a clog) ** AIR 1928 Mad 234 (238) (DB) ** AIR 1930 Mad 805 (812) 53 Mad 805 (DB) (A stipulation in the mortgage deed that the right to redeem would be barred if the mortgage was not redeemed within 3 years from a fixed date is a clog on redemption) ** AIR 1915 Mad 481 (483) (DB) ** AIR 1925 All 432 (434) (A stipulation that even after the expiry of the period of 60 years mortgagors would not ask for redemption — **Held,** a clog) ** AIR 1920 Pat 787 (789) (DB) ** AIR 1915 Low Bur 95 (96) (A stipulation restricting the period of redemption to one year) ** AIR 1927 Lah 226 (227) (DB) ** 1984 Bom PJ 254 (DB) (Condition that mortgagor should redeem only when **mortgagee demands it.**)

24. AIR 1922 PC 17 (19) : 49 Ind App 60.

[See also (1898) 22 Bom 375 (377) (DB).]

25. AIR 1918 Oudh 395 (398) (DB) (Mortgage deed providing that on default a mortgagor to pay off the principal and interest due mortgagee was to take possession and remain in possession for a particular period after which alone redemption would be allowed — Provision held not a clog on equity of redemption) ** AIR 1929 All 388 (389) (DB) *AIR 1922 PC 17 was **not referred to.**) ** (1911) 10 Ind Cas 243 (244) (All) ** (1903) 6 Oudh Cas 167 (174) (The condition in an anomlaous mortgage that if the mortgagor failed to pay the mortgage-money within the time fixed, the mortgagee should be entitled to possession of the property for twenty years and that the mortgagor should not be entitled to redeem within **such period was not a "clog".**)

26. AIR 1931 All 380 (382, 383) 53 All 580 (DB) (10 Ind Cas 243 referred to)

[See also AIR 1914 All 334 (336) 36 All 551 (DB) (Amount payable on one day after 40 years On default the mortgage to continue for another forty years)]

tion was to take away the right of redemption. Such stipulation is statutorily forbidden by S 60 Thus on falure of the mortgagor, to repay the loan, the mortgagee did not acquire any absolute title over the mortgaged property His right remained to be only that of mortgagee(**27**).

The provision that if the mortgagor failed to tender the mortgage money within 4 months of the expiry of the term of mortgage (which was 5 years) the property would be deemed to be owned by the mortagee with the mortgage amount originally advanced being treated as the purchase price, is a term which by itself is a clog on redemption and hence is not liable to be given effect to(**28**).

A transaction of mortgage canot be made irredeemable altogether nor made illusory because redemption of mortgage is inherent in every transaction of mortgage and is the very essence of a mortgage unless enforcement of such right has become time-barred. Merely because the mortgage is not redeemed within the stipulated period of 7 years and the mortgagees continues in possession, it could not be said that the property could not be redeemed. The right of redemption cannot be controlled by agreement Thus the mortgagee in possession would not become tenant under S. 4(c) of the Bombay Tenancy and Agricultural Lands Act(**29**).

Where the mortgagor lets the mortgaged property to the mortgagee who is to hold it until the mortgage-money is paid, the covenant is not a clog as there is nothing to prevent redemption at any time(**30**). So also if mortgagor allows normal period of limitation to expire, he can only file suit on basis of deferred date of redemption but will be precluded from saying that deferred date of redemption amounts to clog on redemption(**31**).

(C) Stipulation must be part of the same transaction as the mortgage.

The doctrine of clog on the equity of redemption applies only to stipulations entered into *as part of the same transaction as the mortgage*, affecting the right of redemption(**32**)

"There is no doubt" said Vice-Chancellor Kindersely, in *Gossip v. Wright*(**33**), "that the broad rule is this . The Court will not allow the right of redemption in any way to be hampered or crippled in that which the parties intended to be a security, either by *any contemporaneous instrument* with the deed in question or by anything which this Court would regard as a *simultaneous arrangement or part of the same transaction*" In *Fairclouvh v. Swan Brewery Co.*(**34**). Lord Macnaghten said after referring to the decision in *Gossip v. Wright*(**35**) : "It is now firmly established by the House of Lords that the old rule still prevails and that equity will not permit any device or contrivance *being*

27. 1996 AIHC 3981 (3982) : 1996 (2) Kant LJ 418

28. 1999 AIHC 4421 (4424) : 1999 (3) Ker LT 189.

29. 1999 (4) Bom LR 186 (190)

30. (1905) 7 Bom LR 772 (782, 783).

31. AIR 1986 P & H 233 (234) : (1985) 87 Pun LR 508

32. (1964) 1 Mad LJ 86 (90) ** AIR 22 Bom 277 (278) . 46 Bom 409 (DB) (Plaintiff executed a permanent lease of land belonging to him in favour of the defendant The same day he mortgaged the land to the defendant In plaintiff's suit to redeem and recover the land, held, the two documents were parts of the same transaction and their real effect was that the mortgagee got the land as security for the loan, and at the same time obtained a contract from the mortgagor that he should be a permanent tenant of the land The contract constituted a clog on the equity of redemption) ** AIR 1930 Mad 305 (313) 53 Mad 805 (DB) ** (1907) 30 Mad 61 (66) (DB) ** AIR 1917 Oudh 237 (239) 20 Oudh Cas 97 ** AIR 1923 Oudh 143 (144) (DB) ** (1903) 27 Bom 297 (300, 301) (DB) ** AIR 1929 Bom 186 (187) 53 Bom 360
[See also AIR 1926 All 171 (172) (DB) ** (1871) 8 Bom HCR (AC) 236 (237) (DB) (Admission by the mortgagor, in another suit, that the mortgaged property had been sold to the mortgagee based on the foreclosure clause in the mortgage-deed.)]

33. (1863) 32 LJ Ch 648 (653) 9 Jur (NS) 592 8 LT 627 . 11 WR (Eng) 632

34. (1912) 81 LJ PC 207 (209) 1912 AC 565 106 LT 931 28 TLR 450

35. (1863) 32 LJ Ch 648 (653) 9 Jur (NS) 592 8 LT 627 · 11 WR (Eng) 632

part of the mortgage transaction or contemporaneous with it to prevent or impede redemption"(**36**). It follows that the equitable doctrine of clogging the equity of redemption is not applicable to *subsequent* and *independent* contracts qualifying the right to redeem(**37**). Thus, a subsequent contract for sale of the equity of redemption to the mortgagee and for delivery of possession to him of the property is not invalid as a clog on the equity of redemption(**38**). In *Shankar Din v. Gokul Prasad*(**39**) their Lordships of the Privy Council said: "there is nothing in law to prevent the parties to a mortgage from coming to any arrangement *afterwards* qualifying the right to redeem". In the undermentioned case(**40**), however, where a subsequent agreement provided that if the amount subsequently lent was not paid within a particular time the stipulations in the former deed were not to be in force, it was held that the Court will not allow an additional advantage to be obtained through the necessity of the debtor and that the principle "once a mortgage always a mortgage" would apply. It is submitted that this view is not correct.

In *Lallu Singh v. Ramnandan*(**41**), it has been held by the Allahabad High Court that a subse-

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36. See also AIR 1914 Oudh 23 (24) : 16 Oudh Cas 267

37. **AIR 1930 All 136 (148) : 52 All 281 (FB)** ** ILR (1967) 3 Mad 161 (179) (So long there is no oppression for unfairness or overreaching on part of mortgagee. **Overruled** on another point in AIR 1977 SC 774.) ** (1964) 1 Mad LJ 86 (90) ** ILR (1960) 10 Raj 517 (520) (DB) ** (1896) 20 Bom 346 (347) (DB). ** AIR 1926 Oudh 228 (229) : 1 Luck 92 : 29 Oudh Cas 118 (DB) ** (1902) 71 LJ Ch 768 (768) : 1902 AC 461 : 87 LT 368 : 5 WR (Eng) 576 : 18 TLR 767 : Reeve v. Lisle ** (1905) 8 Oudh Cas 132 (137) (DB). ** AIR 1923 Oudh 143 (144) (DB) ** AIR 1920 Bom 82 (83) (DB) ** (1903) 27 Bom 292 (300) (DB). ** AIR 1917 Nag 79 (80, 81) ** AIR 1917 Oudh 237 (239) : 20 Oudh Cas 97. (Term of mortgage extended by subsequent agreement.) ** AIR 1930 Pat 121 (122) (DB) ** AIR 1916 Mad 841 (841) : 39 Mad 1010 (DB) ** AIR 1935 Pat 353 (354) (DB). (Subsequent agreement granting permanent lease not a clog.)

[See also 1961 MPLJ 404 (407). (Term regarding mortgage getting itself converted into sale after stipulated period ineffective being clog on redemption — Subsequent receipt only incorporated a factual position by reference to the terms of the document — Not a fresh transaction *dehors* the original transaction of mortgage — Equity of redemption held not extinguished.) ** (1895) 18 Mad 368 (372) (DB). (Mortgage — Subsequent agreement to pay unsecured debt with mortgage-money — Obligation is binding on mortgagor, though not on parties who have subsequently acquired from him for value an interest in mortgaged property.) ** AIR 1925 All 427 (428) : 47 All 582 (DB).]

[See however AIR 1931 Bom 399 (401) (DB). (Permanent lease of mortgaged property executed by mortgagor in favour of mortgagee. — Transaction even if subsequent to date of mortgage cannot be acted upon by Court if terms of lease are unfair and bargain is unconscionable or oppressive one.)]

38. (1964) 1 Mad LJ 86 (91). (When hypotheca is sold to mortgagee, it must be truly independent transaction, free from environments of previous relationship.) ** AIR 1958 Andh Pra 541 (545) ** (1863) 32 LJ Ch 648 (653) : 11 WR (Eng) 632 : Gossip v. Wright ** **AIR 1927 Rang 33 (35) : 4 Rang 368 (FB)** ** AIR 1932 Cal 126 (133) : 59 Cal 1 : 7 (DB) (Obiter.) ** AIR 1915 Low Bur 127 (127, 128) (DB) ** AIR 1917 Nag 79 (80, 81) ** **(1903) 27 Bom 279 (300) (DB) ** AIR 1924 Rang 89 (90)**

[See also ILR (1960) 10 Raj 517 (521, 522) (DB). (Deed of further loan on same security providing that if the subsequent loan with interest was not paid within stipulated time the property will be deemed to have been sold for the total amount — Transaction not independent — Clause held clog on equity of redemption and unenforceable.) ** (1829) 48 ER 12 (14) : Tamlyn 28 : 31 RR 60, Purdie v. Millet ** AIR 26 Mad 386 (387) (DB).]

39. **(1912) 34 All 620 (628) : 15 Oudh Cas 285 (PC).**

[See also AIR 1956 Madh B 83 (84) : ILR (1955) Madh B 348.]

40. **1864 Suth WR 79 (80, 81) (FB)** ** (1903) 2 Bom 154 (156) (DB)

41. **AIR 1930 All 136 (149) : 52 All 281 (FB).** (26 All 559 : 9 Cal WN 789 : 27 All 178 : 4 All 85 : 9 Bom 233, referred to.)

quent contract not to redeem a mortgage without paying *unsecured* debt due to the mortgagee though not coming within the doctrine of clog on redemption, was yet not enforceable as being inconsistent with recognised principles of English law which are applicable to India as rules of justice, equity and good conscience and that the principle of English law was that a mortgagor cannot be compelled as a condition of redemption to pay sums which are not secured upon the mortgaged property notwithstanding a convenant to pay them as a condition of redemption According to the undermentioned case(**42**) of the Chief Court of Oudh, such a subsequent contract is unenforceable as a clog on redemption and according to other cases(**43**) of the same Court it would be enforceable against the mortgagor personally but not against his transferees The Madhya Bharat High Court has also taken a similar view and held that while the stipulation in the subsequent contract would be void as a clog on redemption the debt or obligation created by the contract would not be a clog(**44**) It is submitted that the view that such agreements are clog on redemption is not correct.

(D) The stipulation must have been entered into by the mortgagee in his character as such.

The doctrine of stipulations clogging redemption entirely depends upon such stipulations being made by the mortgagee in his relation as mortgagee It has nothing to do with stipulations made by him in a different capacity as that of a vendee Where *A* purchased property from *B* for $51,000, $5000 of which was to be paid in cash and the balance secured by a mortgage by *A* and *B* and the agreement of sale stated that *A* should give *B* a certain option, failing to do which, he will pay *B* $5000 in adddition to the balance of the purchase-money secured by the mortgage, it was **held that this was not a clog on redemption(45).**

(E) Effect of clogging stipulations.

The mere fact that a stipulation or covenant is a clog on redemption does not invalidate the mortgage as a whole(**46**) but only renders the stipulation ineffective The Courts have power and they will relieve the mortgagor from such stipulations whether by them he forfeits wholly his right to redeem or they have merely the effect of restricting such right(**47**)

29. Clog — Anomalous mortgage.

Section 98 provides that the rights and liabilities of the parties to an anomalous mortgage are to be determined by their contract as evidenced by the mortgage deed and, so far as such contract does not extend, by local usage It has been held by the Privy Council in *Mahomed Sher Khan v Raja Seth Swami Dayal*(**1**) that even in cases of anomalous mortgages the rights and liabilities depend on the terms of the contract *as controlled by the Transfer of Property Act*. The terms of the contract cannot offend the terms of S 60 and clog redemption. The provisions of one section cannot be used to defeat those of another unless it is impossible to effect a reconciliation between them See also the undermentioned cases to a similar effect(**2**).

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42. AIR 1917 Oudh 388 (389).

43. AIR 1923 Oudh 24 (25) ** AIR 1914 Oudh 304 (305) : 17 Oudh Cas 303 ** AIR 1925 Oudh 593 (594).

44. 1955 Madh BLJ HCR 272 (273).

45. (1909) 26 TLR 138 (139), Davies v. Chamberlain

46. AIR 1922 Oudh 221 (223).

47. AIR 1958 SC 770 (773). (Court's jurisdiction to relieve depends on the question whether the mortgagor was oppressed or imposed upon.)

Section 60 — Note 29

1. AIR 1922 PC 17 (19) : 49 Ind App 60. (Appeal from AIR 1915 Oudh 109)

2. AIR 1957 Andh Pra 511 (512) ** AIR 1954 Trav-Co 7 (9) : ILR (1952) Trav-Co 438 (DB) (The principle relating to clog on equity of redemption embodied in S 60 applies even to anomalous mortgages — AIR 1922 PC 17, Rel on) ** AIR 1925 Mad 366 (366) ** AIR

The contrary view that the principle of clog on redemption does not apply to anomalous mortgages, expressed in some cases(3), is no longer good law. In the cases noted below(4) it was held that a provision for renewal of *kanom* being *permissible* under the customary law of Malabar is not a clog on redemption.

30. Stipulation giving mortgagee option to purchase the property.

A stipulation in the mortgage deed for an option to the mortgagee to purchase the mortgaged property will be one for a collateral advantage which clogs the right of redemption and is therefore void(1). The reason is that if the stipulation is valid, the mortgagor cannot, on payment of the mortgage-money, get back the property free of all obligations under the contract of mortgage. (See Note 28). The case is stronger still where the mortgagor stipulates that he will not sell to any one except the mortgagee. The mortgagee, in fact, is, in such a case, given an absolute right to prevent a sale to any other person(2).

In *Samuel v. Jarrah Timber & Wood Paving Corporation*(3), Lord Macnaghten thought that

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1918 Cal 638 (639) (DB) ** AIR 1918 Upp Bur 32 (33) : 2 Upp Bur Rul 141 ** (1907) 30 Mad 61 (66) (DB). **(Mortgage before Act.)**

3. **AIR 1921 Mad 12 (15, 18) : 43 Mad 589 (FB)** (Per Wallis C.J. and Seshagiri Aiyar J.) ** (1907) 30 Mad 300 (303) (DB) ** AIR 1916 Mad 652 (653) (DB) ** AIR 1916 Mad 841 (842) : 39 Mad 1010 (DB) ** AIR 1924 Rang 83 (85) : 1 Rang 419 (DB) (AIR 1922 PC 42 171, **Not referred.**)

   [See also AIR 1944 Mad 42 (44) : 38 Mad 667 (DB) (Per Sadashiva Aiyar J. — Obiter — It is difficult to hold that express terms of S. 98 which are intended to apply specially to anomalous mortgages can be controlled by the provisions of the previous sections of the Act.)]

4. **AIR 1937 Mad 126 (127) ** AIR 1918 Mad 509 (510) (DB)**

   [See also (1910) 7 Ind Cas 698 (699) (Mad) (Mere right of renewal of kanom does not affect redeemability of kanom.)]

Section 60 — Note 30

1. 1971 Assam LR 175 (179) (Stipulation to sell the property to the mortgagee at a fixed price — **Held**, clog on right of redemption.) ** AIR 1951 Mad 524 (525) (DB) ** AIR 1951 Pat 327 (329) (DB) (Stipulation in mortgage that after disposal of title suits in which mortgaged lands were involved, mortgagor would execute a deed of sale in favour of mortgagee, failing which mortgagees were to get sale-deed executed through Court — Stipulation is void and illegal as being a clog on equity of redemption.) ** AIR 1947 Mad 51 (52) : ILR (1947) Mad 313 (DB) (Stipulation by mortgagee to purchase mortgaged property entered at time of loan is a clog — Loan advanced to policy holder on security of policy of insurance — Stipulation that company would have right to cancel policy by paying its surrender value on default in payment of loan is clog — Right of cancelling policy and paying surrender value conferred on the company by the bond amounts to a stipulation that company as mortgagee should have the right of purchasing the policy at its surrender value.) ** (1705) 23 ER 935 (935) : 2 Vern 520, Jennings v. Ward.

   [See also (1889) 61 LJ Ch 49 (54) : 1892 App Cas 1 : 65 LT 765 : 40 WR (Eng) 529, Salt v. Northampton ** AIR 1922 Bom 277 (278) : 46 Bom 409 (DB) (If the mortgage had got a contract for the sale of the land a Court of Equity would not allow him to take advantage of that contract — There is very little difference between a sale and permanent lease.)]

2. AIR 1948 Mad 7 (8) (Agreement for sale followed by mortgage of the same property to the proposed vendee — Stipulation in mortgage deed that if the mortgagor chose to sell during the term of the mortgage, he must sell only to the mortgagee for the price already fixed under the agreement for sale — Stipulation is clog on equity.) ** AIR 1930 Pat 121 (124) (DB).

3. (1904) 73 LJ Ch 526 (527, 529) : 1904 App Cas 323 : 90 LT 731 : 52 WR (Eng) 673 : 20 TLR 536 (**Affirming** (1903) 72 LJ Ch 262 which itself affirmed (1902) 71 LJ Ch 688.)

the view that such a stipulation was void, rested on a well recognised rule, independent of the principle of clog on redemption, that a mortgagee is not allowed *at the time of the loan* to enter into a contract for the purchase of the mortgaged property. Lord Londley in the same case, rested his view on such stipulation being a clog on redemption.

A stipulation for pre-emption by the mortgagee may or may not be a clog on redemption. If the stipulation is for pre-emption at any time *before redemption* it is not ordinarily a clog on redemption(4). But if the right is exercisable even *after* the mortgage is redeemed(5) or is exercisable at a fixed price(6) or at a *concession price*(7) it may be a clog on redemption. See also the undermentioned case(8).

31. Stipulation against redemption by persons other than the mortgagor.

A condition in the mortgage deed that the mortgage is redeemable only *during the life* of the mortgagor is void The mortgage is nevertheless redeemable by his heirs(1). So also, where a mortgage is made redeemable by the mortgagor and the *heirs male* of his body, it is redeemable by the *assignee* of the mortgagor(2).

32. Provision for a long period for redemption, if a clog.

A provision in the mortgage deed fixing a period for redemption and providing that the mortgage shall not be redeemable before that date is not a clog on redemption, if the period fixed is a reasonable one(1) In *Bradley v. Carritt*(2) Lord Macnaghten said "everybody knows that when money was placed out on mortgage as an investment nothing was more common than to make the mortgage irredeemable for a certain limited time. It was an old and well established practice, and a very reasonable practice too" In *Morgan v. Jeffreys*(3) it was held that a postponement of redemption for a short period may not be unreasonable if the mortgagee also during that period is bound not to call for his debt during that period, but that a proviso restraining redemption for 28 years was unreasonable and void, at least, where there was no corresponding restriction preventing the mortgagee from calling in his money during that perod. In *Davies v. Symons*(4), a covenant that the mortgagor will not redeem for 20 years was held to be a clog on redemption.

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4. AIR 1928 Pat 637 (639) 8 Pat 243 (DB) (Convenant for pre-emption before redemption) ** AIR (1929) Mad 243 (250) 52 Mad 300 (DB). (Quaere) ** (1898) 2 Cal WN 575 (576) (DB) ** (1909) 3 Sind LR 130 (131) (DB) (22 All 238. **Foll.**)

5. (1901) 24 Mad 449 (455, 459) (DB).

6. AIR 1951 Mad 524 (525) (Pr 3) (DB) (Stipulation in deed giving an option to mortgagee to purchase held to be a clog) ** AIR 1948 Mad 7 (8) ** AIR 1928 Pat 637 (639) · 8 Pat 243 (DB)

7. AIR 1929 Mad 243 (250) : 52 Mad 300 (DB).

8. AIR 1917 Lah 247 (250) (DB)

Section 60 — Note 31

1. (1702) 22 ER 1195 (1195) Freeman 258, *Price v Perrie* ** (1681) 23 ER 266 (267) : 1 Vern 7 *New Comb v Bonham*. (**Reversed** in 23 ER 435 on the ground that the mortgagor intended to make a settlement of the mortgage on the mortgagee.) ** (1758) 28 ER 605 (606) 1 Eden 54, *Spurgeon v. Collier* ** 1894 Pun Re No. 131, p 497 (499) (DB)

2. (1681) 23 ER (288) 1 Vern 33, *Howard v Harris* ** (1714) 24 ER 384 (385) · 1 PW 268, *Floyer v Lavington* ** 1894 Pun Re No 131, p. 497 (499) (DB) (Proviso restricting the equity of redemption to the mortgagor himself or the heirs of his body.)

Section 60 — Note 32

1. (1898) 67 LJ Ch 540 (541) · 47 WR (Eng) 84, *Biggs v Hoddinott*.

2. (1903) 72 LJ KB 471 (475) : 51 WR (Eng) 636.

3. (1910) 79 LJ Ch 360 (364) : 26 TLR 324

4. (1934) 103 LJ Ch 311 (313) : 1934 Ch 442.

In this country, the periods fixed for redemption are generally much longer than they are in England(5). The mere fact, therefore, that the period is a long one is not by itself a clog on redemption(6).

Also see (1859) 29 LJ Ch 39 (41) 1 Giff 316, *Cowdry v. Day* (Transaction between solicitor and client.)

5. (1896) 20 Bom 677 (688) (DB).

6. **AIR 1958 SC 770 (774).** (Usufructuary mortgage redeemable after expiry of 85 years within six months — Failure to redeem within 6 months to result in transaction being treated as sale — **Held,** that term that mortgage will not be redeemable within 85 years is not a clog as bargain was found reasonable and mortgagee had taken no advantage.) ** AIR 1983 Punj 437 (442) (90 years period — Held not a clog.) ** **AIR 1980 Pat 163 (167) : 1980 BLJR 371 (FB).** (Such a grievance can be raised if at all only by the mortgagor and not by mortgagee.) ** AIR 1973 Guj 93 (96) 14 Guj LR 357 (Unless there is evidence to show that the mortgagee had taken unfair advantage of his position.) ** AIR 1963 Pat 114 (118) ILR 42 Pat 733 (DB) (Mere long period for redemption is not by itself a clog on equity of redemption — **Held,** period of 99 years did not amount to clog.) ** AIR 1960 Raj 47 (48) ILR (1960) 10 Raj 88 (DB) (Term of 99 years held reasonable AIR 1958 Raj 102, **Reversed.**) ** AIR 1958 Pat 464 (467) (Usufructuary mortgage of sixty years does not per se make the bargain an unconscionable one and in the absence of undue influence or fraud the parties who enter into a contract with their eyes open are bound by it by stipulations contained in their instrument of mortgage.) ** AIR 1957 Madh Pra 200 (203) : ILR (1957) Madh Pra 407 (Money would be payable only after expiry of 80 years — Not a clog.) ** AIR 1953 Sau 193 (194) (The original period of 61 years extended by the subsequent mortgage for further period of 30 years held did not amount to a clog on redemption.) ** AIR 1950 Pat 173 (174) ** AIR 1949 Nag 12 (13) ILR (1949) Nag 12 (Length of the term of a mortgage is not in itself a clog on the equity of redemption and it can only be taken into consideration when any other terms in the contract are unconscionable and such as are likely to defeat ultimately a claim to redeem.) ** AIR 1945 Oudh 113 (114) 20 Luck 85 (DB) (Mere fact that the term of a mortgage is fixed at 51 years per se does not constitute a clog on the equity of redemption. Nor do the stipulations to pay compound interest at 18 per cent per annum and keep the property in repair act as a clog on the equity of redemption AIR 1929 Oudh 30 **Foll.**) ** AIR 1944 Mad 501 (502) (Usufructuary mortgage — Mortgagee to appropriate rents and profits in lieu of interest and to be in possession for 60 years — No clog on equity of redemption and right to redeem on payment of principle money arises only on expiry of that period.) ** AIR 1933 All 70 (71) 54 All 1041 (DB) (60 years held not necessarily clog — (Note — Test laid down for determining whether a particular condition is clog or not held **no longer good law** in AIR 1962 All 422.) ** AIR 1920 Oudh 228 (228) (50 years.) ** (1928) 111 Ind Cas 248 (250) (Oudh) (A clause postponing redemption for 11 years.) ** AIR 1929 Oudh 30 (31) 4 Luck 147 (DB) (35 years.) ** AIR 1926 Oudh 38 (39) (200 years *Contra* see AIR 1927 Oudh 224.) ** AIR 1929 Oudh 54 (55) 4 Luck 203 (DB) (Period of 99 years.) ** AIR 1926 Lah 457 (457) (DB) (20 years) ** AIR 1930 Lah 1060 (1061) (Period such as forty years for redeeming a mortgage cannot be reduced by the Court where otherwise there is nothing unconscionable in the agreement ** AIR 1933 Lah 373 (374) (50 years.) ** (1910) 8 Ind Cas 1068 (1069) (DB) (Mad) (90 years.) ** AIR 1921 Oudh 196 (200) 24 Oudh Cas 330 (DB) (The mortgage was for a term of 30 years with a possible extension to 50 years in case it was not redeemed on the expiry of the original term.) ** 1907 Pun Re No. 39 p 168 (172) (DB) (A term of 20 years held not inequitable.) ** AIR 1922 Oudh 221 (223) (98 years.) ** AIR 1925 All 42 (43) (Term of 60 years.) ** AIR 1936 Lah 168 (170) (DB) (25 years) ** (1912) 15 Ind Cas 917 (918) (Lah) (150 years.) ** AIR 1919 Oudh 394 (394) 22 Oudh Cas 191 (A covenant postponing redemption till the lapse of a certain period is not by itself illegal.) ** (1896) 20 Bom 677 (684) (DB) ** (1912) 15 Ind Cas 880 (881) (DB) (All) (Fixing 58 years.) ** AIR 1914 All 163 (164) (35 years.) ** AIR 1915 All 136 (137) (59 years.)

but coupled with other circumstances it may be a clog on redemption(7) Thus, a stipulation barring the mortgagor from redeeming the mortgage until the happening of an event is a clog when although the event is one which will certainly happen there is no certainty about the time at which

[**But see** AIR 1927 Oudh 224 (225) 2 Luck 588 (Period of 200 years constitutes a clog — *Contra* **see** AIR 1926 Oudh 38)]

[**See however** ILR (1956) Patiala 300 (302) (Mortgage of ancestral agricultural land — Condition postponing redemption for 30 years — **Held** not binding on reversioner without necessity) ** (1904) 26 All 479 (481) (DB) (Where a restraint upon redemption extends for a long period of say 30 years or upwards the contract may no doubt be regarded by a Court of equity as unconscionable or oppressive — Period of 15 years held not oppressive)]

7. AIR 1981 Guj 120 (124) 22 Guj LR 473 (Long period of 99 years Mortgagee given absolute right to make repairs alterations, reconstructions Mortgagor in hard-pressed economic condition Terms of mortgage held amounted to clog) ** AIR 1979 Guj 171 (175) (Mortgagor financially hard-pressed — Mortgagee given right to demolish existing structure and construct new one — Expenses to be reimbursed by mortgagor at the time of redemption Terms held unreasonable and unconscionable and not binding) ** (1974) 15 Guj LR 193 (199) (Postponing redemption of a possessory mortgage for a long period with an additional burden on the mortgagor would amount to a clog) ** AIR 1973 All 79 (81) 1972 All LJ 834 (If absolute freedom is given to the mortgagee to incur unlimited expense in repairs and construction of the mortgage house which were to be reimbursed by the mortgagor along with principal with a high rate of interest and the right of redemption is postponed for 60 years the terms are unreasonable and a clear clog on the right of redemption) ** AIR 1972 Raj 293 (295, 296) 1971 WLN Part I 355 ** 1971 Raj LW 357 (360) (Fixation of a period of 100 years for redemption of the mortgage and the mortgagee being allowed to spend unlimited amount on improvement with interest at 12 per cent without reduction for rent and profits can be avoided by the mortgagor as a clog) ** ILR (1963) Mad 1184 (**Held**, on facts that terms fixing 100 years for redemption of mortgage amounted to clog and that mortgagor should be relieved against the term) ** AIR 1963 Pat 114 (118) ILR 42 Pat 733 (DB) ** AIR 1960 Raj 47 (48) ILR (1960) 10 Raj 88 (DB) ** AIR 1958 Raj 298 (301, 302) ILR (1958) 8 Raj 238 (Postponement of right of redemption for 99 years — Mortgagee given unlimited right to make such improvements in mortgaged house as he liked — Until entire amount consisting of original mortgage money and improvements was paid off by mortgagor latter not entitled to redeem — **Held** term of 99 years taken with other conditions amounted to clog) ** AIR 1953 Bom 408 (412) ILR (1953) Bom 773 (Agreement that redemption should be after 99 years and mortgagee may build any structure on the mortgaged plot after spending any amount held clog on redemption) ** AIR 1953 Sau 193 (194) ** AIR 1929 Oudh 30 (31) 4 Luck 147 (DB) ** AIR 1925 Oudh 720 (721) (Under a deed of mortgage the mortgagee secured a profit at the rate of 25 per cent and the period of redemption was fixed at seventy five years There was a further condition that if redemption was not effected in the 7th year a further term of 75 years would be added — **Held**, that the intention of the mortgagee was to make redemption impossible and that the mortgagor was, therefore, entitled to relief) ** AIR 1924 Lah 129 (130) (DB) (Period of 51 years coupled with power to mortgagee to spend as much money on improvement as he likes and charge interest on it is a clog on redemption) ** AIR 1925 All 643 (645) (DB) ** AIR 1925 Oudh 406 (406) ** AIR 1926 Oudh 356 (356, 357) ** AIR 1929 Oudh 54 (54) 3 Luck 203 (DB) ** (1928) 110 Ind Cas 689 (690) (DB) (Oudh) (Period of 50 years) ** AIR 1914 All 34 (336) 36 All 551 (DB) ** AIR 1914 Oudh 379 (381) 17 Oudh Cas 313 (Term of 101 years) ** AIR 1915 Oudh 151 (153) (DB) ** AIR 1933 Oudh 460 (460) 9 Luck 151 (DB) ** AIR 1920 Oudh 53 (53) 23 Oudh Cas 108 ** (1904) 26 All 479 (481) (DB) ** AIR 1919 Oudh 394 (394) 22 Oudh Cas 191 (A covenant in a usufructuary mortgage postponing redemption for 99 years along with the stipulation requiring mortgagor to pay double the principal amount is a clog) ** (1910) 8 Ind Cas 553 (553) (Lah) (The condition in a mortgage deed for the term of 20 years requiring the mortgagor to pay interest for the full term along with the

it would happen(8).

Mortgagor executed a mortgage deed of land. The amount of mortgage was virtually the market price of the land. The mortgage was redeemable after 90 years. **Held**, that there was no clog on redemption of mortgage(9).

Where as per the agreement between the mortgagee and mortgagor the last date of redemption was 15th August, 1986 but besides that it was left to mortgagor even to redeem the property before expiry of said date, held that as there was no question of postponing date of redemption for any indefinite or long period and as the property could be redeemed even before last date of repayment, it cannot be said that there was any clog on equity of redemption(10).

The clause in mortgage that the mortgagees would become owners of the mortgaged property if mortgage was not redeemed at the end of 20 years is void being opposed to the provisions of A. P. Prevention of Agricultural Lands Alienation Act and operates as clog on redemption(11).

Right of redemption is a statutory right. Provision in deed hampering or preventing redemption would be void. It is a question of fact whether a term is oppressive and places a clog on right of redemption. Where a substantial extent of land is mortgaged for a paltry sum and redemption is stipulated after 99 years, such term places clog on redemption and has to be avoided(12).

A right of redemption does not remain independent of the property itself. A sale of property that too to a stranger who had nothing to do with the mortgage and who was not a party to the same would convey a complete title to that property to him and once the title to that property goes, the equity of redemption shall also accompany the property. The stranger would then be in a position to substitute himself in the place of plaintiff mortgagor and to step in his shoes(13).

33. Stipulation for collateral advantage.

Originally, in England, every stipulation in the mortgage deed for a collateral advantage to the mortgagee was held void, whether the equity of redemption was thereby clogged or not(1). "A man shall not have interest for his money on a mortgage", said the Master of Rolls in *Jennings v Ward*(2), "and a collateral advantage besides for the loan of it". This was rested on two grounds: *firstly*, that to allow such an advantage to be gained was contrary to the policy on which the Statutes of Usury were founded, and, therefore, was contrary to public policy(3); *secondly*, that the mortgagor being under the control of the mortgagee is not in a position to contract with the mortgagee on

principal at the time of redemption and not within the term it he chose, is a clog on the equity of redemption.) ** AIR 1922 Oudh 283 (285) (DB). (Interest due over and above the profits to be added to principal and be paid with compound interest with principal at the time of redemption is a clog.) ** AIR 1921 Oudh 45 (45) ** AIR 1917 Oudh 106 (106, 111) (DB).

[See also AIR 1962 All 422 (425). (Condition not only providing for redemption after 4 years but also giving right to mortgagee to rebuild and make repairs without limit in expenditure and to pay taxes — Mortgagee also entitled to receive amount spent with interest at a high rate at the time of redemption — **Held**, condition was a clog.)

8. AIR 1949 Mad 768 (770). (Agreement to pay mortgage money after death of Hindu widow.)

9. 1997 (11) SCC 429 (430).

10. (1980) 1 Andh WR 265 (270).

11. AIR 1983 (NOC) 177 : (1983) 1 Andh LT 199 (DB).

12. AIR 2000 SC 1935 (1937 to 1939). 2000 AIR SCW 1586 : 2000 (4) SCC 326.

13. AIR 2001 Mad 14 (17) : 2000 (3) Mad LJ 745.

Section 60 — Note 33

1. See the observations of Lord Davey in Noakes and Co. v. Rice (1902) 71 LJ Ch 139 (144) : 50 WR (Eng) 305.

2. (1705) 23 ER 935 (935) : 2 Vern 520.

3. (1806) 9 RR 122 (129). 2 Sch and Lef 661. Web v. Rorke. (Lease for 999 years by mortgagor to mortgagee set aside.)

equal terms, and that a Court of Equity will regard a contract for a collateral advantage as an *oppressive* one not to be enforced(4) The Usury Laws were repealed in the year 1854, and the first ground of the view was no longer available. The second ground, however, was held applicable notwithstanding the repeal of the Usury laws and stipulations for collateral advantage were held to be not valid(5), though in some cases(6) it was held that where the stipulation was, as a matter of fact, not oppressive, it was enforceable. In *Biggs v. Hoddinott*(7) the previous cases were reviewed and it was held that a stipulation for a collateral advantage was not invalid unless it could be said that it operated as clog on redemption, or was unconscionable and oppressive in which latter case the contract would not, like any other oppressive contract, be enforced. The facts of that case were that a mortgage of a licensed house by a publican to a brewer provided that the loan should continue for a period of five years and contained a covenant that the mortgagor should not, *during the continuance of the security*, sell, on the premises, beer other than that supplied by the mortgagee It was held that the covenant for the collateral advantage neither clogged redemption nor was oppressive and was therefore valid The principles stated in *Biggs v Hoddinott*(8) were approved by the House of Lords in *Noakes & Co v Rice*(9) In that case a covenant in a mortgage of a leasehold public house provided that the mortgagor will not, during the continuance of the term, *whether or not any principal or interest was still owing on the security*, sell on the mortgaged premises any malt liquors except such as shall have been purchased from the mortgagees. It was held that this was a clog on redemption insofar as it purported to "tie" the public house after payment of principal moneys and interest due on the security. Lord Macnaghten observed as follows :

> "It seems to me to be contrary to principle that a mortgagee should stipulate with his mortgagor that, after full payment of principal, interest and costs, he should continue to receive, for a definite or an indefinite period, a share of the rents and profits of the mortgaged property as the result of an obligation arising from the contract made when the mortgage was created "

In *Bardley v Carritt*(10) a stipulation in a mortgage of shares for a collateral advantage to the effect that the mortgagor undertook to use his best endeavours to secure that the mortgagee should "always thereafter" be employed as broker for the company was invalid as constituting a clog on redemption. In *Morgan v. Jaffreys*(11) a mortgage of licensed premises provided a term of 32 years, during which the mortgagor was bound to deal exclusively with the mortgagee in liquors at current market rates The mortgagee could, however, call for the money earlier but continue the "tie" for 31 years It was held that the stipulation was a clog on redemption and therefore void.

Where the deed of partnership between mortgagor and mortgagee was the part of the same mortgage transaction and the mortgagee did not contribute any capital but was entitled to run the business in any manner he wanted to do to the exclusion of mortgagor and it was provided that there would be first change in respect of advances made by mortgagee, such deed of partnership must be held to have been created to promote and protect interest of mortgagees alone and it would put clog

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4. (1804) 9 RR 71 (75) 2 Sch and Lef 214, Gubbins v Cree (Lease by mortgagor to mortgagee, held oppressive and set aside) ** (1816) 3 ER 1074 (1078) · 4 Dow 16 · 16 RR 1 Hickes v. Cooke.

5. (1863) 11 WR (Eng) 1036 (1037) 2 NR 541 · 9 Jur (NS) 885 132 RR 873, Broad v Selfe (1889) 58 LJ Ch 355 (359) : 37 WR (Eng) 279, James v. Kerr.

6. (1890) 59 LJ Ch 174 (177), Field v Hopkins, (1889) 58 LJ Ch 361 (367) · 41 Ch D 126, Manmalnd v. Upjohn.

7. (1898) 67 LJ Ch 540 (542) : (1898) 2 Ch D 307

8. (1898) 67 LJ Ch 540 (542) : (1898) 2 Ch D 307.

9. (1902) 71 LJ Ch 139 (144) : 50 WR (Eng) 305 (Affirming (1900) 69 LJ Ch 635, Rice v. Noakes.)

10. (1903) 72 LJ KB 471 (475, 478) · 1903 App Cas 253 (266) (**Reversing** (1901) 70 LJ KB 832, Bradley v. Carritt.)

11. (1910) 79 LJ Ch 360 (363) · 26 TLR 324.

on equity of redemption(12).

The law on the validity of stipulations for collateral advantages in mortgage deeds must now be taken to have been finally settled by the decision of the House of Lords in *Kreglinger v New Patagonia Meat and Cold Storage Co* (13), which must be regarded as the leading case on the point. In that case *A* advanced money to *B* upon security of a floating charge over all his property present and future and agreed not to demand repayment for a period of five years, but *B* was to be at liberty to repay the debt at an earlier period on giving notice. The agreement also contained a provision that *B* should not sell any sheepskins to any purchasers other than the lenders for a period of five years from the date of the agreement so long as the lenders are willing to purchase the same at an agreed price. The loan was paid off before the expiration of the five years. It was held by the House of Lords that the option of purchasing the sheepskins was not terminated but continued for the period of five years. Lord Haldane, L.C., said :

> "A collateral advantage may be stipulated for by the mortgagee provided that he has not acted unfairly or oppressively, and provided that the bargain does not conflict with the third form of the principle, this is, that a mortgage (subject to the apparent exceptions in the case of a family arrangement to which I have already referred) cannot be made irredeemable, and that any stipulation which restricts or clogs the equity of redemption is void. It is obvious that the reason for the doctrine in this form is the same as that which gave rise to other forms. It is simply an assertion in a *different way of the principle that once a mortgage always a mortgage, and nothing else*."

The result is that the mortgagor can, even at the time of the loan, agree to give some collateral advantage to the mortgagee provided—

(a) it is not unfair, or

(b) it does not clog the equity of redemption or is not otherwise inconsistent with the right to redeem.

Kreglinger's cases(14), was followed in *Re Cuban Land and Development Co Ltd* (15) and it was held that a collateral bargain with debenture stock-holders of a company to pay them one third of the surplus assets in the event of winding up of the company and which did not in any way prevent the redemption of the debentures on payment of the amount due was not invalid.

The principles stated above have been applied in this country also. In *Venkatarayanim Garu v Subadravamma*(16) where a mortgage with possession was made by *A* in favour of *B*, and it was provided that Rs 4,000 per year were to be allowed to the mortgagee for certain charges that would be incurred by the mortgagee for the usual annual repairs, etc., to the mortgaged property, it was held by their Lordships of the Privy Council that this was not an agreement for a collateral advantage that can be objected to. Where the mortgagor of a mill, agreed to pay the mortgagee remuneration as manager of the mill, it was held not to be bad(17). Where *A* borrowed money from *B* for building a factory and mortgaged the factory and stipulated that he would pay two and a half per cent commission *in perpetuity* on the income of the factory, it was held that it was bad(18). In the undermentioned case(19), *A* mortgaged to *B* for Rs 1200 his *kachha* built tiled shop situated in a

12. AIR 1988 Cal 46 (55) : 1987 Cal LT (HC) 38

13. (1914) 83 LJ Ch 79 (85) : 109 LT 802 (Noakes and Co v Rice (1902) 21 LJ Ch 129 Bradley v Carritt (1903) 72 LJ KB 471 Samual v Jarrah Timber and Wood Paving Corporation, (1904) 73 LJ Ch 526 Santley v Wilde (1899, 68 LJ Ch 68), Referred to.)

14. (1914) 83 LJ Ch 79 (85) : 109 LT 802 Kreglinger v New Patagonia Meat and Cold Storage Co

15. (1921) 90 LJ Ch 440 (442) : (1921) 2 Ch 147

16. AIR 1923 PC 26 (27) : 50 Ind App 41 : 46 Mad 108.

17. (1911) 10 Ind Cas 748 (764) (Bom).

18. AIR 1926 Bom 495 (496) (DB).

19. AIR 1944 All 204 (207) : ILR (1944) All 302 (DB) (There is no such principle that a

busy part of Benares The mortgage deed stipulated that if the mortgagee *B* constructed any building on the mortgaged property by demolition of the 'kachha shop *A* would pay the entire cost of the construction with the mortgage-money, at the time of redemption *B* spent Rs 8,000 odd in constructing a new *pucca* building in place of the dilapidated shop It was held that in the circumstances of the case, the stipulation was not unconscionable or oppressive and did not amount to a clog. See also the undermentioned cases(20).

34. Clog — Penalty in case of default.

A high rate of interest(1) or a provision for compound interest on default(2) is not a clog on redemption But if such a provision amounts to a *penalty* within the meaning of S 74 of the Con-

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mortgagee shall not stipulate for any collateral advantage for himself nothing can be said against it and he can enforce it, always assuming that the bargain is not unconscionable or oppressive Nor is there any such principle namely, that where a collateral advantage is stipulated for by the mortgagee as a condition of the loan that advantage or contract is to be presumed to have been or made under pressure There is no such presumption but each case must be decided according to its own circumstances Observations of Sir Francis Jeune in Stanley v. Wilde, (1899) 2 Ch 474, Approved.)

20. AIR 1962 Andh Pra 274 (288) (Deed creating trust for debenture-holders Clause in deed indemnifying the trustees for all lawful expenses in execution of powers under deed is not a clog on redemption) ** AIR 1957 Andh Pra 30 (34) (Condition which enables mortgagee to continue in possession after mortgage is redeemed is not a collateral advantage given to mortgagee after discharge of mortgage but impedes his right to redeem) ** AIR 1955 Pepsu 87 (89) ILR (1955) Patiala 16 (DB) (Words in mortgage "muramat shakasht rekhat" cannot be interpreted to allow mortgage to pull down entire property as and when the mortgagee pleased and rebuild it in any manner as it would amount to a clog on redemption) ** AIR 1953 Bom 408 (409 410) ILR (1953) Bom 773 (Stipulation permitting mortgagee to build any structure without any limit on the amount he may spend Mortgage also redeemable 99 years after execution — Agreement amounts to clog) ** (1949) 2 Sau LR 215 (217) (A condition or convenant in mortgage deed authorising mortgagee to build as he liked was held to be not in the nature of a clog on equity of redemption) ** AIR 1945 Cal 431 (432) (Mortgage of land — Stipulation in deed that mortgagor should pay fair price for the structures raised by mortgagee on the land at the time of redemption — **Held**, was for mutual benefit and not a clog) ** AIR 1935 Pat 157 (158) (Parties dealing with certain items of expenses which were to be incurred in future in relation to property mortgaged and came to mutual understanding as to who was to incur them and what the respective liabilities of the parties were going to be in respect of those items **Held**, that the contract was to the advantage of both parties and therefore the stipulation could not be regarded as a clog) ** AIR 1918 Oudh 27 (29) (Where a mortgage deed provided that at time of redemption all arrears of rent due from tenants must be paid to holder of deed **Held**, that provision meant that only arrears of rent, recovery of which was not barred by limitation were payable before redemption) ** (1900) 22 All 238 (240) (DB) ** (1909) 3 Sind LR 130 (131) (DB) (Any collateral covenant which though advantageous to mortgagee does not fetter redemption is not a clog.)

Section 60 — Note 34

1. AIR 1926 Oudh 408 (409) 1 Luck 354 · 29 Oudh Cas 253 ** AIR 1920 Oudh 114 (119) ** AIR 1929 Oudh 30 (32) 4 Luck 147 (DB) (Not by itself sufficient to support a plea of clog in the absence of undue influence or unfair dealing.) ** AIR 1930 Cal 207 (208) 56 Cal 960 (DB) ** AIR 1928 Oudh 330 (333) (DB) ** AIR 1929 All 411 (413) (Provided that the parties entered into the contract with eyes open and on equal terms, and that the terms of the mortgage were clear and not equivocal) ** (1926) 92 Ind Cas 665 (666) (Oudh).

2. AIR 1955 all 339 (349) (DB) ** (1893) 20 Cal 360 (365) (DB) ** AIR 1930 Cal 207 (208) : 56 Cal 960 (DB) ** (1904) 28 Bom 371 (377) (DB).

tract Act the Court will relieve against the penalty(3). Excessive interest not amounting to a penalty may also be relieved against under the provisions of the Usurous Loans Act, 1918(4). But apart from these provisions, there is nothing to authorise the Court to interfere with the sanctity of contracts(5). In *Aziz Khan v. Duni Chand*(6) where the mortgagor undertook to pay interest at 25 per cent. per annum, and also to pay compound interest at that rate in case of default in payment, it was held by their Lordships of the Privy Council that in the absence of evidence that the contract was entered into under pressure or undue influence, no relief could be given on grounds of mere hardship(7).

A stipulation that the mortgage shall be redeemable only on payment, at a future time or on the happening of a given event, of a larger sum than that advanced, even though interest is made payable in the meanwhile, is not a clog(8). Thus, in the undermentioned cases(9), it was held that a stipulation for payment of *deorha* (one and half times the principal amount advanced) at redemption was not a clog on redemption. Where it was stipulated that on default of payment on a particular day the mortgage could only be redeemed by payment of one *mura* of rice for each rupee of the mortgage money, and the price of rice rose in the market, it was held that the stipulation was a penal one and should not be enforced(10).

35. Clog — Stipulation that mortgage will not be redeemed before paying other amounts due.

A stipulation to combine two or more mortgages is valid, and is not a clog on redemption. This is recognised by S. 61. See Note 5 on that section.

Where the subsequent mortgage is not only for the second advance but incorporates the prior mortgage, then the former is really a mortgage for both the amounts, and the stipulation to pay them both together is merely a stipulation to pay the *mortgage money secured*, and is not a clog on re-

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3. **AIR 1934 Mad 31 (36, 40) (FB).** (Compound interest is not always penal but shad an ount to penalty if it is excessive or abnormal.) ** AIR 1962 All 422 (425) (Long period fixed for redemption coupled with a condition allowing the mortgagee to pay taxes and to spend any amount on repairs and rebuilding and to recover the whole amount spent with interest at a very high rate held amounted to an oppressive condition which the Court was entitled to relieve the mortgagor from.) ** AIR 1948 Cal 557 (560) (DB) ** AIR [illegible] 54 All 1041 (DB). NOTE — Test laid down in AIR 1931 All 70 for determining whether a particular condition is clog or not **held no longer good law**. (AIR 1962 All 422 (425).) ** AIR 1923 Rang 61 (64) : 11 Low Bur Rul 56 (DB) ** 1891 Pun Re No. 99 p. 471 (472) (DB) ** AIR 1928 Lah 603 (604) (DB) ** AIR 1924 Bom 264 (268) ** (1888) 2 CPLR 9 (15).

   [**See also** AIR 1931 Nag 91 (92, 93) ** (1913) 20 Ind Cas 82 (84) (DB) (Lah) ** AIR 1930 Lah 148 (149) (DB).]

4. AIR 1933 All 70 (71) : 54 All 1041 (DB) ** AIR 1989 Madh Pra. 127 ; 1988 Jab LJ 712. (Where Usurious Loans Act 1918 was applicable to the transaction in question, the Court in view of S. 3 of that Act reopen the transactions when the interest claimed was excessive namely 24%.) ** AIR 1934 Lah 241 (242) (DB). (Interest at Re 1-4 per cent. per mensum not excessive.) ** AIR 1930 Oudh 173 (175) : 4 Luck 41 (DB).

   [**See also** (1911) 11 Ind Cas 519 (520, 521) (DB) (Lah) (Unconscionable terms relieved against.)]

5. AIR 1933 All 70 (71, 73) : 54 All 1041 (DB) ** AIR 1930 Cal 207 (208) : 56 Cal 960 (DB).

   [**See also** AIR 1920 Oudh 114 (120).]

6. **AIR 1918 PC 48 (49) : 1918 Pun Re No. 101.**

7. **See also** (1911) 10 Ind Cas 14 (14) (DB) (All).

8. (1907) 10 Oudh Cas 214 (218) ** (1904) 28 Bom (375) (DB).

9. (1907) 10 Oudh Cas (218) ** AIR 1926 Oudh 502 (503, 504).

10. (1862) 1 Mad HCR 81 (82) (DB).

demption(1).

Where the mortgagor sells a portion of the mortgaged property after the first mortgage and then executes a second mortgage, stipulating that he will not redeem the first without redeeming the second, the stipulation is not binding on the purchaser(2)

A stipulation in a mortgage that the mortgagor will not redeem it without paying an earlier *personal debt* was held not to be a clog on redemption in cases before the Act(3). In cases coming under the Act such a stipulation *in the mortgage* will clearly be a clog on redemption(4) A mere stipulation, however, that the mortgagor will, at the time of redemption, pay other sums also is not a clog on redemption, if the redemption itself is not fettered thereby(5).

36. Hard terms — Not a clog.

The mere fact that the terms of the mortgage are hard is not a clog on redemption(1).

37. Clog — Miscellaneous.

Where a mortgage deed provides that the mortgagor should pay the mortgage money within the stipulated time out of *his own pocket* without selling or charging the mortgaged property, such a provision would be a clog on the equity of redemption(1).

Their Lordships of the Privy Council said :

> "It is very doubtful indeed, if it would not be illegal as amounting to an encroachment on a mortgagor's right to redeem the mortgage property from whatever source he might procure the funds to do so."(2)

Section 60 — Note 35

1. **(1904) 28 Bom 349 (358, 359) (FB).**
2. (1909) 3 Ind Cas 44 (45) (DB) (All).
3. (1909) 2 Ind Cas 469 (471) (DB) (Bom) ** (1894) 18 Bom 755 (757) (DB)
4. (1909) 2 Ind Cas 469 (471) (DB) (Bom).
5. AIR 1959 MP 172 (176) (DB) (Subsequent money debt — Agreement to consolidate — Mortgage decree cannot be claimed in respect of later debt.) ** AIR 1928 All 99 (100) (DB)

   [See also (1894) 63 LJ Ch 239 (241) · (1894) 1 Ch 218 42 WR (Eng) 220 · 69 LT 823 : 8 R 53, Eyre v. Wynn Mackenzie.]

Section 60 — Note 36

1. AIR 1919 Lah 5 (5) 1919 Pun Re No 94 (DB) (Mortgage for forty years — Interest at 2 per cent per month — Suit before expiry of forty years premature, though terms hard.) ** AIR 1919 Lah 407 (408) (Mortgage for 30 years — Interest payable at the rate of 12 annas per cent — Interest to be calculated every four years and then added to principal if not paid — Mortgagee given possession with liberty to make some improvements, cost for which was chargeable at time of redemption — Conditions though onerous, held not clog on redemption — Suit to redeem before expiry of period held premature.)

   [See AIR 1958 SC 770 (774).]

Section 60 — Note 37

1. **AIR 1958 SC 770 (774).** (Term in usufructuary mortgage that if it is not redeemed within 6 months after the expiry of the stipulated period during which it has been made not redeemable held amounted to a clog.) ** AIR 1954 Trav-Co 443 (444) (Provision for renewal will not be itself be sufficient to create an irredeemable tenure — That provision will be satisfied and exhausted with the grant of one renewal and thereafter owner will be entitled to enforce his rights of redemption.) ** AIR 1930 All 283 (285) (DB) ** AIR 1927 Oudh 199 (200) · 2 Luck 564 (DB) ** (1892) 16 Bom 599 (601, 602) (DB) ** AIR 1927 Oudh 237 (237) (DB)
2. **AIR 1916 PC 49 (51) : 43 Ind App 284.**

   [See also (1881) 3 All 369 (377, 378) (FB).]

A stipulation that the mortgagor shall redeem without recourse to a loan from anybody(3) or that he will not alienate his property without the consent of the mortgagee(4) is similarly a clog on redemption. But a stipulation that the mortgagor might redeem before the due date if he could do so without alienating other property of his was held good as being a special concession personal to the mortgagor and not available to his assignee(5).

See also the undermentioned cases(6).

38. Clogging provisions not binding even on transferees of equity of redemption.

Where a provision in a mortgage deed is a clog on redemption it is void not only as against the mortgagor but also against purchasers of the equity of redemption(1) or against subsequent mortgagees of the property. In the undermentioned case(2) it was, however, held that it is not open to the transferee of the mortgagor to plead that a long period fixed for redemption was excessive. It is submitted that this view is not correct.

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3. AIR 1914 All 334 (336); 36 All 551 (DB) ** AIR 1922 Oudh 221 (223) ** AIR 1925 All 34 (35) (DB).

4. AIR 1924 Mad 57 (62) (DB).

5. AIR 1928 All 131 (134) (DB).

6. 1972 J and K LR 817 (836). (An agreement providing for revival of the lease on redemption of usufructuary mortgage executed in favour of the lessee does not amount to a clog.) ** 1971 Raj LW 357. (A mortgagee entitled to invest unlimited amount on improvements carrying 12 per cent interest is not proper and is a clog.) ** (1905) 9 Cal WN 789 (791) (DB) ** AIR 1934 All 888 (889). (Where a mortgage deed provided that the mortgagor would pay the rent of the fields mortgaged to the zamindar and that if he failed to so pay it and the mortgagee paid it, the equity of redemption would be lost and the mortgagee would become the owner of the property. — **Held** that the clause was a clog on the equity of redemption.) ** AIR 1926 All 171 (172) (DB). (Profits of property mortgaged not being sufficient to cover interest. — Provision to pay balance of interest at the time of redemption, if enforceable. — **Held**, not a clog on equity of redemption.) ** (1904) 26 All 479 (482) (DB). (A usufructuary mortgage, under which the mortgagee was empowered to be in possession of the mortgaged property for 15 years enjoining the profits in lieu of interest, provided that "if the property be found to have been mortgaged or hypothecated or transferred to any one, or if there should arise any cause which might be considered likely to cause the total or partial loss of the principal mortgage-money and interest, the mortgagee shall have power to realize the entire mortgage money, with interest thereon at the rate of Rs. 3-2-0 per cent. per mensem from the mortgagor and his property, without waiting for the expiration of term." — **Held** that this condition in the mortgage deed was neither unreasonable nor oppressive, and it did not therefore give a right to redeem before the expiry of the term of the mortgage.) ** (1910) 13 Oudh Cas 128 (135) (DB) ** (1906) 28 All 712 (714) (DB). (Where the terms of a mortgage deed contained a clause to the effect that the mortgagor would not be entitled to redeem the mortgage without first paying up rents of the same property in case he held it as a tenant of the mortgagee. — **Held** that this clause did not create a clog on the equity of redemption.) ** AIR 1925 Nag 1 (5). (Covenant for quiet enjoyment in usufructuary mortgage is not a clog.)

Section 60 — Note 38

1. 1963 BLJR 174 (174) ** **AIR 1930 PC 142 (144) : 57 Ind App 168** ** AIR 1948 FP 17 (18) (DB). (Distinction has to be drawn between provisions of general validity avoided against mortgagor personally by reason of pressure of undue influence brought to bear upon him and provisions which when forming part of the actual mortgage contract had under the general law, no validity at all. AIR 1925 Lah 45. **Held no longer good law**.) ** AIR 1937 Lah 49 (52) (DB) ** AIR 1920 Pat 144 (145) : 5 Pat LJ 423 (DB).

2. AIR 1923 All 123 (123) (DB).

39. Clogging provisions, when should be impeached.

It has been held in a Nagpur case(1) that relief against a clogging provision is an equitable relief which is not granted as a matter of course but granted only if impeached within a reasonable time. Where the mortgage was executed in 1880 and the suit was brought in 1920, it was held that relief against a stipulation amounting to a clog on redemption should not be given. The same view was taken by the Ajmer Judical Commissioner's Court also in the undermentioned case(2). A contrary view is taken by the Rajasthan High Court(3). It is submitted that the first view is not correct. In this country the right of redemption is not an equitable right as it is in England, but a *statutory* right which cannot be qualified by any contract to the contrary.

40. Provision for reasonable notice before redemption.

In England, the mortgagor must, after default, give six months' notice to the mortgagee of his intention to redeem, or six months' interest in lieu of notice(1). The reason is that *at law* the mortgagor has, after default, lost his estate and can be let in to redeem only in *equity*, and a Court of Equity will not assist him unless he does equity and it is equitable that he shall give six months' notice to enable the mortgagee to provide another place for the money(2). The rule of six months notice does not apply, however, where the mortgagee takes possession of the mortgaged property. Such conduct is equivalent to demanding the mortgage amount and the mortgage can be redeemed immediately if possession is so taken(3). On the same principle, where the mortgagee sues for the recovery of his money, he cannot claim six months' notice or interest in lieu thereof. He can claim interest only up to the date of payment(4). The reason of the rule of six months' notice does not apply to equitable mortgages and consequently the rule itself does not apply to such mortgages(5).

In this country, there is no such rule requiring any notice to be given before redemption(6). But, under the present section a provision for *reasonable* notice before payment or tender of the mortgage-money may validly be made by the parties(7). It cannot, therefore, be considered a clog on redemption. Where a deed provided for notice by the mortgagee as well as by the mortgagor and

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Section 60 — Note 39

1. AIR 1923 Nag 60 (61) : 19 Nag LR 1.
2. AIR 1951 Ajmer 28 (Pr 15).
3. AIR 1958 Raj 298 (302) : ILR (1958) 8 Raj 258. (AIR 1923 Nag 60. **Not followed; Reversed on another point in AIR 1960 Raj 47.**)

Section 60 — Note 40

1. (1934) 103 LJ Ch 168 (171) : 1934 Ch 322 : 150 LT 335, Cromwell Property Investment Co v Western and Toovey ** (1891) 60 LJ Ch 694 (696) : 65 LT 334, Smith v. Smith ** (1867) 36 LJ Ch 671 (672) : 15 WR (Eng) 1077 Bartlett v Frankling ** (1862) 54 ER 1142 (1142) : 31 LJ Ch 806, Day v Day ** (1889) 38 WR (Eng) Dig 138 (138) : 1889 WN 95 Johnson v. Evans.

   Also see S 84, Note 14.

2. (1934) 103 LJ Ch 168 (171) : 1934 Ch 322, Cromwell Property Investment Co v Western and Toovey.

   [See also (1934) 103 LJ Ch 311 (313) : 151 LT 96, Davis v Symons]

3. (1896) 65 LJ Ch 542 (543, 544) : (1896) 1 Ch 648, Bovill v. Endle.
4. (1883) 32 WR (Eng) Dig 137 (138) : 23 Ch D 372, In re Alocock Prescott v Phips ** (1871) 20 WR (Eng) Dig 7 (7) : 13 Eq 176, Letts v Hutchins
5. (1892) 61 LJ Ch 231 (232) : (1892) 1 Ch 385, Fitzgerald Trustee v Mellerish.
6. AIR 1951 Punj 404 (406, 407) : ILR (1950) Punj 271 (DB) ** (1907) 17 Mad LJ 177 (178) (DB).
7. AIR 1951 Punj 404 (406) : ILR (1950) Punj 271 (DB) ** AIR 1924 Bom 264 (269).

the mortgagee gave notice for payment, it was held that a little delay by mutual agreement on the part of the mortgagor to pay the amount did not necessitate a notice by the mortgagor or payment of interest in lieu of notice(**8**). Where a deed provided that if the *mortgagee* wanted payment he must give notice before the beginning of the cultivation season of the particular year, it was held that this provision did not disable the *mortgagor* from redeeming the mortgage at any time(**9**).

There has been a difference of opinion as to whether a provision for redemption only in a *particular month or season* of any year is valid. In the undermentioned cases(**10**) it has been held that such a provision is not a clog on redemption and is valid. A contrary view was expressed in the cases noted below(**11**). In *Suppan Chettiar v. Rangan Chetty*(**12**) where the mortgage deed provided for a right of redemption only on *one* particular day of the year, it was held that this was a clog on redemption. The fourth paragraph of this section furnishes a *test* for determining whether such provisions are valid or not. If the provision is one which can be regarded as providing for *reasonable* notice, having regard to the nature of the property mortgaged and to the other circumstances, it will be valid(**13**). If, however, the provision is not a reasonable one, but is intended in substance to fetter the right of redemption, it will not be valid.

41. Redemption piecemeal of mortgaged property — Last paragraph of the section.

It is an important principle of the law of mortgage that a mortgage is one and *indivisible*(**1**) and so long as the integrity of the mortgage remains intact, every part of the mortgaged property is

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8. AIR 1924 Bom 264 (269, 270).

9. AIR 1923 Mad 553 (556) (DB).

10. AIR 1957 MP 200 (201). ILR (1957) Madh Pra 407 ** **AIR 1946 Mad 542 (544) : ILR (1946) Mad 379 (FB).** (Though S. 60 of the Transfer of Property Act is unqualified in its terms and contains no saving provision as other sections do in favour of contract to the contrary, it does not however mean that the parties to a mortgage are precluded from deciding for themselves what is reasonable notice. Usufructuary mortgage — Provision that if mortgagor did not redeem on the date fixed for payment he shall have the right of redemption by paying the amount in the 30th Panguni (12th April) of any subsequent year — Provision for "reasonable notice" and validity.) ** AIR 1917 Oudh 123 (124) ** 1894 All WN 143 (144) (DB) ** AIR 1930 All 283 (285) (DB) ** AIR 1926 All 665 (666, 667). 48 All 611 (DB) (Assumed.)

[See also AIR 1919 Mad 847 (848) (DB). (Assumed.)]

11. AIR 1914 Mad 563 (563) (DB). (Provision for redemption within particular dates of any year is a clog.) ** AIR 1919 Oudh 385 (386). (Provision for redemption in a particular season — Suit can be brought at any time.) ** (1906) 16 Mad LJ 146 (148) (DB).

12. AIR 1938 Mad 405 (409) (DB).

13. See **AIR 1946 Mad 542 (544) : ILR (1946) Mad 739 (FB).** (Parties can provide as to what is reasonable notice for redemption.)

Section 60 — Note 41

1. **AIR 1949 PC 330 (331)** ** 1962 MPLJ 973 (975) (DB) ** AIR 1957 Bom 6 (7). ILR (1957) Bom 283 ** AIR 1956 Cal 625 (630) ** AIR 1956 Mad 293 (295) ** (1948) 27 Pat 572 (580) (DB) ** AIR 1940 Mad 498 (501) (DB) ** 1869 Pun Re No. 95 ** (1906) 2 Nag LR 116 (117). (The character of indivisibility exists not only with reference to the mortgagee who may generally be more benefited thereby, but also with reference to the mortgagor.) ** AIR 1914 Nag 31 (31). 10 Nag LR 72. (The Civil Procedure Code 1908 does not affect the rule regarding the indivisibility of a mortgage nor the Mitakshara rule that no coparcener has a definite share till partition is made.) ** (1884) 8 Bom 481 (489) (DB) ** 1892 Pun Re No. 42 p. 156 (159) (DB) ** AIR 1928 Sind 101 (102). 2 Sind LR 243 ** AIR 1929 Bom 139 (141). 52 Bom 353 ** **AIR 1930 Bom 466 (467) : 54 Bom 625 (FB)** ** (1922) 64 Ind Cas 211 (213) (DB) (Lah). (AIR mortgagee is fully entitled in law to effect an assignment of his mortgagee rights either in whole or in part, and

liable for the whole amount(2) A part purchaser of the mortgaged property from mortgagor can redeem the whole of the mortgaged property if he is ready to pay up the whole of the mortgaged money but the part purchaser cannot redeem the mortgage partly according to his share even if he is ready to pay up the whole of the mortgaged money because the mortgaged property should be construed as a whole unit and not divisible for purpose of redemption(3) One result of the application of this principle is that, if the mortgagee does not agree, a mortgagor or a person interested in a part of the mortgaged property cannot redeem a part of the mortgaged property by payment of a *proportionate part of the mortgage-debt*(4) On the other hand, even if the mortgagee is willing to allow partial redemption, a mortgagor or other person entitled to redeem, though entitled only to or

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if he does in part, this does not mean that he is destroying the indivisibility and integrity of the mortgage security qua the mortgagor) ** AIR 1923 Rang 119 (119) 4 Upp Bur Rul 132 ** AIR 1933 Rang 392 (393) (DB) ** AIR 1924 Nag 266 (268) 20 Nag LR 115 (Mortgagee accepting part of mortgaged property in lieu of his whole mortgage-debt does not affect the indivisibility and the party entitled to redeem cannot redeem the portion so taken by paying proportionate mortgage-debt) ** AIR 1940 Cal 60 (64) (Obiter) ** AIR 1927 Pat 117 (122) (DB) ** (1909) 1 Ind Cas 264 (277) (DB) (Cal) ** AIR 1937 Mad 136 (137) ** AIR 1916 Mad 863 (865) : 38 Mad 310 (DB) ** (1912) 15 Ind Cas 605 (606) (DB) (Mad).

[See (1877) 3 Cal 397 (409) : 5 Ind App 18 (PC).

[See also AIR 1951 SC 189 (192). (Notwithstanding the fact that under general law a mortgage decree is one and indivisible where there are more than one mortgagor-judgment-debtors and one of them is an agriculturist there is nothing wrong in scaling down the decree in his favour under the Madras Agriculturists Relief Act which is a special law and leaving the decree intact as against the other judgment-debtors ** **AIR 1954 Mad 383 (384) : ILR (1954) Mad 158 (FB).** (Madras Agriculturists Relief Act (4 of 1938), S 7 — One of mortgagors agriculturist — Debt scaled down and discharged in respect of him — Debt against non-agriculturist mortgagors not extinguished — AIR 1951 SC 189 Relied on) ** AIR 1935 All 391 (394) (DB) (But where there is severance of interest as between mortgagees with consent of mortgagor, position is different so far as frame of suit is concerned It is better that suits by mortgagees are consolidated)]

2. **AIR 1969 SC 69(72) : (1969) 1 SCJ 157.** (Where two persons execute a usufructuary mortgage each is liable for the entire debt and there is no provision for splitting up the debt)

[See AIR 1947 Oudh 122 (126) 22 Luck 37 (Release of part of charged property from charge by owner's action — Effect — Charge-holder can recover entire amount of charge from remaining property)

[See also AIR 1955 Mad 260 (261) (DB) (Melkanom — Grant consisting of 14 items but melkanomdar able to establish valid title to only 13 items — Redemption of those items alone could not be permitted — But on melkanomdar paying the whole of mortgage amount he may be allowed redemption of those items only leaving the fourteenth item for appropriate future proceedings.)]

See also S. 67, Note 27.

3. **AIR 2001 Pat 20 (26) : 2000 (2) BLJR 1431.**

4. **AIR 1971 Andh Pra 363 (366) : (1971) 2 Andh WR 43 (FB).** (The idea of partial redemption is foreign to the provisions of Section 60) ** AIR 1991 Punj and Har 205 (206) (Purchaser from mortgagor is not entitled to redeem his share of mortgage property on payment of proportionate mortgage amount) ** 1968 Ker LT 298 (298) (Redemption of mortgage — Each of several mortgagors entitled to redeem — Two mortgagors separately obtaining decrees — Later decree does not supersede earlier one — Execution of decree by one — Other has to work out his rights against him) ** AIR 1956 Mad 293 (295) ILR (1956) Mad 914 ** ILR (1953) Punj 333 (337) (DB) (This provision of the Transfer of Property Act is not affected by the principles of customary law) ** AIR 1952 Pepsu 6 (7)

interested in a share of the mortgaged property, can redeem the whole mortgage(5). He cannot be *compelled* to redeem piecemeal, his right being to redeem the whole subject to the equities of the

3 Pepsu LR 484 (Mere fact that each branch of mortgagees' family is recorded as having definite share does not entitle mortgagors to get only part of mortgage redeemed.) ** AIR 1950 TC 33 (35) ** AIR 1949 Nag 296 (297) : ILR (1949) Nag 60 (DB) (Subsequent mortgagee of portion of the mortgaged property cannot redeem such portion by paying proportionate amount. — The fact that a decree has been passed on the mortgage does not alter the position. — Hence in an appeal from a preliminary decree on the mortgage, the subsequent mortgagee cannot ask for the exclusion of the portion mortgaged to him on his payment of a proportionate part of the mortgage money.) ** AIR 1947 Pesh 45 (48) (DB) **(1906) 28 All 1 (17) : 32 Ind App 229 (PC) ** AIR 1937 PC 124 (126) : ILR (1937) Lah 245 : 31 Sind LR 271 : 64 Ind App 126** ** AIR 1936 All 595 (597) (DB) ** AIR 1937 Mad 136 (137) ** AIR 1928 Sind 101 (102, 103) : 22 Sind LR 243. (As between the mortgage and the holders of equity of redemption the former is not bound to distribute his debt rateably upon the mortgage properties. — He has a right to recover the whole of his debt from whatever portion of the mortgage property he wishes to proceed against.) ** AIR 1923 Rang 119 (120) : 4 Upp Bur Rul 132 ** 1869 Pun Re No. 95 ** AIR 1934 Nag 266 (268) : 20 Nag LR 115 ** 1878 Pun Re No. 76 p. 24 (242) ** 1904 Pun Re No. 2 p. 12 (15) (DB) ** (1883) 7 Bom 467 (472) (DB) ** AIR 1923 Oudh 542 (544) (DB) ** (1909) 1 Ind Cas 264 (277) (DB) (Cal) ** (1901) 5 Cal WN 83 (85) (DB) ** AIR 1921 Cal 792 (794) (DB) (Apportionment will not be forced upon the mortgagee unless some special equitable considerations are established.) ** (1875) 24 Suth WR 24 (24) (DB) (A part owner cannot redeem in part.) **(1866) 6 Suth WR 240 (244) (FB)** ** (1865) 3 Suth WR Misc 4 (4) (DB) ** (1864) Suth WR Ap. No. 216 (217) (DB) (Purchaser of a part of mortgaged property in revenue sales cannot insist upon the redemption of his part.) ** 1864 Suth WR Gap No. 75 (76) (DB) ** (1908) 4 Cal WN 507 (508) (DB) ** (1872) 7 Suth WR 342 (343) (DB) ** (1874) 22 Suth WR 262 (263) (DB) (Construction of mortgage in favour of two persons jointly. — Mortgagees entering on possession and dividing the property between themselves. — Mortgagor cannot redeem one without paying the other. — He must pay both of them at the same time.) ** (1909) 2 Ind Cas 662 (668) (DB) (Cal) ** AIR 1920 Pat 67 (69) : 5 Pat L J 644 (DB) ** AIR 1916 Pat 94 (98) (DB) ** (1896) 22 Mad 209 (212) (DB) ** (1880) 2 Mad 223 (225) (DB) ** AIR 1915 Lah 228 (232) : 1915 Pun Re No. 83 (DB) ** AIR 1940 Mad 498 (501) (DB) ** (1884) 8 Bom 481 (488) (DB) (In a mortgage of ancestral property by father, unless the mortgage deed provides for redemption of son's interest by payment of proportionate part of debt, the mortgage is indivisible.) ** AIR 1915 Mad 944 (945) (DB) (Section 60 of the Transfer of Property Act cannot be read subject to S. 82 and the fact that the several items were purchased piecemeal by different persons in court auction cannot authorize a partial redemption as each of those purchasers.) ** (1910) 7 Ind Cas 537 (537) (DB) (Mad) ** (1882) 5 Mad 385 (386) (DB) ** AIR 1923 Lah 129 (130) (DB) (But when one of the mortgagors redeems the whole mortgage the other co-mortgagor can redeem his share by payment of proportionate debt.) ** AIR 1926 Lah 601 (602) (DB) ** AIR 1932 All 85 (90) : 53 All 39 (DB) (Integrity of mortgage not broken. — Mortgagee can insist on whole mortgage amount being paid. — Court cannot order piecemeal redemption.) ** (1913) 16 Oudh Cas 199 (200) (Purchaser of equity of redemption of the part of mortgaged property is not entitled to redeem that part only by paying proportionate part of mortgage money.) ** (1872) 4 NWPHCR 92 (93) (DB) ** 1881 All WN 11 (14) (DB) ** (1898) 21 Mad 369 (371) (DB) **** AIR 1941 Lah 421 (422)**

[See also (1884) 8 Bom 497 (499, 500) (DB) ** (1881) 8 Cal 79 (88) (DB) (Obiter.) ** AIR 1935 All 391 (394) (DB) ** (1901) 3 Bom LR 935 (938) (DB) (The mortgagor can, however, relinquish a part of the equity of redemption provided he pays the whole of the amount due.) ** AIR 1930 Bom 466 (475) : 54 Bom 625 (FB) (Do.) ** AIR 1926 Bom 363 (364) (DB) (Do.)]

5. 1970 Ker LT 149 (153) (Even a person in possession of a fractional right of redemption can redeem the whole property.) ** AIR 1965 Punj 224 (225) (AIR 1954 Punj 81 and AIR 1921 PC 125 and ILR 3 Cal 397 (PC), Foll.) ** AIR 1956 Mad 293 (296) : ILR (1956

other persons interested(6). The execution purchaser of the whole or part of equity of redemption has also right to redeem the whole mortgage property because he derives title from the mortgagor and is included in the term "mortgagor"(7) If purchaser of a part of hypotheca is not impleaded in a mortgage suit and the hypotheca is sold in Court auction the purchaser can redeem his share as against the auction purchaser(8).

Mad 914 (DB) ** AIR 1954 Trav Co 251 (254) (DB) (Mortgagees can resist the claim for redemption of any item only if they have acquired the equity of redemption of that item) ** 1889 Bom PJ 246 (DB) (But the mortgage can insist that all the owners of equity of redemption he made parties to the suit) ** AIR 1917 All 401 (401) · 39 All 719 (DB) ** (1866) 1 Agra 125 (127) (DB) ** AIR 1927 Pat 25 (26) (DB) (Subject however to safeguarding of the equal title to redeem of any other person having a right of redemption) ** AIR 1918 Cal 975 (976) (DB) ** AIR 1927 Cal 479 (480) ** AIR 1919 Cal 1061 (1062) (DB) ** AIR 1926 Bom 303 (304) 50 Bom 331 (DB) ** (1886) 10 Bom 656n (658n) (DB) ** AIR 1929 Bom 139 (140, 141) 53 Bom 353 ** AIR 1933 Nag 44 (47) 29 Nag LR 77 (The son is as a member of the joint family in which the shares are of necessity undermined until partition entitled to redeem as much property as his father could have redeemed Section 60 is no bar to the owner of the equity redeeming the whole mortgage) ** AIR 1923 Rang 119 (120) 4 Upp Bur Rul 132 ** 1869 Pun Re No 95 ** AIR 1933 Rang 392 (393) (DB) ** 182 Pun Re No 42 p 156 (159) ** 1904 Pun Re No p 12 (15) (DB) (The mortgagee cannot compel one of the co-mortgagors to restrict the redemption only to his share) ** (1886) 10 Bom 648 (653) (DB) ** (1883) 7 Bom 467 (472) (DB) ** 1888 Bom PJ 236 (DB) ** AIR 1925 Lah 651 (652) ** AIR 1921 Lah 65 (66) (DB). (Unless there is a special bargain) ** AIR 1928 Lah 105 (105) (DB) ** 1888 Bom PJ 19 (DB) ** (1909) 2 Ind Cas 662 (668) (DB) (Cal) ** (1867, 7 Suth WR 314 (315) (DB) ** (1865) 2 Suth WR 150 (151) (DB) ** **(1906) 28 All 1 (17) : 32 Ind App 229 (PC)** ** (1903) 6 Oudh Cas 223 (229) (DB) ** (1904) 27 All 178 (182) (DB) ** (1899) 22 Mad 209 (212) (DB).

[**See also** AIR 1964 Ker 309 (310) (Suit for redemption by co-mortgagor — Other co-mortgagor who is necessary party not joined — Plaintiff may be allowed to redeem whole mortgage on payment of entire amount due) ** AIR 1940 Cal 150 (153) (DB) ** AIR 1917 Oudh 415 (416) ** AIR 1925 Rang 377 (381) 3 Rang 367 (DB) ** 1881 Bom PJ 57 (DB) ** (1893) 16 Mad 328 (332) (DB) (Plaintiff interested in part of the equity of redemption was refused relief as other persons interested in equity of redemption were not made parties.)]

[**But see** (1901) 5 Cal WN 83 (85) (DB) (Whether to allow piecemeal redemption or not depends upon the wishes of the mortgagee)]

6. **AIR 1982 SC 121 (124) : 1982 UJ (SC) 120** ** AIR 1933 Cal 154 (165) 59 Cal 1372 (DB) ** (1899) 22 Mad 209 (211) (DB) ** (1928) 109 Ind Cas 176 (177) (DB) (Mad) ** AIR 1925 Mad 351 (351) (DB) ** AIR 1931 Pat 434 (435) ** AIR 1930 Pat 579 (582) 9 Pat 930 (DB) ** AIR 1917 All 401 (401) 39 All 719 (DB ** AIR 1922 Bom 424 (425) (DB)

[**See also** AIR 1957 Bom 6 ILR (1957) Bom 283 (Co-mortgagors jointly and severally liable for the whole debt — One of them is entitled to redeem the mortgage as a whole — Hence account of the transaction will embrace the entire debt — Scaling down of debt under Bombay Agricultural Debtors Relief Act must be of the entire debt and not the fractional interest of any particular debtor.)]

[**See however** 1954 Ker LT 975 (976, 977) (Death of mortgagor K — His heirs seeking to redeem entire mortgage — Court finding that they have a half share only in the equity of redemption — **Held**, that although on that finding the Court was entitled to give decree for redemption of entire property it was also open to it to mould the relief according to the circumstances and give them a decree for recovery of one half of the property on payment of half the mortgage money and interest thereon.)]

7. **AIR 1967 PC 1440 (1445) : (1968) 1 SCJ 68.**

8. **(1974) 1 Mad LJ 350 : 87 Mad LW 454 (2)**

In *Mirza Yadalli Beg v. Tukaram*(9). *A* mortgaged several fields to *X* and subsequently sold *one* of them to *B*, *X* filed a suit on his mortgage for foreclosure without impleading *B*, obtained a decree, and, in execution thereof, went into possession of nine fields. *B* then sued for redemption of the *entire* mortgage. Their Lordships of the Privy Council observed

> According to English law the respondents (B) would have been entitled to redeem the mortgagee in its entirety, subject only to the safeguarding of the equal title to redeem of any other person who had a right of redemption, a point which has not arisen so far in the present case. The respondents, being transferees of part of the security, by English law, if it applied, would, on the one hand, be *entitled to redeem the entire mortgage on the properties* generally, and, correlatively, could not compel the mortgagee to allow them to redeem their part by itself. This would be so as the result of principle unless something had happened which extinguished the mortgage in whole or in part, such as an exercise of a power of sale originally conferred on the mortgagee by his security, or such conduct on the part of the transferees as would estop them from asserting what normally would have been their right."

Their Lordships further observed that the concluding part of S. 60 did no more than declare applicable what was just the law as established in England.

There are, however, three ways in which the integrity of a mortgage can be broken up(10)—

(1) by operation of law.

(2) by act of parties at the time of the contract of mortgage, and

(3) by act of parties subsequent to the contract of mortgage.

The first case arises under the last paragraph of this section where the mortgagee acquires or all the mortgagees acquire the share of a mortgagor. See also the undermentioned case(11) for another instance of the integrity of a mortgage being broken by operation of law under the provisions of the Evacuee Interest (Separation) Act, 1951.

Where a mortgagee in possession acquires a portion of equity of redemption, the mortgage is not extinguished completely but only to extent of his acquiring mortgagor's interest. This is also clear from the last para of S. 60. Mortgage subsists as far as other co-sharers are concerned. Thus mortgagee would be entitled to benefit of S. 5 of the Kerala Land Reforms Act(12).

Where the mortgagee brings a suit for sale in respect of only a portion of the mortgaged property and in execution of the decree in the suit purchases such portion, it has been held that this section does not apply to the case but that as the mortgagee himself splits up the mortgage, the integrity of the mortgage is broken and the remaining portion of the mortgaged property can be redeemed on payment of a proportionate part of the mortgage-money(13).

The last paragraph of this section comes into play only where there are more mortgagors than

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9. AIR 1921 PC 125 (125) : 47 Ind App 207. (Note — The contrary view expressed in 28 All 279 cannot be considered to be good law.)

10. AIR 1939 Nag 136 (139) (DB) ** (1911) 10 Ind Cas 15 (16) (Oudh) (Act of parties subsequent to contract of mortgage — Mortgage security held had, with consent of all parties, been split up.)

11. AIR 1962 Punj 53 (55) ILR (1961) 1 Punj 344 (DB) (The Evacuee Interest (Separation) Act, 1951, is designed to split the evacuee and non-evacuee interests of a mortgage thereby destroying the principle of the integrity of a mortgage.)

12. AIR 1994 Ker 75 (78)

13. AIR 1979 Punj 70 (70) 1978 Pun LJ 421 (AIR 1942 PC 50, Distinguished.) ** AIR 1945 Pat 106 (108) 23 Pat 648 (DB) (Per Chatterji J., Reuben J., held that 4th para of this section applied to such a case.)

[See also (1948) 27 Pat 572 (580, 581) (Partial redemption — Mortgagee purchasing equity of redemption in part of mortgaged property — Integrity of mortgage is broken up — Purchaser of part of property cannot be permitted to redeem whole mortgage.)]

one interested in mortgage security and the mortgagee acquires the share of one of them If there is only one mortgagor and the mortgagee acquires a part of the security, then the last paragraph will not come into play at all In such a case, the mortgagee would still be entitled to enforce his mortgage against the remaining properties for the whole of the remaining amount due on his mortgage(**14**).

There is, however, nothing to prevent the parties interested in *agreeing* to a piecemeal redemption(**15**) Where there are more than one mortgagors all of them should be parties to such an agreement(**16**) This agreement may be incorporated specifically in the mortgage deed itself or may be by subsequent arrangement. (See S. 67(d).)

In *Nathumal v Raman Mal*(**17**) a provision in a mortgage deed of several houses, namely, "if I sell any house I will pay the entire sale-proceeds thereof to the mortgagee and will not take credit for interest on the amount paid", was construed as meaning that the mortgagor was to have the power to redeem part without redeeming the whole of the mortgaged property. In *Jawahir Singh v Baldeo Singh*(**18**), where *J* being interested in a four annas share of the mortgaged property sued for redemption of that share only, and stated in the plaint that if the mortgagee objected to the redemption of a share, he was willing to redeem the whole, but the mortgagee did not accept the latter offer, it was held by their Lordships of the Privy Council that the mortgagee not having accepted the offer of *J* for redemption of the whole mortgage, *J* was entitled to redeem the four annas share only *A*, the father and *B*, *C* and *D* the members of a family, mortgaged certain property to *X* *A* sued for redemption and the suit was dismissed Then *B*, *C* and *D* sued for redemption of the whole property It was held that the dismissal of the suit by *A* operated to exclude *A*'s share from the mortgage and, therefore, *B*, *C* and *D* could redeem only their shares(**19**) *A*, *B*, *C* and *D*, mortgagors sued separately to redeem their shares and decrees were passed in the suits of *A* and *B* for such redemption, without objection by the mortgagee But on appeal in the other two suits of *C* and *D* the mortgagee claimed that their suits for partial redemption ought not to be allowed It was held that the passing of the decree in the suits of *A* and *B* had the effect of breaking up the integrity of the mortgage(**20**). See also the undermentioned cases(**21**).

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14. AIR 1956 Mad 293 (295) : ILR (1956) Mad 914

15. AIR 1963 Ker 75 (78, 79) (If splitting up of mortgage is agreed to by all parties thereto S 60 cannot stand in the way of partial redemption — Partition in mortgagor's family and subsequently in mortgagee's family — **Held**, by partition in his own family mortgagee had recognised disruption of singleness of mortgage already effected by partition in mortgagor's family) ** AIR 1956 Cal 625 (630) (Mortgagee agreeing to place himself in possession of part of property with a view that proportionate part of debt may be satisfied by enjoyment of usufruct — **Held** the integrity of mortgage was broken by the mortgagee himself and hence suit to recover possession of that portion of the mortgage property was not bad) ** AIR 1954 Mad 818 (820) ILR (1955) Mad 274 (DB) (The only way by which integrity would be broken is in the manner laid down in last clause in S 60 But that is only when there is no modification of mortgage by consent of parties) ** (1899) 22 Mad 209 (211, 212) (DB) ** (1905) 28 Mad 555 (557) (DB) ** 1912 Pun Re No 50 (DB).

[See also AIR 1933 Lah 129 (130) (DB) (An apportionment of a mortgage debt cannot be made without the consent of all the parties interested.)]

16. 1955 Andhra WR 316 (317) (Where in a suit against one of the mortgagors and the lessee, the lessee enters into a compromise with the mortgagee regarding one of the items of the property, the mortgage cannot be deemed to have been split up by reason of the compromise)

17. AIR 1937 PC 124 (126) : ILR (1937) Lah 245 : 31 Sind LR 271 : 64 Ind App 126.

18. (1907) 10 Oudh Cas 193 (196).

19. (1907) 29 All 215 (216) (DB).

20. AIR 1929 All 260 (262) (DB).

21. 1979 Ker LT 15 (18) (Suit for redemption by one of the co-mortgagors — Non-impleading

Even if all the mortgagees are not before the Court in a suit filed by the mortgagor for redemption of the property but the mortgagor is prepared to pay the entire amount due at the foot of the mortgage to such mortgagees as are before the Court and given up his right under the mortgage as against those mortgagees who are not before the Court the Court can pass a decree for redemption directing that the entire mortgage amount should be paid to the mortgagees who are actually before the Court(22).

While it is true that under the last para of S 60 the co-mortgagor cannot redeem the entire hypotheca and has to redeem only the mortgagor's share, that principle does not apply if the purchase of a share by the mortgagee is after the filing of the suit for redemption by the co-mortgagor. In that case the co-mortgagor can sue for redemption and possession of the entire hypotheca and the mortgagee cannot cling on to possession of the property by purchasing after suit a share of hypotheca, however small, from the non-redeeming co-mortgagors(23).

Where a co-mortgagor had discharged the entire mortgage debt which was joint and several liability of himself and his co-mortgagor he would be in equity entitled to be subrogated to the rights of mortgagee redeemed and to treat the non-redeeming co-mortgagor as his mortgagor to the extent of the latter's portion or share in the hypotheca and to hold that portion or share as security

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other co-mortgagors — Not fatal to the suit.) ** 1964 Ker LT 153 (153, 154) (Right of redemption arising before T P Act was made applicable to Travancore — Law allowing partial redemption — Suit held not bad for partial redemption — Subsequent application of S 60, T P Act cannot alter right of redemption that already vested in mortgagor.) ** AIR 1957 Pat 559 (560) (Though a mortgage contract is indivisible there may be cases where the mortgage security becomes split up. One such case occurs where on the death of the Muhammadan mortgagor his heirs succeed to the estate as tenants in common in specific shares and become liable for the debt of the deceased only to the extent of his share. In such a case there is no reason why the mortgagor could not release the share of any one and sue for the balance of the other shares on record.) ** 1956 All WR (HC) 271 (Co-mortgagees partitioning or getting separate possession of the mortgaged property — Does not break the integrity of the mortgage — No right arises to mortgagor to redeem piecemeal.) ** AIR 1953 Kutch 8 (10) (When some of co-mortgagors extend period of a statutory usufructuary mortgage) other co-mortgagors are entitled to redeem to the extent of their share.) ** AIR 1944 All 232 (233) (ILR (1944) All 349 (DB)) (Mortgage by Hindu father of joint family property — Application by father under Encumbered Estates Act — Mortgage debt apportioned between father and his sons, father being held liable for 1/5th portion and sons for 4/5th — Sons claiming redemption — Contention by mortgagee that sons sought to redeem the whole mortgage and not only that part of it which affected them — **Held** that mortgage debt under S 60 meant that portion of the amount of the mortgage which was still due — Under Encumbered Estates Act, mortgage on father's share was discharged — It was only 4/5ths of original mortgage-debt that remained to be secured by mortgage debt and 4/5ths property could be applied to the payment of that debt.) ** (1881) 3 Mad 230 (233) (DB) (Indivisibility destroyed by conduct of mortgagee himself — Piecemeal redemption allowed.) ** AIR 1923 Lah 22 (23) (DB) (Plaintiff himself by his conduct splitting up the equity of redemption cannot thereafter rely upon the fact that equity of redemption is indivisible — Submitted not correct — The rule of law is that *mortgage is indivisible not the equity of redemption.*)

22. **AIR 1982 SC 121 (124) : 1982 UJ (SC) 120.** (AIR 1930 Bom 456 (FB) Approved.) ** ILR (1970) 20 Raj 1126 (1129) (1969 WLN (Part I) 242) (A mortgage is indivisible and a suit for partial redemption of a mortgage cannot lie and therefore one of the mortgagors can maintain a suit for redemption of the whole mortgage provided he joins other co-mortgagors as parties to the suit. Hence where one of the co-mortgagors was not joined as party the other mortgagor or his successor in title could not maintain the suit for redemption of the mortgage.)

23. AIR 1988 Andh Pra 215 (226) (1987) 2 APLJ (HC) 27 ** (1989) 1 Mah LR 9 (12) (Bom) (Co-mortgagor can be permitted to redeem the whole property.)

for the excess payment made by him(24).

Where one of the co-mortgagors redeemed usufructuary mortgage, he would be entitled to possession and the only right of the co-mortgagors would be to contribute their shares of the amount spent by the redeeming co mortgagor in redeeming the mortgage and seeks a partition and separate possession of their shares in the property(25).

If a suit by one of the co-mortgagors without impleading the other mortgagor for redemption is decreed and there is a failure to deposit the amount within the time specified in the decree, a final decree for foreclosure in such a suit does not debar the other heir from redeeming the property. But in such a case in absence of evidence to the contrary he is entitled to redeem to the extent of his share only(26)

Where a decree was passed in a suit for redemption that the plaintiffs who were legal representatives of original mortgagors were entitled to redeem as the original mortgage to the extent of 70 cents of land covered under the mortgage deed and Purakkadam deed on payment of mortgage amount, the question of breaking of unity of mortgage would not arise when the entire 70 cents of suit property was covered under mortgage deed and Purakkadam deed which were held to be invalid and not binding on plaintiffs(27).

42. Mortgagee allowing redemption of a share, if splits up security as to the rest.

Before the amendment of the section by the introduction of the word "only" there was a difference of opinion on the question whether the fact that the mortgagee allows one of several shares in the mortgaged property to redeem his share on payment of a proportionate part of the mortgage-debt, splits up the mortgage so as to entitle the other sharers also to redeem their shares only on payment of their proportionate part of the debt, one view being that the mortgage was so split up(1), the other being that the mortgage remained indivisible except as to the portion in respect of which the mortgagee allowed redemption, and that, therefore, another sharer was not entitled to redeem his share only(2) The introduction of the word *only* in the section now overrules the former view and gives effect to the latter(3).

A obtained a preliminary decree for sale on his mortgage against *B C* and *D*, *B* and *C* applied to the Debt Relief Court and obtained relief, not with respect to the entire mortgage-debt, but with respect to what was considered a proportionate liability of *B* and *C* under the mortgage This settle-

24. 1984 Guj LH 932 (937) (DB).

25. (1997) 1 Mad LJ 392 (393)

26. 1975 WLN 330 (332).

27. 2002 (5) Scale 154 (158).

Section 60 — Note 42

1. 1958 Ker LJ 78 (80) ** AIR 1919 All 246 (247) (DB) ** (1912) 15 Ind Cas 849 (849) (All) (The failure of the mortgagee to make any claim against those of his mortgagors who had obtained the benefit of the Bundelkhand Encumbered Estates Act, held, had the effect of breaking the integrity of the mortgage.)

2. AIR 1926 All 136 (139) ** AIR 1915 All 450 (451) (Even if the partial redemption was the result of mutual agreement between the parties, embodied in the deed)

3. AIR 1955 Punj 96 (97) (Integrity is not broken unless mortgagee purchases or otherwise acquires as proprietor portion of property under mortgage.) ** 1954 Ker LT 752 (754, 755) (Such other sharer who redeems entire mortgage has his remedy only under S. 82 for contribution.) ** AIR 1948 All 55 (56) ** **AIR 1942 PC 50 (52) : 69 Ind App 98.**

[**See also** 1955 Andhra WR 316 (317) (Mortgage of two items — Suit for against one mortgagor only — Compromise by which on payment of a certain sum of the mortgagee would give up the mortgage debt on one item – Other mortgagor not a party to compromise — **Held** that it could not be held that mortgage had been split up by the compromise)]

ment was accepted by the mortgagee *A*. *A* claimed to recover the entire mortgage amount from *D*. It was contended on *A's* behalf that he was entitled to proceed against *D*, who was not party to the settlement between *A* on the one side and *B* and *C* on the other, with his remedy under the decree and that the contingency contemplated by the proviso to S. 60, not having arisen, the mere fact that there was a settlement by the Debt Relief Court with respect to part of the debt should not stand in his way of obtaining a decree for the entire amount due under the mortgage against the other party, viz., *D*. It was held that no doubt, the principle laid down in S. 60 was not applicable to the facts of the present case. But where the mortgagee accepts a settlement with some of the persons interested in the mortgaged property and agrees to recover from them a proportionate part of the debt payable by them out of the property owned by them and has submitted to the scheme of payment enforced on him by operation of the provisions of the Relief of Indebtedness Act it would be most inequitable to allow him to recover the entire debt again from the other co-mortgagors. The Courts are therefore at liberty in view of the special circumstances to treat the settlement as between the mortgagee on the one side and the co-mortgagors on the other as an adjustment of a part of the claim which reduces the liability of the other co-mortgagors under the mortgage(**4**).

43. Mortgagee releasing part of mortgaged property from mortgage, if splits up security.

A mortgagee is entitled to release from his mortgage security any part of the mortgaged property and enforce the whole mortgage against the other properties(**1**). Before the amendment of 1929 there was a difference of opinion as to the effect of such a release. One view was that the security was split up thereby and another person interested in part of the property was held entitled to redeem his share(**2**). The mortgagee himself was held bound to abate the debt in proportion to the property released(**3**). Another view was that such a release was equivalent to a purchase by the

4. AIR 1944 Nag 225 (229) : ILR (1945) Nag 194 (DB).

Section 60 — Note 43

1. **AIR 1976 Cal 242 (253) : (1976) 2 Cal LJ 57 (FB)** (AIR 1942 Cal 226 **Overruled**) ** **(1906) 28 All 174 (177, 178) (FB)** ** 1964 Ker LT 608 (611) ** AIR 1957 Pat 408 (412, 413) (Release can be made unilaterally and without consideration and after the mortgage money has become due.) ** AIR 1956 Mad 293 (295, 296) : ILR (1956) Mad 914 ** AIR 1955 Mad 439 (442) (DB) (Release by itself does not bring about splitting up of mortgage.) ** (1911) 10 Ind Cas 96 (Oudh) (On facts held that part of mortgage security had not been released by mortgagee.) ** AIR 1922 All 352 (354) : 44 All 46 (DB) (Where portions of a mortgaged property have subsequently to the mortgage passed to different owners, the mortgagee is competent unless he has himself been a party to the dividing up of the property and has broken the integrity of the mortgage to sue to enforce the whole of his claim against any portion of the mortgaged property.) ** (1913) 35 All 444 (444) (DB) ** AIR 1916 Mad 863 (868) : 38 Mad 310 (DB) ** (1886) 9 Mad 453 (454) (DB) ** **(1905) 7 Bom LR 191 (193) (DB).**

[See also AIR 1957 Trav-Co 186 (188) (DB) (Mortgaged property devolving on two heirs of mortgagor in equal shares — Both are joint contractors within S. 43 Contract Act — Claim against one barred by limitation — Mortgagee can enforce whole mortgage against half share of the other.)]

[But see (1905) 1 Cal LJ 337 (339, 340) (DB) ** (1880) 2 All 906 (907) (DB) (Mortgagee cannot release any item of the mortgage-property.)]

Also see S. 67, Note 28.

2. AIR 1926 Bom 31 (32) (DB) (The Transfer of Property Act is not exhaustive and a High Court, as a Court of Equity, is entitled to administer the principles of equity as laid down in decided cases, which are not distinctly prohibited by statute.) ** (1907) 6 Cal LJ 612 (619) (DB) ** (1905) 2 Cal LJ 202 (208, 216) (DB) ** (1907) 6 Cal LJ 46 (53) (DB) ** **AIR 1933 Cal 588 (589) (DB).**

3. AIR 1916 Cal 485 (486) ** (1903) 30 Cal 755 (757) (DB) ** AIR 1931 Pat 164 (168) : 10

mortgagee of such share(4). A contrary view, namely, that the release extinguished the mortgage to the extent of that share only but the mortgage was indivisible as regards the rest of the property and could not be redeemed piecemeal was also held in some cases(5). In the undermentioned cases(6) it was held that the mortgagee was not bound to abate the debt in proportion to the portion of the property released. By the introduction of the word *only* after the word *except* in 1929 into this section, the Legislature has accepted the contrary view(7) and it is now clear that a release of a portion of the property by the mortgagee will not entitle a sharer to make a piecemeal redemption(8).

Pat 341 (DB) ** AIR 1934 Cal 421 (424) (DB) (Mortgage before the amendment — Old view followed.) ** AIR 1934 Cal 775 (776) : 61 Cal 894 (DB) (Do.) ** AIR 1925 Cal 94 (95) (DB) ** (1881) 3 Mad 230 (233) (DB) (Where the equity of redemption of different plots of land in the possession of the usufructuary mortgagee under one entire contract has been sold to two different persons and the mortgagee has abandoned his possession of one plot and taken a lease from purchaser of that plot, and thereby destroyed the indivisibility of the original contract, the purchaser of the other plot is entitled to redeem his land on payment of a proportionate amount of the mortgage debt.) ** (1908) 31 Mad 333 (336) (DB) ** AIR 1924 Pat 530 (534) (DB) ** AIR 1919 Cal 352 (356) (DB) ** AIR 1933 Cal 154 (164) : 59 Cal 1372 (DB).

[**See also** (1912) 16 CLJ 401 (403) (DB) (Mortgagee must not release properties of one of mortgagors to detriment of others.) ** (1910) 6 Ind Cas 842 (843) (DB) (Cal.) (Mortgagee who releases his lien upon one of two mortgaged properties which he knows belongs to two or more persons cannot increase the burden on the other property — But it is otherwise if the properties belong to the same person at the time of the release.) ** AIR 1935 Cal 666 (670) (DB) (Mortgagee did not make some of the mortgagors party to the suit — He must abate the proportionate debt.) ** AIR 1927 Cal 195 (195) (DB) (Mortgagee did not want to proceed against all but only some of the mortgagors — He must apportion the debt.) ** (1906) 33 Cal 613 (621) (DB) (Release was invalid — Hence the property was held liable in the hands of the purchaser of it but as the purchase-money was paid to the mortgagee that property was directed to be sold last.) ** AIR 1925 Cal 1048 (1051) (DB) (Where a mortgagee gives up or releases any person interested in the equity of redemption in respect of portion of the mortgaged properties, or where the effect of his conduct is to cause such release there ought to be an apportionment of the mortgage-debt and the mortgagee cannot recover more than what falls to the share of the properties not released — But questions like these can be raised and decided in suits — The mortgagee decree-holder is entitled to execute the decree against some only leaving others.)]

4. (1912) 34 All 606 (611) (DB) (A first mortgagee cannot release part of the mortgaged property for less than its due proportion of the debt and then claim a decree against the mortgagor and puisne mortgagee for the whole of the balance of the mortgage-debt.)

5. AIR 1923 All 499 (499) : 45 All 524 (DB) (The integrity of the mortgage can only be broken up in case the mortgagee or mortgagees purchase a part of the mortgaged property.) ** (1902) 25 All 79 (82) (DB) (Mortgagee can proceed even personally against mortgagor if the portion proceeded against is insufficient to satisfy his claim.) ** (1895) 17 All 63 (66) (DB) ** (1899) 2 Oudh Cas 344 (348).

6. **AIR 1918 Mad 1030 (1033) : 40 Mad 968 (FB)** ** AIR 1929 All 889 (890) ** 1864 Suth WR Gap No. 260 (261, 262) (DB) ** AIR 1916 Mad 229 (230) : 39 Mad 419 (DB).

7. **AIR 1931 Nag 44 (44) : 27 Nag LR 4**

[**See also AIR 1942 PC 50 (53) : 69 Ind App 98.** (Privy Council held that this case was to be decided on the law as it stood before amendment of 1929. They held that even before the amendment a release of a portion did not destroy the integrity of the mortgage as to the rest of property.)]

8. AIR 1956 Mad 293 (296) : ILR (1956) Mad 914 (AIR 1918 Mad 1030 (FB), Foll.) ** AIR 1955 Mad 439 (442) (DB) (Release by itself does not bring about splitting up of mort-

It has been held in the case noted below(9) that such a release by the mortgagee may be inferred very appropriately in a case where he purchases the property for an entirely independent consideration but not where what is purchased is the equity of redemption

If a part of the mortgaged property is released by the mortgagee under a registered document to enable the mortgagor to repay a debt due to the mortgagee if the release is not conditional it becomes operative to the full extent even though the promised amount of debt is not paid(10)

44. Mortgagee acquiring share in property.

It has been seen already that a purchase by the mortgagee of the *whole* of the equity of redemption will *extinguish* the right of redemption and the mortgage security The result, however of the acquisition by the mortgagee of a part of the mortgaged property is not to extinguish the mortgage in its entirety, but only *pro tanto* in respect of that part(1) Under S 82 the mortgaged properties are bound to *contribute* rateably to the mortgage-debt so that when the mortgagee himself acquires a part of the property he is bound to pay himself a *quota* of the mortgage debt and the mortgage-debt rateably due to him in respect of that part is thus discharged(2) As a consequence of this, the other properties are liable for only the balance of the mortgage debt(3) A further result of

gage) ** AIR 1949 Nag 346 (347) ILR (1949) Nag 376 (What the mortgagee could have done in this respect before the preliminary decree he could do even after obtaining that decree AIR (1918 Mad 1030 (FB) Referred to) ** AIR 1933 All 246 (247) (DB) ** AIR 1936 Rang 266 (268, 269) 14 Rang 198 (DB) ** AIR 1934 Cal 775 (776) 61 Cal 894 (DB) ** AIR 1939 Pat 49 (51) : 18 Pat 141 (DB)

[See also AIR 1942 PC 50 (53) ILR (1942) 11 608 : ILR (1942) Kar PC 99 69 Ind App 98.]

9. AIR 1956 Mad 293 (297) : ILR (1956) Mad 914

10. **AIR 1970 SC 1717 (1720) : 1971 MPWR 1.**

Section 60 — Note 44

1. (1946) 24 Mys LJ 8 50 Mys HCR 291 ** AIR 1994 Ker 75 (78) ** 1942 Mad LJ 289 (291) (DB) ** AIR 1942 Mad 44 (46 47) (DB) (For determining extent to which right is extinguished value of mortgaged properties at date of mortgage should be considered) ** (1906) 4 Cal LJ 195 (196 197) (DB) ** (1888) 10 All 5 (11) (574 576) Principle of rule formulated in last part of S 60 applies to adjective law, that is rules of procedure such as those relating to execution of decree for possession of immovable property)

   [See also AIR 1917 All 309 (311) 39 All 74 (DB) Mortgagee purchasing a portion of mortgaged property — Mortgage is not pro tanto extinguished in absence of stipulation or intention to that effect.)]

2. **(1900) 22 All 284 (289) (FB)** ** AIR 1959 Ker 112 (113) ** AIR 1956 Mad 293 (296) ILR (1956) Mad 914 (Release of property Subsequent purchase of by mortgagee may bring about reduction of mortgage amount but would not affect his right to proceed against rest of the property for the balance) ** AIR 1933 Pesh 97 (98) ** AIR 1924 Mad 364 (364) (DB) ** AIR 1927 Oudh 542 (543) (DB) ** AIR 1928 Rang 266 (266) 6 Rang 4[illegible] (DB).

   [See also 1942 NLJ 289 (291) (DB) (Suit for partial redemption under S 60 is suit for redemption and contribution under S. 82.)]

   Also see Note 23 and S. 82, Note 18

3. AIR 1965 Ker 132 (134) (DB) ** AIR 1959 Ker 112 (113) ** (1946) 50 Mys HCR 291 ** AIR 1949 Nag 155 (158) ILR (1948) Nag 595 (Mortgage prior and subsequent Purchaser of part of mortgaged property in execution of decree on subsequent mortgage paying off decree on prior mortgage is subrogated to rights of prior mortgagee as to whole property but is also owner of equity of redemption in the part of the property which he has purchased in execution of the decree on the puisne mortgage Under the circumstances the integrity of the prior mortgage is split up and he cannot claim to recover whole decretal

the acquisition by the mortgagee is to *split up* or *break up* the integrity of the mortgage(4) and the consequence of this is that not only all the owners of the other mortgaged properties are entitled to redeem them by paying the whole balance of the mortgage-debt but, each of such owners is entitled to redeem on payment *of a proportionate part* of the debt(5). This is what the concluding part of the section enacts.

amount from the other item) ** AIR 1945 Pat 106 (108) 23 Pat 648 (DB) (Lease by mortgagor after mortgage — Mortgagee obtaining decree without impleading lessees and bringing part of mortgaged property to sale of mortgage property in their possession for realization of proportionate amount of mortgage money chargeable on property — Lessees can redeem on payment of proportionate amount of mortgage money) ** (1908) 12 Cal W N 745 (746) (DB) ** (1889) 13 Bom 45 (49) (DB) ** (1889) 2 CPLR 90 (92, 93) ** AIR 1923 Rang 61 (63) 11 Low Bur Rul 356 (DB) ** AIR 1923 Pat 490 (491) 2 Pat 715 (DB) ** (1883) 13 Cal LR 272 (273, 274) (DB) ** AIR 1919 Cal 822 (823) (DB).

[See also (1875) 15 Beng LR 303 (305) (DB) (Mortgagee cannot throw the whole burden on the other part.)]

Also see S. 82, Note 18

4. **AIR 1951 SC 189 (192)** ** 1958 Ker LT 328 (329) ** AIR 1954 Madh B 67 (70) ILR (1953) Madh-B 147 (Mortgage of property owned by A and B as tenants-in-common — A selling property to mortgagee without B's consent — Sale transfers only A's interest and equity of redemption to that extent is extinguished by sale — Result is severance of the security and breaking up of the integrity of mortgage) ** AIR 1953 Mad 720 (721) ILR (1953) Mad 1200 ** AIR 1953 Nag 259 (262) ILR (1952) Nag 366 ** AIR 1952 Pat 101 (104) 27 Pat 572 (DB) ** (1948) 27 Pat 332 (388) (DB) ** (1946) 24 Mys LJ 8 50 Mys HCR 291 ** (1897) 1 Bom 544 (547) (DB) ** AIR 1920 Bom 191 (192) (DB) ** (1897) 21 Bom 619 (625 626) (DB) ** AIR 1923 Rang 61 (63) 11 Low Bur 356 (DB)

[See also AIR 1951 Trav Co 101 (102) 1950 Trav Co LR 683 (DB) (Hypothecatee purchasing all items mortgaged — Purchase of some items proving infructuous — As charge remains alive in respect of those items it cannot be held that charge remained unbroken) ** (1884) 9 Bom 141 (144) (DB) (Partition suit by A against B — B claiming the property as mortgagee of A — Pending suit A selling part of property to C — Decree for redemption in favour of A — After decree A selling other portion of the property to D — D selling it to B — **Held**, C as purchaser of A's interest acquired right as against B to redeem other portion on paying amount properly attributable to it under the decree)]

5. **(1870) 13 MIA 404 : 14 Suth WR (PC) 17 (18) (PC)** ** 2000 (2) BLJR 1105 (1107) ** AIR 1962 Ker 36 (37) (Mortgagee obtaining equity of redemption over share of property — Suit for partial redemption is maintainable) ** AIR 1960 Punj 420 (421) (Mortgage of land owned by A and B in equal shares — B transferring his share to mortgagee — Integrity of mortgage broken — A can redeem his half share) ** AIR 1954 Madh B 67 (70) ILR (1953) Madh B 147 ** AIR 1953 Kutch 8 (10) ** AIR 1953 Nag 259 (262) ILR (1952) Nag 366 ** AIR 1952 Nag 341 (347) ** AIR 1951 Trav-Co 212 (2) (213) (DB) ** AIR 1952 Pat 101 (1948) 27 Pat 572 (580) (DB) ** (1948) 27 Pat 332 (338) (DB) ** AIR 1930 Cal 810 (814) 57 Cal 872 (DB) ** AIR 1922 All 192 (193) (DB) ** AIR 1919 All 401 (401) (DB) ** AIR 1929 All 409 (411) (DB) ** AIR 1929 All 604 (606) (DB) ** AIR 1937 All 44 (45) (DB) (Proportion determined not according to the value of the different items but in proportion to the liabilities of the parties under the sale deed) ** AIR 1940 All 528 (530) ** AIR 1940 Oudh 97 (102) 15 Luck 175 (DB) (Transfer of entire equity of redemption by some of the co-mortgagors in favour of mortgagee — The sale held not valid in respect of those who did not join the sale — Hence mortgage subsisted and partial redemption of shares of the latter allowed) ** AIR 1915 Oudh 211 (213, 215) (DB) ** (1867) 2 Agra 88 (89) (DB) ** AIR 1919 Pat 399 (399 400) (A person entitled to partial redemption may be compelled to redeem that portion of the property in which he is interested) ** AIR 1920 Pat 170 (171) (DB) ** AIR 1925 Pat 31 (32) (DB) ** AIR 1934 Pat 648 (650) 13 Pat 364 (DB) ** AIR 1931 Nag 44 (44) 27 Nag LR 4 ** AIR 1937 Rang 359 (360) ** AIR 1934 Rang 372 (375) (DB) ** AIR 1923 Rang 61 (63) 11 Low Bur Rul

Except where the mortgagee or a co-mortgagee has acquired in whole or in part the share of a mortgagor a co-mortgagor will not be entitled to redeem only his own share(6).

Where the petitioner acquired 1/3rd share in the mortgaged property and the opposite party mortgagee acquired 1/6th share in it, the petitioner is entitled to redeem his share(7)

The effect of purchase by mortgagee from some only of the mortgagors entitles the other mortgagors to redeem their share(8).

But there is a conflict of opinion on the question whether in such a case it is open to a sharer in the residue left after the mortgagee's purchase of a share in the mortgaged property to redeem the whole of that residue without the consent of the mortgagee One view is that he is not entitled to redeem more than his share(9) This is based on the decision of the Privy Council in *Nawab Ajmat*

356 (DB) ** AIR 1936 Pat 629 (631) 15 Pat 481 (DB) ** (1870) 2 NWPHCR 4 (5) (DB) ** (1910) 8 Ind Cas 153 (154) (DB) (Mad) ** (1913) 18 Ind Cas 69 (69) (DB) (Mad) ** (1900) 4 Cal WN 507 (508) (DB) (Mortgagee impleading some mortgagors only in purchasing property — Purchase valid only to the extent of their shares — Others can redeem their shares by paying proportionate share of amount) ** (1903) 25 All 446 (456) (DB) ** (1903) 26 All 72 (75) (DB) ** (1905) 28 All (55) (57) ** (1906) 3 Cal LJ 377 (378) (DB) (Obiter) ** (1907) 5 Cal LJ 315 (326) (DB) ** (1907) 6 Cal LJ 612 (619) (DB) ** (1908) 8 Cal LJ 92 (93) (DB) ** (1879) 4 Cal LR 294 (295) ** (1909) 1 Ind Cas 264 (277) (DB) (Cal) ** (1905) 2 All LJ 123 (125) (DB) ** 1887 All WN 250 (252) ** (1909) 31 All 335 (337, 338) (DB) (Acquisition by inheritance) ** (1936) 164 Ind Cas 498 (493) (DB) (Cal) (Where purchase by mortgagee at a sale is free from all encumbrances he can throw burden of mortgage debt on the remaining mortgaged property 32 All 6 (2) (PC) Followed.) ** AIR 1918 Cal 806 (806) (DB)

[See also (1911) 8 All LJ 1092 (1093) (DB) (One of two properties comprised in a mortgage and subject to a prior mortgage brought to sale for default in payment of prior mortgage — Purchase of the property by second mortgagee in name of third person — Suit for redemption as regards other property — Integrity of mortgage being broken suit allowed and money calculated as if there was no prior mortgage on that property) ** (1888) 11 Mad 304 (306) (DB) (Mortgage of ancestral estate by A and B Hindu co-widows — Decree for money against B — Mortgaged property sold in execution and purchased by mortgagee — Decree for money held not binding on A or the estate — **Held,** A was entitled to redeem moiety of the estate during B's lifetime) ** (1883) 5 All 257 (258) (DB) (A mortgaging by conditional sale two villages to B — A subsequently selling one village to B and another to C — B suing C — **Held,** mortgage was split up and it remained a debt in respect of village sold to C redeemable by C at a proportionate valuation and in consequence one which could be foreclosed by B on similar terms)

6. ILR (1966) 1 Cal 659 (661).

7. 1979 UPLT (NOC) 23 : 1979 Rev Dec 138 (141)

8. ILR (1974) 1 Ker 201 (219) (DB).

9. (1965) 69 Cal WN 688 (692) (Foreclosure of 5/6th property — Holder of 1/6th share can redeem only his share) ** 1958 Ker LT 328 (330) ** AIR 1954 Madh B 67 (70) ILR (1953) Madh B 147 (Tenants-in-common — Sale by one of his share to mortgagee — Other cannot claim to redeem the whole property since the result of the purchase by mortgagee is to extinguish the right of redemption relating to the part purchased by him) ** AIR 1953 Mad 720 (721) ILR (1953) Mad 1200 (DB) **** AIR 1952 Nag 341 : ILR (1952) Nag 211 (FB)** ** AIR 1952 Pat 101 (104) 27 Pat 572 (DB) (Execution of mortgage decree — Mortgagee decree-holder purchasing mortgaged property — Person interested in portion of mortgaged property not impleaded in suit — Suit for redemption by such person — It was held that he was entitled only to partial redemption) ** (1948) 27 Pat 332 (388) (DB) ** AIR 1945 All 388 (389) ILR (1945) All 637 (Transferee from a mortgagor cannot claim any higher right) **** AIR 1933 All 257 (259) : 55 All 359 (DB)** ** AIR 1916 Mad 863 (865) 38 Mad 310 (DB) ** 1911 Pun Re No 62 (DB) ** AIR 1927

Ali Khan v. Jowahir Singh(**10**), where the mortgagee having purchased one of several shares in the mortgaged property, *one* of the persons interested in another share claimed to redeem not only his share, but also the other shares not purchased by the mortgagee. Their Lordships of the Privy Council held that this could not be allowed. They observed as follows:

> "The appellant (mortgagee) now complains that the plaintiffs have been allowed to redeem as against him the villages other than their own village of Hosseinpore, i.e., to put themselves in his shoes as mortgagee in respect of these villages. ... The Courts below, however, seem to their Lordships to have mistaken the effect of the former decision of the Sudder Court. It merely ruled that the plaintiffs were bound to offer to redeem the villages in question, it did not rule that they were *entitled* to do so, or to acquire the interest of the mortgagee in them against his Will. ... They (i.e., their Lordships) think that the appellant (mortgagee), if desirous of retaining possession of these villages as mortgagee, is entitled to do so against the plaintiffs, whose right in that case is limited to the redemption and recovery of their village of Hosseinpore upon payment of so much of the sum deposited in Court as represents the portion of the mortgage-debt chargeable on that village."

A contrary view has been expressed in the undermentioned cases(**11**), namely, that a sharer in the mortgaged-property is entitled to redeem all the shares other than those purchased by the mort-

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Mad 1039 (1040) (DB) (A and B, coparceners in joint Hindu family mortgaging specific items — A selling his equity of redemption to mortgagee — B or his transferees cannot insist on redemption of whole.) ** (1879) 2 All 565 (567) (DB) ** (1906) 28 All 155 (157) ** (1907) 29 All 262 (263) (DB) ** AIR 1917 All 358 (358) : 39 All 618 (DB) ** (1913) 21 Ind Cas 251 (253) (Oudh) ** AIR 1920 Oudh 234 (236) (DB) ** (1907) 10 Oudh Cas 81 (84) (DB) (**Dissenting** from 9 Oudh Cas 63 to the contrary.) ** AIR 1940 All 528 (53) ** AIR 1926 All 46 (47) : 48 All 171 (DB) (Note — The reasoning, however, that the principle of integrity of mortgage is only for the benefit of the mortgagee stated in this decision is not correct.) ** AIR 1924 Oudh 40 (44) : 26 Oudh Cas 308 (DB).

[**See also** AIR 1968 Bom 106 (110) (DB) (It is open to doubt if the later P. C. decision in **AIR 1921 PC 125** can be treated as **Overruling** the earlier P. C. decision in 13 MIA 404.) ** AIR 1930 All 523 (524) (DB) (Half share of property purchased by mortgagee — Co-sharer puisne mortgagee of the property redeeming other half paying proportionate mortgage debt — Other co-sharer mortgagors cannot redeem the whole property from him but can redeem only their proper share of the property redeemed by the co-sharer puisne mortgagee.) ** AIR 1918 Oudh 318 (319) (Suit for redemption of whole property — Pending suit mortgagee acquiring portion of mortgaged property — **Held**, in such a case right of owner of portion of mortgaged property was not absolute but depended upon will of mortgagee — Therefore it could not be said that by taking transfer during pendency of suit mortgagee affected right of plaintiff under decree or order which might be made in the suit — S. 52, T. P. Act, did not apply — Mortgagee could insist upon his right to insist on plaintiff to a suit for redemption of his share only.) ** AIR 1922 All 405 (406) : 44 All 708 (DB) (Where the integrity of a mortgage is broken, a mortgagor who owns a part of the equity of redemption can redeem his own part, but where the rights of mortgagors have vested partly in a prior mortgagee and partly in a subsequent mortgagee after a suit had been brought by each of them to enforce his own mortgage, neither the former can be compelled to redeem the whole nor can he compel the latter to give up his interest in the share of the mortgagor which he has acquired — Each can redeem to the extent of the shares of his mortgagors acquired by him, on payment of such proportionate amount as **may be found due on that mortgage.**)]

10. (1870) 13 Moo Ind App 404 (415, 416) (PC).

11. AIR 1965 Orissa 63 (65) : ILR (1964) Cut 712 ** AIR 1954 Punj 81 (83) : ILR (1953) Punj 271 (DB) ** (1886) 10 Bom 658n (658n) (DB) ** AIR 1925 Pat 57 (58) : 3 Pat 818 (DB) ** (1886) 10 Bom 656n (657n) (DB) ** AIR 1926 Bom 303 (304) : 50 Bom 331 (DB) ** AIR 1937 Mad 136 (138) (Principle of integrity applies both to mortgagee as well as mortgagor. This view has been dissented from in AIR 1928 Lah 792 and AIR 1926 All 46.)

[**See also** AIR 1914 Bom 259 (260) (DB) (Mortgage of properties X and Y — Subsequent sale of X to A and later still sale of Y to mortgagee — A was held entitled to redeem both X

gagee including the shares belonging to the other sharers For this view the cases noted below(12) have relied on the decision of the Privy Council in *Mirza Yadalli Beg v Tukaram*(13) According to the Orissa case(14) the earlier decision of the Privy Council in *Nawab Ajimat Ali Khan's case* denying the ordinary right to redeem the whole mortgage to one of the several mortgagors on the mortgagee purchasing a share in the mortgaged property, must be treated as overruled by the later pronouncement of the Privy Council It is submitted that the second view is not correct The opinion that the *Aziz Azimat Ali's case* must be treated as overruled by the later *Mirza Yadalli Beg's case* is open to serious doubt(15).

Where one of mortgagees acquires by purchase a part of mortgaged property it cannot be said that the mortgage over that portion has merged in the sale The purchaser-mortgagee is in no different position from an outsider so far as his rights conferred by his purchase are concerned The mortgage remains one and undivided and if redeemed at all can only be redeemed in its entirety The purchaser-mortgagee cannot insist that the mortgagor should redeem only that part of the property which has not been purchased(16)

A purchase by the mortgagee of a part of the property in execution of a decree obtained by him on a *prior mortgage* of the said part only, will not, however, entitle the mortgagor to redeem the other part by payment of a proportionate amount(17) Thus, where *X* is mortgaged to *A* first and then *X* and *Y* are mortgaged to him under another mortgage, and in execution of a decree on the first mortgage *A* purchases *X*, the mortgagor cannot redeem *Y* from the second mortgage by merely paying the proportionate part of the debt He must pay the entirety of the mortgage debt(18) The reason is that the second mortgage is only *subject* to the first mortgage By the sale in execution of the decree obtained on the latter mortgage, the property sold disappears from the second mortgage and the entirety of the debt attaches to the property *Y*

> "Under the first head of objection it was strongly argued that the apportionment should have been made according to the actual and ascertained values of the several *mouzahs* and not according to the amount of revenue assessed on and payable in respect of, such *mouzahs* to Government

The words "proportionate part of the amount remaining due on the mortgage" mean 'proportionate to the value of the properties mortgaged' In *Nawab Ajimat Ali Khan v Jowahir Singh*(19) a mortgagee had become owner by purchase of a share of the equity of redemption The owner of another share was held entitled to redeem on payment of a sum equal to the share of the mortgage amount proportioned according to the value of the properties comprised in the mortgage and in the share Their Lordships of the Privy Council observed

> "The proportion of the debt chargeable on each village ought to vary according to the actual value of the village, and the amount of Government revenue assessed on a village may not always be a correct criterion of its actual value

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and Y as sale in favour of mortgagee was subsequent to sale in favour of A and could not deprive him of his right to redeem both the properties.)]

12. AIR 1954 Punj 81 (83) ILR (1953) Punj 271 (DB) ** AIR 1937 Mad 136 (138) ** AIR 1926 Bom 303 (304) 50 Bom 331 ** AIR 1925 Pat 57 (58) 3 Pat 818 (DB
13. **AIR 1921 PC 125 (125) : ILR 48 Cal 22 : 47 Ind App 207** ** AIR 1965 Orissa 63 (65) ILR (1964) Cut 712.
14. AIR 1965 Orissa 63 (65) : ILR (1964) Cut 712.
15. See AIR 1968 Bom 106 (110) (DB).
16. AIR 1985 Punj & Har 268 (270)
17. AIR 1956 Mad 293 (296) ILR (1956) Mad 914 ** AIR 1938 All 22 (25) ILR (1938) All 63 (DB).
18. **(1910) 32 All 612 (617) : 37 Ind App 182 (PC).** (On appeal from 28 All 593)
19. **(1870) 13 Moo Ind App 404 (408, 409) (PC).**

On the other hand, there might be a difficulty in applying the principle contended for by the appellant to cases in which the amount payable by a mortgagor seeking to redeem, is not ascertained, as in this country, by inquiry and account, but must be calculated and tendered or brought into Court by him before the commencement of the suit."

That was a case before the Transfer of Property Act The last difficulty pointed out by their Lordships no longer exists in view of the provisions of the Civil Procedure Code providing for such inquiry and account In *Bishesur Dial v. Ram Sarup*(20) a Full Bench of the Allahabad High Court followed the case of *Nawab Ajimat Ali Khan v. Jowahir Singh*(21) and it was held that "when the mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bers the same ratio to the whole amount of the debt that the value of the property purchased bears to the value of the whole of the property comprised in the mortgage". See also the undermentioned cases(22) to the same effect.

The "acquisition" referred to in the last paragraph may be in any manner e g., by purchase, inheritance or otherwise(23). The taking by the mortgagee of a *further charge* from some of the

20. **(1900) 22 All 284 (293) (FB).** (Observations in 20 All 23 to the contrary held not correct)

21. **(1870) 13 Moo Ind App 404 (408) (PC).**

22. **AIR 1920 Mad 375 (378) : 43 Mad 372 (FB).** (22 All 284 and 13 Moo Ind App 404 (PC) Followed. 12 Ind Cas 130, **Overruled.**) ** AIR 1932 Mad 18 (19) ** AIR 1936 Cal 537 (540) (If property is purchased by the mortgagee after the decree, apportionment cannot be claimed in execution proceedings — In such cases the remedy of other part-owners is a suit for contribution) ** AIR 1932 Cal 319 (320) : 59 Cal 76 (DB) ** AIR 1938 Cal 618 (622) : ILR (1938) 2 Cal 590 (DB) ** AIR 1924 All 11 (11, 12) , 45 All 46 (DB) (The plaintiffs co-mortgagees by suing for their share of the mortgage-money must be deemed to have admitted that the balance of the mortgage-money had been satisfied by the acquisition of a proportionate share of the mortgaged property and that the plaintiffs should be given a decree for their share of the mortgage-money as against a proportionate share of the mortgaged property) ** (1911) 10 Ind Cas 235 (235) (All) ** (1911) 35 All 434 (435) (DB) ** AIR 1914 All 165 (166) (DB) (B obtained a decree on the foot of a mortgage against T and L In execution of another decree T's share in the property was put up for sale B applied that half of the money due under his decree was a charge on T's property which was being put up for sale. B himself purchased T's property — **Held,** that under the circumstances, B's decree must be deemed to have been satisfied to the extent of one half) ** AIR 1916 All 108 (108) 38 All 103 (DB) ** AIR 1934 Mad 250 (251) ** AIR 1918 Oudh 404 (405) 21 Oudh Cas 172 (DB).

[**See also (1886) 8 All 438 (442) (FB).** (Mortgage-deed executed for Rs 4 000 — Mortgagee purchasing 2/3rd of the property — Suit by mortgagor for redemption of 1/3rd share — **Held,** with reference to S. 7(ix), Court-fees Act, principal money secured must be regarded as 1/3rd of Rs. 4,000)]

[**But see** AIR 1921 Nag 96 (96) (No longer good law.) ** (1897) 19 All 196 (198) (**Not followed in 22 All 284 (FB).**)]

23. AIR 1947 Nag 210 (223) ILR (1947) Nag 740 (DB). (Per Hidayatullah, J , agreeing with Bose, J. (Hemeon, J , contra) — The words "has or have acquired" in paragraph 5 of S 60 have not been defined and in principle there is no difference between an acquisition by way of purchase or other transfer and an acquisition by way of foreclosure decree) ** 1911 Pun Re No 62 (DB) (Purchase and inheritance) ** AIR 1924 Mad 364 (364) (DB) (Court auction purchase) ** AIR 1940 Mad 498 (502) (DB) (Acquisition by mortgagee may be by inheritance or device) ** (1909) 31 All 335 (338) (DB). (Inheritance of mortgagor's rights by mortgagee) ** AIR 1929 All 604 (606) (DB) (Mortgagee becoming heir by mortgagor) ** 1991 Pun LJ 307 (311) (When the mortgagee becomes an heir to the mortgagor and inherits a portion of the mortgage, it cannot be said that the integrity of the mortgage

original mortgagors does not break up the integrity of the original mortgage(**24**) Where there is no acquisition by the mortgagee of any part of equity of redemption, there is no question of splitting up of the integrity of the mortgage and of allowing piecemeal redemption(**25**). It has ben held in the undermentioned cases(**26**) that the words "share of a mortgagor" in the section mean the share of a mortgagor in the *equity of redemption* that is, in the ownership of the property *minus* the interest vested in the mortgagee, that consequently the last paragraph of the section does not apply where the mortgagee purchases a portion of the mortgaged property free of his encumbrance by paying full value of the property, and that therefore the owner of the other part of the property cannot redeem merely by paying a proportionate part of the debt See also the undermentioned case(**27**) where adopting a similar reason it was decided that the mortgagee purchasing a part of the property at a revenue sale has the right to throw the entire burden of the debt on the remaining property

The last paragraph of the section does not apply where *some only* of the mortgagees, where there are more than one, acquire a share of a mortgagor The mortgage cannot in such cases be redeemed by the owner of a part of the property by payment of a proportionate part of the money due on the mortgage(**28**) Where such part owner pays up the *entire* mortgage amount strictly the

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has not been broken) ** AIR 1920 All 129 (131) 42 All 544 (DB) (Acquisition of part of **equity of redemption by mortgagee after decree for sale.)**

[See also (1888) 10 All 570 (574) (Mortgagee acquiring a share in mortgaged property by purchase after the decree for redemption is passed) ** (1897) 2 Bom 619 (626) (DB) **(Inheritance)]**

24. (1908) 11 Oudh Cas 73 (74) ** AIR 1925 Oudh 150 (152).

[But see 1905 Pun Re No 91, p 279 (281) (DB) **(Integrity is broken up by taking a further mortgage on a portion of the property previously mortgaged.)]**

25. AIR 1923 All 397 (397) (DB) (Prior mortgagee obtaining decree without impleading subsequent mortgagee and subsequent mortgagee obtaining decree without impleading prior mortgagee — Property purchased by M in execution of decree on prior mortgage — Property purchased by A in execution of decree on subsequent mortgage — Subsequently M inheriting original mortgagor's rights — **Held,** upon sale of mortgagor's right to A no part of equity of redemption could become vested in M as successor to mortgagor — Therefore **integrity of prior mortgage was not borken up.)**

26. AIR 1940 Mad 498 (501) (DB) ** (1910) 6 Ind Cas 842 (844) (DB) (Cal) ** (1936) 164 Ind Cas 490 (493) (DB) (Cal) ** AIR 1930 Cal 619 (620, 621) (DB)

[See also AIR 1941 All 200 (204, 205) ILR (1941) 1 All 220 (If a mortgagee after a purchase by him of a part only of mortgaged property claims to enforce his entire mortgage against remaining portion of property in respect of whole unabated mortgage debt burden lies heavily on him to show that special circumstances existed or that there was some form of special bargain in the particular transaction between him and mortgagor from which it must be concluded that no part of mortgage debt was to be extinguished)]

27. AIR 1953 Nag 259 (261, 262) ILR (1952) Nag 366 (Sale of property under S 141(c) Berar Land Revenue Code for arrears of revenue — Sale not due to default of mortgagee — Purchase at sale confers clear title to the property and not merely equity of redemption — **Case is not governed by last para of S. 60.)**

28. AIR 1945 Bom 69 (71) ** AIR 1923 Mad 533 (538) 47 Mad 7 (DB) (Per Krishnan J) ** AIR 1939 All 600 (601) (DB) ** AIR 1925 Oudh 609 (609) 27 Oudh Cas 360 ** (1883) 5 All 276 (277) (DB) ** AIR 1939 Nag 136 (139) (DB) ** AIR 1937 Nag 262 (263) ILR (1937) Nag 503 ** AIR 1924 All 11 (11, 12) 45 All 46 (DB) (But when the mortgagees sue for only half the mortgage money they must be deemed to have practically admitted that something has happened which has had the effect of satisfying half the mortgage amount) ** (1873) 5 NWPHCR 148 (150) (DB) ** (1912) 15 Ind Cas 605 (606) (DB) (Mad)

[See also (1911) 9 Ind Cas 1026 (1027) (DB) (All) (Mortgage in favour of more than two persons — One mortgagee acquiring a share of mortgaged property — Purchaser from

mortgagee's rights are determined including his right to retain possession of the purchased property, if the mortgage is a necessary one; the mortgagee can, however, sue afresh in respect of his purchase. But there is nothing to prevent the Court for the sake of convenience, to decide in the same suit how much mortgage-money is to be chargeable on the property purchased by the mortgagee and to allow redemption of the rest on payment of the proportionate amount(29)

It has been held in the undermentioned case(30) that where a *subsequent* mortgagee acquires a share in the equity of redemption, the last paragraph of S. 60 applies, so as to enable him to redeem his share only from the *first mortgage* on payment of a proportionate part of the amount due on that mortgage It is submitted that this view is not correct. The word "mortgagee" clearly refers to the mortgagee *under the mortgage sought to be redeemed* and not any other mortgage that might have been subsequently made by the mortgagor.

The principle of the mortgage security being split up by the mortgagee acquiring a portion of the mortgaged property cannot apply to a maintenance charge decree under which the claim is a recurring one. The principle can only apply with reference to a charge which has ripened into a present claim at the time of the acquisition of the share(31).

Two items of property, *A* and *B*, are first mortgaged to *X*, and then *A* alone is mortgaged to *Y*. *X* then buys both *A* and *B* In such a case, it will be seen, the mortgagee acquires the *whole* of the equity of redemption and not only a *share* in it But at the same time, under S. 101, *X* is entitled to keep alive the mortgage on *A* as against *Y*, the subsequent mortgagee This means that *X's* mortgage is *extinguished* as regards item *B* but is kept alive as regards item *A* In other words, the mortgage is split up, and *Y* can redeem *A* by paying a proportionate part of the mortgage-money This is the principle underling the decision cited below(32).

45. Undivided property — Moertgagee purchasing share — Redemption.

Where undivided property belonging to several co-sharers has been mortgaged and the mortgagee purchases the undivided share of one of them, can the other co-sharers redeem their shares without suing for partition?

According to the Bombay High Court they are entitled to redeem and can only be allowed to redeem the whole leaving the mortgagee to bring a suit for partition like any other co-sharer.(1) High Court of Rajasthan also held the same view (2) According to two early cases of the Madras High Court(3) they are not entitled to redeem the mortgage wholly or partly until they have first

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another mortgagee suing for recovery of a portion of the debt — **Held**, suit is maintainable.)]

29. AIR 1923 Mad 533 (538) : 47 Mad 7 (DB).

30. AIR 1937 Rang 220 (222) : 1937 Rang LR 13 (DB).

31. AIR 1945 Pat 278 (279, 280) : 24 Pat 245 (DB).

32. AIR 1948 Nag 316 (322) ILR (1947) Nag 912 (DB) (Landlord having a first charge for rent on a holding which consists of two fields A and B — P, a creditor of the tenant, obtaining a puisne charge on field A for his debt — Landlord then purchasing in execution of his rent decree both A and B — Integrity of the landlord's prior charge is broken and P can redeem A by paying proportionate amount.)

Section 60 — Note 45

1. (1891) 15 Bom 24 (26) (DB) ** (1891) 15 Bom 27 (27) (DB) ** (1897) 21 Bom 619 (626) (DB)

2. AIR 1974 Raj 77 (78, 79) 1973 Raj LW 428 (Where mortgaged property belonged to A and B who were co-widows & B sold her share to the mortgagee without A's consent, A will be entitled to redeem whole mortgage.)

3. (1883) 6 Mad 61 (62) (DB) ** (1897) 20 Mad 295 (298) (DB)

ascertained their shares in a suit for partition In later cases,(4) however, it has been held by the same High Court that a co-sharer can be allowed, in the same suit, to get a deree for partial redemption and partition.

The Calcutta High Court also has taken a view similar to the one expressed in the above mentioned later cases of the Madras High Court (5)

Where joint family property has been mortgaged and it is subsequently allotted to one member he or his transferee has a right to redeem the mortgage as partition need not be by registered instrument.(6)

If the mortgagee acquires the share in the equity of redemption the integrity of the mortgage is broken and the other mortgagor who owns only a share is entitled to redeem his share (7)

46. One co-mortgagor acquiring mortgagee right — Redemption by other.

Where one of several co-mortgagors acquires the mortgagee rights in the proeprty, the question has arisen as to whether this section applies so as to allow the other co-mortgagors to redeem their shares alone According to the undermentioned cases(1) such acquisition splits up the mortgage and the principle of this section applies so as to allow of piecemeal redemption by the other co-mortgagors But according to the Calcutta High Court,(2) the rule that the integrity of the mortgage is broken when the *mortgagee* purchases a part of the equity of redemption does not apply to the converse case of a co-mortgagor purchasing the mortgagee right, so as to enable the other co-mortgagors to redeem piecemeal In the case noted below(3) it was held that once one of the mortgagors redeems the whole mortgage, the mortgage comes to an end and the redeeming mortgagor is not a "mortgagee," that S 60 does not apply to the case and that, consequently, there is nothing to

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4. AIR 1916 Mad 863 (866) 38 Mad 310 (DB) ** AIR 1918 Mad 1142 (1144) (DB) ** AIR 1923 Mad 533 (534, 536) · 47 Mad 7 (DB)

   [See also AIR 1915 Mad 1148 (1148) (DB) (There is no objection to granting a decree for redemption of plaintiff's undivided share and for his being put in possession on redemption of that undivided share as a tenant-in-common with other sharers)]

5. AIR 1956 Cal 625 (627)

6. AIR 1980 Pat 254 : 1981 BLJR 134 (DB).

7. 1966 Ker LT 842.

Section 60 — Note 46

1. AIR 1959 Punj 170 (172) (DB) (In Punjab, where provisions of S 92 T P Act are not applicable it has been held that a co-mortgagor, who has redeemed the whole mortgage cannot be taken to have been subrogated to all the rights of the original mortgagees but it will be in accord with the principles of justice, equity and good conscience that each of the other mortgagors may redeem his share of the property by payment of the proportionate amount actually paid by redeeming co-mortgagor) ** AIR 1953 Mad 366 (368) ** AIR 1934 Oudh 348 (349) (DB) (It is not necessary that the share in the equity of redemption acquired by the mortgagee should be specified) ** AIR 1926 Lah 601 (602) (DB) ** AIR 1941 Lah 421 (422).

   [See also AIR 1953 Trav-Co 335 (336) (Decree in previous suit for redemption by co-mortgagors — One of them subsequently obtaining redemption of entire property by virtue of his title to one half share in equity of redemption — Suit by the other for redemption of his half share is not barred by the joint action of both in previous suit)]

2. AIR 1918 Cal 602 (604) (DB).

3. AIR 1923 Lah 129 (130, 131) (DB).

   [See also AIR 1933 Pesh 97 (98) ** AIR 1926 Lah 238 (238) (Question of limitation — A co-mortgagor who redeems the whole mortgage does not become a mortgagee of the shares of the co-owners but merely has a charge on the property)]

prevent the other co-mortgagors from getting back their shares on payment of the proportionate part of the mortgage-money.

Where one co-mortgagor gets the right to contribution against the other co-mortgagor by paying off the entire mortgage debt, a correlated right also accrues to the latter to redeem his share of the proeprty and get its possession on payment of his share of the liabilit to the former This corresponding right of the 'non-redeeming' co-mortgagor, to pay his share of the liability and get possession of his property from the redeeming co-mortgagor, subsists as long as the latter's right to contribution subsists This right of the 'non-redeeming' co-mortgagor is purely an eqitable right, which exists irrespective of whether the right of contribution which the redeeming co-mortgagor has as against the other co-mortgagor, amounts to a mortgage or not (4)

Where the Kamawan executed possessory mortgage of the property belonging to tarwad and one of the co-mortgagors redeemed the mortgage and subrogated himself into shoes of the mortgagee, the other co-owners are entitled to pay to the extent of their respective shares of mortgage amount and seek possession from co-mortgagor within 12 years from the date of redemption of mortgage by the co-owner.(5)

47. One mortgagor — Two or more mortgagees — Redemption by paying one alone.

Where A executes a mortgage in favour of B and C as tenants in-common no redemption could be effected by A of part of the property by paying to one of the mortgagees his separate debt It may be different where the document really consists of two different mortgages combined in one deed in which case there may be separate redemption (1)

The mortgagor has no right, whatsoever, to pay the amount with one of the mortgagees ignoring another co-mortgagee. The receipt passed by one mortgagee will not amount to valid discharge and the mortgagor has no right to divide the amount and pay the same. Another mortgagee to whom no payment was made is entitled to recover the mortgage amount (2)

48. Suit for redemption.

The mortgagor, as against a person who is in possession as a mortgagee, has a right to redeem unless there is a contract between the parties or a merger or a special statute or an order of the Court which debars the exercise of the right.(1)

The suit for redemption by an agriculturist is not barred on ground that an application only has to be made before the Tahsildar Though summary remedy is provided under the T N Debt Relief Act (1982) that does not prohibit the debtor from invoking jurisdiction of civil Court, the remedy under the T.N Act is only additional remedy (2-3)

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4. **AIR 1979 SC 1937 (1942) : 1980 UJ (SC) 312.**

5. **AIR 1997 SC 1909 (1911) : 1997 AIR SCW 1663 : 1997 (3) SCC 317.**

Section 60 — Note 47

1. **AIR 1919 PC 24 (26) : 46 Ind App 272.**

2. 1999 (3) Rec Civ R 72 (74) (Mad).

Section 60 — Note 48

1. AIR 1957 Pat 502 (507).

[See AIR 1956 Assam 17 (19) ILR (1955) 7 Assam 489 (DB) (An anomalous mortgage of the occupancy tenancy is not hit by the provisions of Sylhet Tenancy Act 11 of 1936, and therefore, not void. The mortgagor therefore is entitled to sue for redemption on payment of the mortgage money.)]

2-3. 2000 (3) Mad LW 546 (552).

A *benamidar* can sue for redemption whether the beneficial owner is a party to the suit or not (4)

A mortgagor seeking redemption may alternatively claim that the mortgage has been paid off but that if anything is found due he is willing to pay it (5) Where the mortgagee of leasehold property escapes the payment of rent which he has to pay under the mortgage, it has been held that the mortgagee and not the mortgagor is entitled to the benefit of such non-payment and the mortgagor cannot claim at the time of redemption to deduct such sum from the mortgage money.(6)

Where in a suit for redemption, it is found that the mortgage is not valid, it has been held in the undermentioned cases(7) that the suit must be dismissed Even if parties agreed to the factum of mortgage if the document is not registered a suit for redemption will not be tenable (8) According to this view, it will be open to the plaintiff to sue for possession on title (where possession has passed to the mortgagee) and then it will be open to the mortgagee to plead that he must in equity be repaid the amount advanced by him (9) The Calcutta High Court(10) and following that view the

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4. AIR 1920 Pat 21 (24).

5. (1901) 24 Mad 408 (411) (DB).

[See also AIR 1947 Mad 18 (23) (DB) (Plaintiff purchasing property in execution of his mortgage decree and suing to recover possession — In plaint purchase admitted to be subject to usufructuary mortgage — Plaintiff willing to pay off amount of usufructuary mortgage if legally bound to do so — On trial Court holding that suit was for redemption plaintiff amending plaint under protest as one for redemption — Suit held was one for redemption.)

6. AIR 1920 Pat 66 (67) (It rests on the principle that it is a separate matter altogether in respect of which the landlord had a right of action against the mortgagee in possession — if the landlord had brought a rent suit against the original tenants mortgagors the tenants could have recovered the sums from the mortgagee in possession 1 Ind Cas 113 (All) Foll)

Also see S. 76, Note 8

7. AIR 1947 Pat 110 (111) (Suit for possession held in effect one to redeem oral mortgage — Onus held on plaintiff to show that he was mortgagor and entitled to redeem — Suit dismissed — Principle "once a mortgage always a mortgage" does not apply — 63 Ind Cas 400 (Pat). **Dissented from** — AIR 1938 Pat 479, Rel on) ** AIR 1926 Rang 201 (201 202) ** AIR 1929 Rang 179 (180) 7 Rang 140 ** AIR 1928 Rang 44 (45) 5 Rang 668 (DB) ** AIR 1941 Rang 234 (235) 1941 Rang LR 309 (DB) (Mortgage with possession — Mortgagor can however bring suit for possession based on title)

[See also 1937 Rang LR 442 (443) (Plaintiff entitled to give evidence of the factum of the abortive mortgage for showing the character of defendant's possession, viz that it was not adverse.)]

8. AIR 1980 Sikkim 1 (8) 1978 Sikkim LJ 23 (DB) (AIR 1927 Mad 92 and AIR 1947 Lah 335 **Held not good law in view of AIR 1931 PC 79**)

9. **AIR 1935 Rang 230 (232) : 13 Rang 274 (FB)** ** AIR 1926 Rang 201 (201, 202)

[But see AIR 1959 Pat 164 (164) (DB) (Possession under unregistered mortgage — Mortgagee acquires only limited title by prescription — Mortgagor can sue for redemption)]

Also see S. 59, Note 4

10. AIR 1914 Cal 894 (895) (DB).

[See also AIR 1947 Bom 206 (208) : ILR (1947) Bom 228 (Usufructuary mortgage for more than Rs 100/- — Mortgage not registered — Owner of land cannot sue for redemption but is entitled to treat mortgagor as trespasser and evict him without repaying the loans advanced by him.)]

Madhya Bharat(11) Assam(12) and Pepsu High Courts(13) have held that if in such a case, the mortgagor proves his title he may be given a decree for possession. Same is the view of the Madras High Court(14) and the Burma High Court(15) also. The Allahabad and the Patna High Courts have held that the mortgagor under a void mortgage, who is entitled to recover possession on payemnt of the money received from the mortgagee should not be refused relief merely because he has filed a suit for redemption instead of a suit for possession.(16) The High Courts of Patna and Rajasthan have held that although a mortgage is not valid because of its non-compliance with the provisions of S 59 a decree for redemption should be passed when the defendants are persons who having been inducted on the property as mortgagees had acquired by prescription the character of mortgagees of that property.(17) (See also S. 59 Note 3) In the udnermentioned cases,(18) mortgages in possession leased the mortgaged property. The mortgagor filed a suit for redemption against the mortgagee joining the lessees also as defendants. The lessees objected that as the mortgage had already been satisfied, the suit for redemption was not maintainable It was held that lessees were entitled to raise such objection inasmuch as the mortgagees, from whom they derived their title, were competent to raise it It was further held that the suit for redemption could not be treated as a suit for possession only.

Where suit for redemption of mortgage was dismissed only due to failure of mortgagors to pay mortgage amount within time prescribed by preliminary decree and such order of dismissal was not passed on any application by the mortgagees and it was passed without hearing mortgagors as to why the amount was not deposited within time, the order would be bad in law (19)

It is the essence of foreclosure and redemption suits that each party is entitled in such suits to enforce his rights against the others. If, on accounting, the balance is against any party, he must pay it.(20)

Mortgagor making payment of decretal amount in pursuance of compromise decree can seek direction from execution Court for return of possession in separate suit for recovery of possession is not necessary.(21)

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11. ILR (1953) Madh B 303 (309, 310). (A suit for redemption is in substance a suit for possession of immovable property The plaintiff is entitled to recover possession of the house on the basis of his title even though a suit for redemption is not maintainable)
12. AIR 1961 Assam 48 (50) : ILR (1961) 13 Assam 23 (DB).
13. AIR 1951 Pepsu 109 (111).
14. (1954) 2 Mad LJ 654 (657). (It is open to a mortgagor in a suit for redemption of a usufructuary mortgage to rely upon his title and recover possession, if it is found that the mortgage relied upon is void.)
15. 1949 Bur LR (HC) 50 (54)
16. AIR 1956 All 639 (640) ** AIR 1936 Pat 63 (64)
17. **AIR 1960 Raj 1 (7) : ILR (1959) 9 Raj 1121 (SB).** (The limited right of mortgagee can be acquired by adverse possession even though the mortgage deed was invalid AIR 1958 Raj 102, **Overruled.** AIR 1938 Pat 479 Held obiter and **Dissented from.**) ** AIR 1957 Pat 245
18. AIR 1968 Punj 473 (475).
19. 1988 All LJ 594 (597) : (1988) 2 Civ LJ 356.
20. AIR 1926 Mad 955 (958) (DB) ** AIR 1927 Mad 189 (190) (In a suit for redemption of kanom, a sum due to mortgagor for arrears of rent from the mortgagee can be set off against the kanom amount)

    [See AIR 1951 Trav-Co 17 (21) (DB).]

    [See also AIR 1957 Pat 452 (455). (Whether there is an allegation or not to that effect by mortgagor it is for the Court to determine the question in suit for redemption or possession whether the mortgage money has been satisfied or not.)]
21. (1978) 19 Guj LR 420 (443) (DB).

A suit for redemption cannot be met by a plea of a right of pre-emption under an agreement which under S 54 creates no interest in immovable property especially when a suit to enforce the right of pre-emption is barred by limitation (22) Nor can a mortgagee successfully plead in defence to the suit for redemption his right to sue for specific performance of a mere contemporaneous agreement for sale to him of the mortgaged property (23) A sub-mortgagee who has no privity of contract with the mortgagor, cannot resist the mortgagor's suit for a redemption on the ground that it is one for partial redemption, where no such objection has been raised by the mrotgagees (24)

The property which was subject matter of the mortgage was sold for arrears of rent in execution of a rent decree and the mortgagor had not proved any default of rent on the part of mortgagee and also not pressed the application for setting aside the auction sale when the auction purchaser a relative of mortgagee had compromised with mortgagor to return the money in respect of mortgage executed in favour of mortgagee and therefore the property was transferred to auction purchaser **Held,** the suit for redemption could not succeed (25)

In suit for redemption it is not incumbent that the question of paramount title raised by some other defendant must be decided under all circumstances (26) However it is held by the Kerala High Court in the undermentioned case (27) that the general principle that question relating to paramount title should as far as possible be excluded from the trial of a mortgage suit is not an absolute or inflenible rule to be applied without regard to the circumstances

Dismissal of a prior suit of redemption on merit on the ground that the mortgagor failed to prove the mortgage would operate as a bar to a subsequent suit for redemption (28)

Though suit for redemption is decreed a subsequent suit within limitation is not barred unless the right is lost in the meanwhile Any number of suits for redemption of the same mortgage within period of limitation may be tenable unless the right has been lost by act of parties (29)

Successive suits for redemption of mortgage can be filed till right of redemption as not extinguished. Dismissal of earlier suit for redemption whether as abated or as withdrawn or in default would not debar mortgagor from asking a subsequent suit, so long as mortgage subsists and right of redemption is not extinguished If the right to redeem is not extinguished under the old decree that decree will not operate as res judicata against subsequent suit (30)

Where the earlier suit for redemption was dismissed on ground relating to which its jurisdiction stood ousted by a statute, the decision in earlier suit being void would not operate as res judicata to a subsequent suit for redemption of mortgage In instant case the jurisdiction of civil Court to decide the question whether a transaction is "Ottium Kuzhikanavum" is ousted by the Kerala Land Reforms Act (1964) Therefore subsequent suit would not be barred by res judicata (31)

A decree for redemption in a redemption suit, unless it could be said to involve a decision that the mortgagor's right to redeem was extinguished, cannot operate as *res judicata* so as to prevent

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22. AIR 1924 Mad 57 (61)
23. AIR 1956 Assam 17 (20) : ILR (1955) 7 Assam 489 (DB)
24. ILR (1958) Ker 165 (167, 168) : 1957 Ker LT 1283
25. AIR 1981 Pat 225 (227) : 1981 BLJR 527
26. 1967 BLJR 684 (687).
27. (1987) I Ker LT 223 (226)
28. ILR (1972) 22 Raj 913 (920) (Previous suit for redemption — Dismissal for failure of mortgagor to prove mortgage — Second suit held barred by res judicata)
29. 1970 Ker LT 149 (151)
30. AIR 1998 Guj 31 (37) : 1998 (1) Guj LR 760.
31. 1998 AIHC 3203 (3204) : 1998 (2) Ker LT 29

the Court from trying a second suit for redemption.(32) So also, where after obtaining a decree for redemption in a joint action one of the co-mortgagors redeemed the whole property by virtue of his title to a half share in the equity of redemption and the other co-mortgagor filed a suit for redemption of his half share of the properties on partition by metes and bounds, it was held that the suit was not barred by the previous joint action of the co-mortgagors, the cause of action for a suit for redemption being a recurring one (33) Where the earlier suit for redemption was dismissed on ground that the plaintiff was not entitled to a right to redeem the successor in interest of the plaintiff cannot seek to redeem the same mortgage even on plea of co-ownership which was raised for the first time in subsequent suit The principal of constructive res judicata will operate in such case (34) See Note 40 on S 11 in the AIR Commentaries on the Code of Civil Procedure, 10th (1985) Edn

If the question of amount due has been decided in a previous suit between the parties it cannot be reopened in a subsequent suit for redemption under Section 3 of the Usurious Loans Act, 1918 (35)

Where the interest of a mortgagee has been divided between more than one person, the mortgagor cannot, at his pleasure, bring separate suits against each of them for redemption. This section does not justify such a course (36) Where under a mortgage deed, though the share of each of the joint mortgagees is set out and specific portion of the property is made security for each, the mortgage money is required to be paid in a lump sum, a single suit for the redemption of the mortgage is in no way barred by law.(37)

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32. **AIR 1934 PC 205 (207) : 56 All 561 : 61 Ind App 362 ** AIR 1950 FC 1 (6) : 1949 FCR 484** (AIR 1945 Mad 225 **Reversed.**) ** AIR 1965 Ker 153 (153) ** AIR 1963 Mad 226 (230) ILR (1963) Mad 454 (Prior suit for redemption held barred under Art 148 Limitation Act (1908) — Subsequent suit for redemption held barred to principle of res judicata) ** ILR 1955 Punj 830 (836) (Provision in redemption decree stating that if amount was not paid right of redemption would be barred — Final decree for redemption — No payment made — **Held,** right of redemption was lost — Second suit barred) ** **AIR 1955 Trav-Co 9 (12) : ILR (1954) Trav-Co 675 (FB).** (A subsequent suit for redemption is maintainable even though the execution of the decree for redemption obtained in the previous suit is barred by limitation) ** AIR 1949 Mad 443 (448) ILR (1949) Mad 276 (DB) ** AIR 1930 Oudh 465 (467).

[**See also** AIR 1956 All 237 (240) (Order under S 12 U P Agriculturists' Relief Act 27 of 1934, is equivalent to a final decree in a redemption suit freeing the mortgaged property from the burden of the mortgage — Consequently there is no further right to redeem)] ** AIR 1953 Orissa 17 (19) ILR (1952) Cut 493 (Suit for recovery of possession as from a trespasser — Decree which was not one under O 34 R 7 allowing plaintiff to recover possession on payment of mortgage money due to defendant No final decree dismissing suit passed on failure of plaintiff to comply with the condition — **Held,** second suit by plaintiff for redemption was not barred by res judicata) ** **AIR 1937 Mad 214 (216) : ILR (1937) Mad 545 (FB).** (B, assignee of jenmi, obtaining decree for possession conditional on payment of money for improvements made by tenant — Failure of B to execute decree — Jenmi applying for extension of time for payment — Application rejected — Subsequent suit by jenmi for redemption of same property — Jenmi held not precluded from bringing suit even though he had applied for extension of period in previous suit by assignee. AIR 1934 PC 205, Foll.)]

Also see Note 26

[**But see** AIR 1930 Oudh 270 (272) 5 Luck 684 (DB) (Obiter)]

33. AIR 1953 Trav-Co 335 (336) (DB)
34. 1979 Mah LJ 682 (686).
35. AIR 1970 Punj 152 (156) 71 Pun LR 129 (DB) (Question of amount due from mortgagor in subsequent suit for redemption - Question already decided in previous suit inter partes — Question cannot be reopened under Section 3 of Usurious Loans Act (1918))
36. AIR 1927 Bom 513 (513, 514) (DB).
37. AIR 1922 All 80 (81) (DB).

Where during the pendency of a suit for redemption one of the defendants died and an application for the addition of his legal representatives was made after the period of limitation it was held that so long as the right to redeem was not extinguished it was in the interest of the parties to allow the suit to proceed with the representatives added as parties rather than drive the plaintiff to institute a fresh suit against the surviving defendants and the legal representatives of the deceased defendant.**(38)**

In a suit for redemption the mortgagor and the mortgagee are the only necessary parties and no third party can be added. But in a case where the mortgagor is dead and some of his heirs file a suit for redemption the heir who has not been joined as plaintiff can file a petition to be added as a necessary party and can be joined as defendant **(39)**

In a suit for redemption the subject matter in dispute is not the property which has been given as security for the loan but it is the loan itself for which the security was given that constitutes the subject-matter.**(40)**

A suit for redemption is neither a suit in respect of rights or interest in land nor is it a suit for a proceeding for declaration or adjudication of any other right in regard to which proceedings can be taken under the Bihar Consolidation of Holdings Act **(41)**

The principles of estoppel which are applicable to the case of a landlord and tenant equally apply to the case of a mortgagor and mortgagee in possession. Hence a mortgagee cannot resist a claim for redemption on the ground that the mortgagor has no title to the mortgaged property **(42)**

Where a person claiming under a paramount title on the basis of decree against the mortgagor got only paper delivery the mortgagee who continued to be in possession cannot be said to have been dispossessed so as to entitle him to deny the mortgagor's right to redeem **(43)**

The question whether a suit for redemption is at all competent may be raised for the first time in second appeal, if all the facts on which the question hinges are set out in the plaint and no new facts have to be found.**(44)**

Where each of the several mortgagors is entitled to redeem in his own right the entire mortgage, if two of such mortgagors obtain decrees for redemption in separate suits the later decree in no sense supersedes the earlier since the later decree in no way effects the title to redeem found in the former decree.**(45)**

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38. AIR 1950 Pat 281 (282).

[See also AIR 1953 Bom 445 (446) · ILR (1954) Bom 29 (DB)]

39. AIR 1984 (NOC) 45 · 1983 BLJR 507

40. AIR 1951 Mad 723 (723) (DB) (AIR 1923 PC 102, Rel on)

41. AIR 1981 Pat 62 (64) (1981 BLJR 57 (DB) (Suit for redemption does not abate under S 4(c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act 22 of 1950.)

42. (1971) 2 Cut WR 733 (738) ** AIR 1962 Mad 395 (396) (Mortgagee in possession — Relationship between them subsisting — Mortgagee cannot deny mortgagor's title to property) ** AIR 1956 Mys 14 (16, 17) (ILR (1955) Mys 562 (To allow mortgagee to investigate title of mortgagor in the course of suit would unnecessarily enlarge scope of suit and create complications) ** (1851) 29 Mys LJ 5 (8, 9) (DB) (A mortgagee is precluded from denying the title of the mortgagor during the pendency of the mortgage. But if the title of the mortgagee has determined (for instance where there is an eviction by a title paramount), the rule of estoppel does not apply and the mortgagee can show that the title under which he entered has determined in fact and in law) ** AIR 1915 Cal 362 (368) (29 Ind Cas 746 (DB).

43. AIR 1973 Mys 28 (30, 31) : (1973) 1 Mys LJ 186.

44. AIR 1968 Punj 473 (476).

45. 1968 Ker LT 298 (298)

Section 60 gives the right to a mortgagor to file a suit for redemption only against the mortgagee. Therefore where the defendant was neither a mortgagee nor derived any title to the suit from the mortgagees who were legally in possession a suit for redemption is incompetent against such defendant.(46)

Where mortgagee is allowed to pay himself the mortgage money from rents and profits of the property mortgagor has to file a suit for recovery of possession But where the right to recover possession is on payment or tender of mortgage money or the balance thereof, under clause (b) of Section 62 it is in substance a suit for redemption(47).

Under the terms of a mortgage the mortgagee was put in possession with a stipulation that he was to pay certain amount by way of Michavaram and appropriate the balance towards interest and Michavaram remained unpaid the Michavaram amounts in his hands represented surplus profits realised from the property which were liable to be applied in redemption of the principal amount(48).

If the mortgagee continues in possession after payment of the mortgage money by 1921 and the suit is brought in 1966 it is merely a suit for possession simpliciter and not for redemption and will be in time as the mortgagee claimed to be in possession as a mortgagee and not adversely to the mortgagor as an owner(49).

A person claiming adversely both to the mortgagor and the mortgagee may be joined in a mortgage suit(50).

A mortgagor deposited the amount due under Sec. 83 and obtained delivery of the property and documents which reliefs he could have obtained in a suit for redemption Thereafter if the mortgagor sues for rendition of accounts against the mortgagee it would be in enforcement of incidental rights which could have been granted in the suit for redemption the suit will be tenable because it is not a suit for redemption(51).

When there is no evidence to prove payment of mortgage money and no entry of such payment even in account books of mortgagor, title of mortgagor is also not proved — Suit for redemption dismissed(52).

Neither on authority nor in principle can it be said that the Court has no powers to appoint receiver under O 40, R. 1 of Civil P C in a pending mortgage suit if the other requirements of the law viz., it should be just and convenient to appoint a receiver having regard to the facts and circumstances of each case, are satisfied(53). Persons claiming title to mortgaged property in derogation of title to mortgagor are not necessary parties to suit for redemption filed by mortgagor However, where the relief asked for in the suits was also the possession of suit properties and those persons claiming adverse title were therefore impleaded in the suit, the mortgagor cannot withdraw the suit against those persons at the appellate stage when he had failed in the trial Court to establish his title(54).

49. Costs of mortgagee in suit for redemption.

The mortgagee, whether in a suit for redemption or for foreclosure is entitled to his costs,

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46. AIR 1977 (NOC) 284 (Gauhati).
47. ILR (1966) Andh Pra 1084 (1092-93).
48. AIR 1970 Ker 289 (296, 299, 300) : ILR (1970) 1 Ker 10.
49. AIR 1977 (NOC) 255 (All).
50. AIR 1975 Kant 179 (181) : (1975) 1 Kant LJ 105.
51. AIR 1969 SC 751 (758, 759) : (1969) 2 SCJ 147.
52. 1982 WLN (UC) 224 (228) (Raj).
53. AIR 1989 Bom 21 (24) : (1988) 2 Bom CR 189
54. 1984 Ker LT 13 (16).

from the mortgagor, unless he has forfeited it by some improper defence or other misconduct(1). The right to such costs does not depend upon any exercise of that descretion of the Court, which, in litigious causes, is generally not subject to review(2). The reason for this was stated in *Wetherell v Collins*(3) to be that *at law* the mortgagee is the absolute owner of the property after default, and if the mortgagor claims redemption which equity gives him, it must be on terms indemnifying the mortgagee for all costs arising out of his legal acts. In *Cotterell v Stratton*(4) the reason was given by the Lord Chancellor as follows :

> "The contract between mortgagor and mortgagee, as it is understood in this Court, makes the mortgage a security not only for principal and interest, and such ordinary charges and expenses as are actually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption. These rights, resting substantially upon *contract*, can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract."

It follows from the above, that in a suit by the mortgagee for recovery of his amount where there was no valid tender of the amount before suit(5) or in a suit for redemption where there has been no such tender(6), the mortgagor must pay the costs of the suit. But if there was a valid tender and the mortgagee has refused it, the mortgagee will in a subsequent suit for redemption(7) or for

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Section 60 — Note 49

1. ILR (1966) 1 Ker 398 (404) ** AIR 1960 Punj 480 (482) (DB) (Suit for redemption — Mortgagee unsuccessfully claiming title to mortgaged property — **Held**, not entitled to costs.) ** AIR 1959 Cal 624 (625) : ILR (1959) 2 Cal 503 (Costs as a rule are part of mortgage-decree and recoverable from mortgaged property — But Court can grant personal decree for costs.) ** AIR 1954 Ajmer 9 (1) (9) (Mortgage suit — Suit by mortgagee after due and reasonable notice to defendants — Mortgagee is in all events entitled to costs unless his conduct is contumacious.) ** AIR 1954 Trav Co 313 (314, 315) : ILR (1953) Trav-Co 823 ** AIR 1953 Bom 445 (448) : ILR (1954) Bom 29 (DB) (A mortgagee is only entitled to party and party costs and not costs as between attorney and client.) ** AIR 1953 Trav-Co 423 (424) (DB) ** AIR 1952 Trav-Co 447 (448) (Defendants raising arguable contentions on suit for redemption — Order directing parties to bear their own costs held not improper.) ** AIR 1952 Trav-Co 329 (330) : ILR (1951) Trav Co 896 (DB) ** AIR 1952 Trav-Co 295 (300) : ILR (1952) Trav Co 152 (DB) (Putting excessive value on improvements is not misconduct which would disentitle a mortgagee as to his costs in an action for redemption — Mortgagee however claiming more than what was bargained for in mortgage deed and also putting plaintiff to prove his title to redeem when there was no doubt about his title — Mortgagee allowed only one fourth of costs incurred by him.) ** AIR 1951 Trav-Co 17 (22) (DB) ** AIR 1939 Mad 751 (756) (DB) (Mortgage is security also for the costs properly incident to a suit for foreclosure or redemption.)

   See Note 16 on Section 84

2. (1872) 42 LJ Ch 417 (419) : 8 Ch 295 : 21 WR (Eng) 234 : 28 LT 218, Cotterell v Stratton
3. (1818) 56 ER 502 (503) : 3 Mad 255 : 18 RR 229
4. (1872) 42 LJ Ch 417 (419) : 8 Ch 295 : 21 WR (Eng) 234 : 28 LT 218
5. (1840) 49 ER 34 (35) : 52 RR 44, Hodges v. Croydon Canal Co.
6. AIR 1918 Mad 942 (945) (DB) ** (1884) 8 Bom 190 (193) (DB) (Defendant in a redemption suit is ordinarily entitled to his costs unless he has refused a tender of the amount due to him or has so misconducted himself in the course of the suit as to induce the Court to subject him to a penalty.) ** (1898) 22 Bom 440 (446) (DB) (A mere offer by letter to pay an amount is not usually treated as a tender either in law or in equity.) ** (1895) 8 CPLR 113 (121) ** (1909) 2 Ind Cas 662 (669) (DB) (Cal).
7. (1911) 80 LJ Ch 295 (297) : 103 LT 895, Rourke v Robinson ** (1918) 88 LJ Ch 31 (37) : 119 LT 526, Graham v. Seal ** (1903) 5 Bom LR 387 (389) ** (1899) 1 Bom LR 381 (383) (DB).

   [**See also** (1869) 38 LJ Ch 566 (567) : 17 WR (Eng) 1001, Pearce v Morris (Mortgagee

foreclosure(8) be disentitled to his costs. A mortgagee who unsuccessfully disputes the mortgagor's right to redeem will be disentitled to his costs(9).

50. Onus of proof in suit for redemption.

In a suit for relief by *A* against *B* on the allegation that *B* is only a mortgagee, it is incumbent upon *A* to establish that there is a subsisting mortgage in respect of which he is entitled to the relief claimed(1). If he fails to do so his suit must fail(2). He cannot succeed merely because the mortga-

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accepting money tendered but refusing to give up title deeds or to convey the legal estate was held liable for costs of the suit.)

8. **(1863) 11 WR (Eng) 1036 (1037) : 132 RR 873, Broad v. Selfe**

9. 1884 Bom PJ 254 (DB).

Section 60 — Note 50

1. **AIR 1920 All 92 (93) : 42 All 575 (FB) ** (1889) 11 All 438 (443) (FB) **** AIR 1963 Andh Pra 420 (422, 423) ILR (1962) Andh Pra 1054 (DB) (Sale of hypotheca by manager of joint Hindu family to mortgagee in discharge of mortgage debt — Suit for redemption thereafter by member of family is misconceived.) ** AIR 1959 Ker 377 (379) ** AIR 1958 Raj 110 (112) (Consideration cannot be omitted that it is defendant who would naturally have the mortgage deed and it would be more in his power to give evidence of its contents than in that of the plaintiff.) ** 1955 Raj LW 472 (473) ** AIR 1952 Kutch 1 (2) ** AIR 1952 Kutch 8 (9) (Courts will view the evidence in the light of the presumption that there is a subsisting mortgage — Onus becomes immaterial when both sides have led evidence.) ** AIR 1952 Raj 91 (93) ILR (1951) 1 Raj 166 ** AIR 1951 Ajmer 21 (23) ** AIR 1950 All 88 (89) ILR (1951) 1 All 117 ** AIR 1935 Lah 515 (516) (DB) (Mortgagee claiming the status of a mortgagee at the time of the sale of his rights — Does not estop his assignee from demanding proof from the mortgagor at the time of redemption that the mortgage was subsisting at the time the mortgagee described himself as a mere mortgagee.) ** 1905 All WN 14 (15) (DB) ** (1896) 18 All 403 (407) (DB) ** AIR 1914 All 512 (512) (DB) ** AIR 1916 All 98 (99) (DB) ** AIR 1923 All 441 (441) ** (1926) 95 Ind Cas 945 (945) (Oudh) ** AIR 1933 All 21 (24) 54 All 975 (DB) ** 1894 All WN 167 (168) (DB) ** AIR 1923 Lah 219 (220) ** AIR 1934 Lah 121 (122) ** AIR 1926 Oudh 546 (547) ** AIR 1923 Lah 243 (244) ** AIR 1923 Lah 665 (666) ** AIR 1925 Lah 632 (633) ** AIR 1926 Lah 120 (121) ** AIR 1927 Lah 574 (576) (Unless a plaintiff in a redemption suit gives prima facie evidence that the suit is brought within limitation he fails to show that he has a subsisting right to the property in suit or in other words he fails to prove his title.) ** AIR 1917 Oudh 124 (125) ** (1886) 8 All 295 (300) (DB) ** AIR 1914 All 43 (44) ** **AIR 1938 Oudh 16 (16) : 13 Luck 669**

   [See also AIR 1926 All 234 (236) 48 All 251 (DB) (Where in a suit for redemption the plaintiff fails to prove the mortgage but the defendants are found to be in permissive possession of the property title of the plaintiff is proved.)]

2. **AIR 1943 All 393 (399, 403) : ILR (1944) All 76 (FB).** (Specific mortgage pleaded must be proved.) ** ILR (1956) 6 Raj 55 (61) (DB) (Suit for redemption — Plaint not mentioning specific mortgage — Document mentioning the document filed with plaint — Notice of it taken by defendant who had the deed in possession — Defect held not fatal to the suit.) ** 1955 Raj LW 472 (474) ** AIR 1954 Ajmer 47 (47) (**Held** that the plaintiff's allegation that the property in suit had been mortgaged with the defendant was not satisfactorily proved and as such the plaintiff was not entitled to succeed.) ** AIR 1951 Ajmer 21 (23) ** (1927) 100 Ind Cas 58 (59) (Lah) ** AIR 1914 All 362 (363) ** AIR 1927 All 781 (782) ** AIR 1931 Oudh 378 (379, 380) 7 Luck 94 ** (1907) 17 Mad LJ 122 (123) (DB) ** AIR 1925 Rang 7 (7) : 2 Rang 397.

   [See also 1882 All WN 131 (131) (DB). (Failure to prove mortgage by legal evidence.) ** 1882 All WN 137 (137) (DB) (In a suit for redemption mortgagor claiming to recover mortgaged property on payment of Rs 20 — Mortgagee alleging that land was mortgaged for Rs 400 — Mortgagor failing to prove that the land was mortgaged for Rs 20 nor

gee has failed to establish his defence(3), for a plaintiff must succeed on the strength of his own title and not on the weakness of his oppenents(4). He must let in *prima facie* evidence of his right(5). If he does adduce such evidence it will shift the *onus* on to the opponent(6). What is *prima facie* evidence to satisfy the above requirement will largely depend upon the facts and circumstances of each case(7). In the undermentioned case(8) the plaintiff sued for redemption of a mortgage alleged to have been executed 45 years before suit but failed to prove the specific mortgage pleaded. He however, proved that the defendant was a mortgagee under some mortgage. It was held that the *onus* of proof which was on the plaintiff to prove his case was sufficiently discharged by showing that the defendants were mortgagees.

Where a party alleges that sub-mortgage was created by mortgagee with prior knowledge of mortgagor, onus of proving such fact is on party alleging it(9).

The *admission* by the defendant that he is a mortgagee *under the mortgage set up* may dispense with proof of the plaintiff's right(10). The admission must, however, be one made in the

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offering to pay any such sum as might be found by Court. — Suit held rightly dismissed.) ** (1874) 6 NWPHCR 36 (37) (DB). (Mortgagee in possession as ostensible owner for a long time. — Burden is on mortgagor to prove that he is in possession as mortgagee and not as owner.)]

3. **(1889) 11 All 438 (450) (FB)** ** (1889) All WN 187 (187) (DB) ** AIR 1914 All 43 (44).

   [**See also** AIR 1950 All 88 (89). ILR (1951) 1 All 117. (Decree in suit for redemption on the ground that defenadnt had failed to show that the suit is barred by limitation. — No finding recorded that claim was not barred. — **Held,** Court has acted illegally and with material irregularity.)]

4. **(1854) 10 Moo Ind App 151 (160) (PC)** ** (1954) Madh BLJ HCR 387 (388, 389) ** AIR 1929 Rang 179 (180, 181). 7 Rang 140 ** (1900) Pun Re No. 7, p. 349 (351) ** AIR 1917 Low Bur 71 (71) ** (1884) 9 Bom. 37 (40) (DB) ** AIR 1934 Pat 615 (616). (10 Moo Ind App 151 (PC), Rel. on.) ** (1865) 2 Suth WR 261 (262) (DB) ** AIR 1927 Lah 57 (57).

   [**See also** AIR 1914 Mad 23 (23) (DB). (Mortgagor relying for his title on sale for arrears of rent. — He must prove validity of sale.) ** (1884) 8 Bom 543 (546) (DB). (A defendant sued on a mortgage to A in 1830 cannot fairly be called on to meet a case of some undefined mortgage to B in or about 1830.)]

5. **(1889) 11 All 438 (446) (FB)** ** (1954) Madh BLJ HCR 387 (388, 389) ** AIR 1916 All 98 (99) (DB) ** (1903) 11 Qudh Cas 285 (289) (DB).

6. **(1889) 11 All 438 (FB)** ** (1875) 3 Ind App 85 (88) (PC) ** (1954) Madh BLJ HCR 387 (388, 389) ** (1886) 8 All 295 (300) (DB). (3 Ind App 85 (PC) Foll.) ** (1913) 20 Ind Cas 29 (30) (DB) (All) ** AIR 1931 Pat 295 (296). 10 Pat 417 (DB) ** (1903) 27 Bom 271 (278) (DB) ** 1886 Bom PJ 247 (DB). (Prima facie proof that a mortgage had been originally made will be sufficient to shift the onus on the defendant.) ** 1884 Bom PJ 18 (DB). (Do).

7. AIR 1916 All 98 (100) (DB) ** (1911) 10 Ind Cas 7 (8) (Oudh).

8. (1903) 27 Bom 271 (277, 278) (DB).

9. AIR 1985 Ker 163 (166).

10. AIR 1952 Kutch 1 (2). (When a mortgage alleged is either admitted or proved, it may be presumed in a proper case having regard to the circumstances of the case, that it is a subsisting mortgage, if it is shown that the equity of redemption therein was not extinguished by operation of law of limitation.) ** (1889) 12 All 189 (191) (DB) ** AIR 1929 All 305 (306) ** AIR 1929 All 242 (242) ** (1913) 20 Ind Cas 666 (666) (Low Bur). ** AIR 1929 Rang 179 (180, 181). 7 Rang 140. (Where the mortgage which was alleged to be possessory could not be proved because there was no registered instrument, but the mortgagee admitted that the mortgagor had mortgaged the land to him but he had never been put in possession, **Held** that the mortgagor's suit for redemption of a possessory mortgage and for possession of the mortgaged property on the footing of redemption of that mortgage was bound

proceeding filed by the plaintiff and not one made in some other proceeding(**11**). Where the defendant admits the mortgage, the *onus* will be on him to show that it is not redeemable(**12**). As to what amounts to an admission of the mortgage so as to dispense with proof of the same, see the undermentioned cases(**13**).

Where the defendant admits a mortgage but denies that the plaintiff is the mortgagor, the latter cannot succeed on the mere admission of the defendant(**14**).

Where the mortgagor fails to prove the mortgage pleaded by him, but the defendant *admits* that he is a mortgagee under a *different* mortgage then, according to the Allahabad and Oudh Courts, the mortgagor cannot take advantage of the admission and get a decree in that suit for relief on the basis of the mortgage admitted(**15**) The Travancore-Cochin(**16**) and the Rajasthan(**17**) High Courts have also taken a similar view But according to the Bombay Madras and Rangoon Courts

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to fail because he could not prove the mortgage — The admission of the mortgagee could not bind the other claimants and it was no admission of the alleged possessory mortgage) ** (1903) 27 Bom 271 (278) (DB).

[**See also** (1880) 4 Bom 584 (588) (DB) (Defendant admitting that relations between him and plaintiff were those of mortgagee and mortgagor but contending that right to redeem was time-barred — Contention decided in plaintiff s favour and against defendant — Plaintiff held entitled to decree.)]

11. **See** (1884) 8 Bom 543 (546, 547) (DB) (Statement in a report by survey karkun)

12. AIR 1952 Kutch 8 (9) ** AIR 1922 Mad 185 (185) (DB) (There is nothing in books on Malabar Law to show that the tenure Neerozhikka Otti Kanom is irredeemable) ** AIR 1918 Mad 121 (122) (DB).

[**See also** AIR 1927 Mad 92 (93) (Where the pleadings show that the defendant admits his position as mortgagee and the terms of the mortgage, a suit for redemption will lie) ** ILR (1951) Trav Co 282 (284) (DB) (Redeemability is the normal incident of a mortgage or a lease transaction and except in cases where the law has made it irrideemable the jenmi can be deprived of his right of redemption only when he has created permanent occupancy right in the tenant.)]

13. AIR 1924 All 458 (458 459) (DB) (The very fact of the mortgagee selling his rights was an express acknowledgment of the existence of a subsisting mortgage and of subsisting rights which he was competent to sell and the very fac of the defendant purchasing those rights was an acceptance on his behalf of an existing mortgage a mortgage which was in force as a subsisting mortgage at the date of the sale to him.) ** AIR 1929 All 242 (242) (Admission by mortgagee in his written statement that he is a mortgagee in possession of land in dispute is a sufficient acknowledgment that the maker of the statement thinks and believes that he is liable to be redeemed at the date of making of the statement)

14. AIR 1925 Oudh 250 (251).

15. AIR 1941 All 362 (363) (Plaintiff is at liberty to bring another suit on the mortgage admitted by defendant) ** AIR 1934 All 656 (657) (Different considerations are applicable to a case in which the suit framed as one for redemption is in substance a suit for possession pure and simple) ** (1926) 96 Ind Cas 304 (305) (DB) (All) ** (1926) 98 Ind Cas 1035 (1037) (Oudh) ** (1900) 3 Oudh Cas 173 (175) ** (1896) 18 All 403 (407) (DB) ** AIR 1926 Oudh 546 (547).

[**See also AIR 1943 All 393 (399, 403) : ILR (1944) All 76 (FB).** (Usufructuary mortgage — Redemption — Suit for — Plaintiff not proving specific mortgage set up by him — Suit is liable to be dismissed. (Per Bajpai and Dar, JJ.)

16. 1954 Ker LT 695 (697) (Where the plaintiff brings a suit to redeem a specific mortgage (kanom) mentioned in the plaint he is bound to prove that mortgage and if he fails to do so he cannot succeed in the suit even if it is found that the defendant is in possession of the property as a mortgage. (AIR 1943 All 393 (FB) Foll.)

17. AIR 1950 Raj 47 (51) (DB) (AIR 1938 Oudh 16. Relied on.)

he can be given a decree on the basis of the admitted mortgage(**18**) But the admission must be taken *as a whole* or not at all. Thus, where the mortgagee admitted a mortgage for Rs. 270, while the mortgagor sued to redeem a mortgage for Rs 246, the latter can, if he wishes to rely upon the admission, be given a decree for redemption only on payment of Rs 270(**19**)

The mortgagee, who accepts the mortgage of a property on the understanding that the mortgagors had the right to mortgage the entire property and redeem it cannot subsequently resile from the position and oppose what was mortgaged by the document(**20**)

51. Suit for possession by mortgagee under terms of mortgage deed — Mortgagor, if can plead right of redemption in defence.

Where a mortgagee brings a suit for possession in pursuance of a condition in the mortgage deed that if the principal and interest are not paid off in a certain period, the mortgagee can take possession of the mortgaged property, the mortgagor cannot, in that suit, claim to redeem the mortgage He can only bring a separate suit for that purpose(**1**)

52. Limitation.

Under Art 148 of the Limitation Act, 1908 (now see Art 61(a) of the Act of 1963), the period of limitation for a suit for redemption against a mortgagee was 60 years and time ran from the date when the right to redeem accrued Where the mortgagee transferred the mortgaged property as *owner* to a third person a suit for possession against such third person by redemption was governed by Art. 134 of that Act (now see Art 61(b) of the Act of 1963) under which the period of limitation was 12 years from the time when the transfer became known to the plaintiff See Notes on those Article AIR Commentaries on the Limitation Act, 7th (1997) Edition

Where after executing mortgage by conditional sale, the mortgagors died before the period of re-conveyance expired under S. 16(1) of the Limitation Act, the period of limitation would be computed from the time when the L R of the deceased became capable of instituting the suit for redemption of mortgage and recovery of possession Consequently when the suit was filed within the period of 30 years from the date when the L R of mortgagor attained majority the suit would

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18. (1893) 17 Bom 365 (368) (DB) ** 1888 Bom PJ 131 (DB) ** AIR 1917 Mad 495 (499) (DB) ** (1907) 30 Mad 388 (390) (DB) ** (1869) 4 Mad HCR 359 (366) (DB) ** (1912) 14 Ind Cas 815 (816) (Upp Bur) (A sued B for redemption of a piece of land which he said had descended to him from an ancestor — He claimed to redeem it for Rs 246 — B admitted the mortgage, but alleged that the original mortgage money was Rs 270 — **Held**, that the ordinary rule must be applied that as A could not succeed without relying on B's admission that admission must be taken as whole and that it must be held that the original mortgage-money was Rs 270) ** AIR 1923 Rang 24 (25) 4 Upp Bur Rul 114

19. (1912) 14 Ind Cas 815 (816) (Upp Bur) ** AIR 1923 Rang 24 (25) 4 Upp Bur Rul 114

20. AIR 1950 Kutch 36 (37).

Section 60 — Note 51

1. AIR 1945 Mad 225 (229) ILR (1945) Mad 803 (DB) ** AIR 1937 Oudh 406 (409) 13 Luck 357 (DB) (AIR 1925 Oudh 235 **Not foll.** AIR 1926 Oudh 357 Foll) ** AIR 1928 Lah 668 (669) (DB) ** AIR 1926 Oudh 357 (358) 2 Luck 213 (DB) ** AIR 1925 Oudh 150 (151).

[**See however** AIR 1920 Oudh 311 (311) (A mortgage deed by its terms was a deed of simple mortgage for the first five years — After the first five years the mortgagees were to have the option of retaining the deed as a simple deed or obtaining possession — If they entered into posseession, there was to be no redemption for ten years after they had obtained possession — The mortgagor did not redeem within five years but as soon as the mortgagees sued for possession, he deposited the amount required to redeem the mortgage — **Held**, that the mortgagor could be allowed to redeem.)]

not be barred by time(1).

If the period of mortgage is fixed and mortgagor is to pay some amount after the expiry of that period, the mortgagor may tender that amount to the mortgagee and his right to recover possession would accrue after the period of mortgage has expired. Where no mortgage period is fixed and option is given to the mortgagor to pay the mortgage money and thereafter recover the possession, he is entitled to pay mortgage money at any time and thereafter seek recovery of possession. If the mortgagee refuses to deliver the mortgaged property time to bring the suit would run from that period(2). If mortgagee comes into possession of the property pursuant to usufructuary mortgage, his possession has a lawful origin. A mere assertion of adverse title on his part cannot affect the subsisting equity of redemption of the mortgagors or operate to shorten the period of limitation prescribed for a suit for redemption(3).

Article 61(a) of the Limitation Act, 1963 refers not only to a suit to redeem but also a suit to recover possession of immovable property mortgaged. In the instant case the mortgage ceased to exist on 10-1-1953 by operation of Madras Agricultural Relief Act (1938) as amended by Act 24 of 1950 and upon that date the mortgagor acquired the right to recover possession of mortgaged property The suit for recovery of possession is thus covered by Art 61(a), Art 65 would not apply as on 10-1-53 the possession of the mortgagee did not become adverse to that of mortgagor(4).

Where the Court declares that the stipulation in the mortgage deed that redemption could be enforced only after expiry of 99 years is a clog on redemption, the starting point for limitation for filing the suit for redemption would be the date on which the offending clause in the mortgage deed was struck down by the Court(5).

A suit for redemption of usufructuary mortgage filed within 29 years of execution of mortgage deed and delivery of possession is not barred by limitation in view of Art 61(a) of the Limitation Act (1963)(6).

In the instant case it was not proved that the mortgagor had paid the mortgage money to the mortgagee and that since the mortgagor did not redeem the mortgage within the prescribed period of 30 years, the mortgagee became the owner of the mortgaged land(7).

By reason of the operation of the Madras Agricultural Relief Act (1938) as amended by Act 24 of 1950, the mortgage debt (incurred in 1923) had been wiped out on 10-1-1953 The limitation for filing suit for redemption would be 30 years under Art 61(a) from 10-1-53 and not 12 years under Art. 65, the possession of the mortgagee could not be said to have become adverse to mortgagor from 10-1-53 and therefore Art. 65 has no application(8).

Where the terms of mortgage were hit by provisions of Usurious Loans Act, 1918 and the mortgagee could not also recover more than double the amount advanced, and he was also liable to render the accounts which he did not, it would be fair and reasonable that he had already recovered more than the amount advanced from the period of 63 years when he remained in possession and enjoyed the fruits of land, the mortgage would be deemed to have been redeemed during limita-

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Section 60 — Note 52

1. 1996 AIHC 3493 (3499) : 1996 All CJ 42.
2. 1991 Srinagar LJ 356 (359, 360) (J & K).
3. 2000 (3) BLJR 1886 (1890)
4. **1996 (1) Cur LJ (CCR) 149 (150) (SC).**
5. 2002 AIHC 465 (473) (Guj) (AIR 1977 Mad 297, **Dissented from.**) ** AIR 2001 Guj 329 (340) : 2001 (1) Guj LR 697.
6. AIR 1999 Guj 101 (103) : 1999 (2) Land LR 220.
7. 1997 (1) ICC 767 (769) (Punj & Har).
8. **1996 (1) Cur LJ (C, Cr, R) 149 (150) (SC).**

tion(9). Mere purchase of mortgagee right would not give fresh period of limitation for redemption of mortgage(10).

See the undermentioned cases(11).

53. Adverse possession of equity of redemption.

Where a *third* person is in adverse possession of the mortgaged property for 12 years as *full owner*, a suit for redemption against him does not lie(1). It is only the perceptible act such as receipt of rents and profits by third party in assertion of possession of incorporal right of equity of redemption which can establish an adverse title(2). Where a possessory mortgagee is dispossessed by the trespasser whether the possession of the trespasser would be adverse to the mortgagor may be decided with reference to the following observations of Lord Davey in *Khuarajmal v. Daim*

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9. AIR 2002 Punj & Har 108 (111) : 2002 (1) Cur LJ (CCR) 85

10. 2001 AIR SCW 5213 (5213) : 2001 (1) Pun LR 503.

11. AIR 1983 Punj 171 (174) : (1983) 85 Pun LR 288 (FB) (Oral mortgage where money secured exceeded Rs. 100/- was valid before June 14, 1948 in State of Haryana. In such case, the terminus for limitation for redemption has to run from June 14, 1948. In a suit for redemption by mortgagor, the application for bringing legal heirs of mortgagee after 30 years is liable to be dismissed. (1966) 68 Punj LR 408 **Overruled.**) ** 1991 Srinagar LJ 356 (363) (Where no time was fixed as to when payment should be made by mortgagor and there was no evidence also to suggest that mortgagee had ever refused to accept the payment or tender offered by mortgagor and that the mortgagee had ever chosen to enforce the security against the mortgagor, the mortgagor's right to seek recovery of possession cannot be held to be lost because the mortgagor's right to sue would commence from date when mortgagee refuses to accept the payment or tender offered by mortgagor and it will continue till expiry of 60 years in favour of Art. 148 of Limitation Act.) ** 1988 Bank J 497 (500) (Bom) (Where in support of the claim that the properties were purchased from the mortgagee for valuable consideration, the sale deeds were not produced, it could not be held that the sale of mortgagee was for valuable consideration. Art. 61(b) of Limitation Act will not apply in such case.) ** AIR 1985 (NOC) 213 (1985) 1 Kant LJ 346 (Where the suit for redemption was filed on 2-1-1959, the provisions of Limitation Act, 1908 would be applicable and the period of Limitation for filing suit would be 60 years from date on which the right accrues to the mortgagor.) ** (1984) 1 Rent CJ 543 (544) (Punj & Har) (Where there was a concurrent finding of fact that alleged acknowledgment of mortgage by mortgagees extending period of limitation was not established, such finding cannot be assailed in second appeal.) ** AIR 1981 Pat 131 (133) 1982 BLJR 497 (Mortgage executed before commencement of Limitation Act, 1943 — Suit for redemption must be filed within 7 years of the commencement of the new Act in view of S. 30 of that Act.) ** AIR 1981 Madh Pra 111 (114) 1981 MPLJ 473 (The limitation for a suit for redemption of mortgage with possession where the period is one year will commence on the expiry of the stipulated period in absence of contract to the contrary.) ** AIR 1969 A 31 (Case under Tehri Garhwal Limitation Act, Art. 117.) ** ILR (1969) 3 Mad 535 (546) (If a usufructuary mortgagee transfers the mortgaged property to a third person as an absolute owner on the basis of a statement in the mortgage deed that if the mortgage is not redeemed within 7 years mortgagee would become owner, the condition is a clog and mortgagor would be entitled to redeem subject to liability to pay for improvements.) ** AIR 1967 Assam 32 (32) ILR (1964) 16 Assam 508 (Suit for possession after the expiry of the fixed period of usufructuary mortgage — Limitation under S. 125 of the Assam (Temporarily Settled Districts) Tenancy Act, 1935 applied.)

Section 60 — Note 53

1. (1912) 34 All 289 (294) (PC) ** AIR 1960 Pat 43 (45) ** (1979) 2 Mad 226 (228, 229) (DB).

   [See also AIR 1927 Sind 46 (48).]

2. AIR 1977 Ker 204 (206) (DB).

"The circumstances relied on as evidence of adverse possession are — that since the dates of the execution sale no accounts have been demanded by or rendered to the mortgagors or their representatives, no payments of subsistence money which they were entitled to under the mortgages have been made to them, and the parties after the sale ceased to cultivate the land and left the village and renewed pattas have been granted to nominees of the mortgagees If the purchasers had been independent third parties, and accounts had been rendered and payments made by the mortgagees to them instead of to the mortgagors, the circumstances relied on would have been cogent evidence of adverse possession of such third parties . ... . But there have been no separate dealings with the equity of *redemption as a distinct subject of property* Their Lordships are satisfied that the possession has been that of the mortgagee throughout, and the question at issue is exclusively one between mortgagor and mortgagee. As between them, neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a realease of the equity of redemption, will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem. It is almost unnecessary to add that a renewal of the parties or the making of a new settlement with Government in the name of nominees of the mortgagees did not alter the real title to the lands."(3)

The *equity of redemption*, where the mortgage is a simple one, or under some other form of mortgage under which the mortgagor is entitled to periodical payments from the mortgagees, is capable of adverse possession. See Note 7 on Arts. 64 and 65 in the AIR Commentaries on the Limitation Act, 5th (1976) Edn The result of such acquisition is, however, not the extinguishment of the right to redeem, but the transference of such right to the acquirer(4). But where the mortgagee is in possession and the adverse possession is as against him the mortgagor's right to redeem will not be barred thereby(5).

Though a usufructuary mortgage of an occupancy holding by the tenant is void the relationship between the tenant and the mortgagee will be analogous to that of a mortgagor and a mortgagee and so long as the mortgage money remains unpaid the mortgagee has right to retain possession and such possession cannot in law be adverse to the rights of the mortgagor(6)

The mortgage remains so long as it is not redeemed and the suit for redemption is always maintainable in law notwithstanding dismissal of earlier suit Once a mortgagee always a mortgagee No mortgagee can claim the property to the detriment of the mortgagor so long as the right of mortgagor is not extinguished(7). A mortgagee cannot deny the mortgagor's title to the mortgaged property during pendency of mortgage, but this principle would not apply where the mortgagee in possession is evicted by a person having paramount title(8).

A possession which may be adverse to the mortgagee may not necessarily be adverse to the mortgagor unless there is assertion of title as against the mortgagor and something must be done or declared excluding the mortgagor's right to resumption of possession at will(9).

Where property of a Muslim mortgagor is sold to the mortgagee while the mortgagor Muslim is a minor by the de facto guardian the nature of mortgagee's possession does not become adverse

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3. **AIR 1971 Ker 38 (43) : 1970 Ker LT 610 (FB).** ((1905) 32 Ind App 23 (PC) Foll.)
4. (1820) 37 ER 527 (579) 2 Jac & W 1, Marquis Cholmondeley v Lord Clinton.

   [**See also** AIR 1918 Cal 933 (938) 44 Cal 425 (DB) (Where a simple mortgage has been executed by a person in possession, the subsequent dispossession of the mortgagor though it may operate by lapse of time to extinguish the equity of redemption in favour of the adverse possessor does not affect the interest of the mortgagee.)]
5. AIR 1916 All 79 (81, 82) : 38 All 411 (DB)
6. **1975 All WC 522 (FB).**
7. 2000 AIHC 2081 (2086) : ILR (2000) Kant 1402.
8. AIR 1973 Mys 28 : (1973) 1 Mys LJ 186.
9. AIR 1980 Bom 213 (218, 219) : 1980 Mah LJ 725

by such act irrespective of the length of time of such possession(10)

A was put in possession of mortgaged property by the mortgagee after purported redemption of usufructuary mortgage and A claimed to be in possession not only of the mortgagee's right but also adversely to the mortgagor B purchased equity of redemption of the usufructuary mortgage, claiming possession on the strength of his title against A It was held that he was entitled to possession without redeeming the mortgage in favour of the mortgagee(11)

A person entering into possession of the property as a mortgagee and remaining in possession for a period exceeding 12 years does not acquire ownership by prescription so as to disentitle the mortgagor to redeem the property(12).

Possession of the mortgagee cannot become adverse to mortgagor so long as the right to redemption still subsists in the mortgagor(13)

The character as adverse possession depends on the animus possidendi of the person, under which the possession has been taken and continued Though the mortgage as such may be invalid the possession having been taken on the footing of a mortgage such possession is not in derogation of the absolute title of the owner, but is at least permissive(14)

Merely because the mortgage debt is satisfied or the document returned after endorsement it does not alter the character of possession of the mortgagee converting it into adverse possession, particularly when there is no arrangement in regard to the possession or ownership between the parties(15).

As to adverse possession of the mortgagee himself of the equity of redemption, see Note 28 on Arts 64 and 65 in the Commentaries above referred to

A co-mortgagor, redeeming the whole property will not become owner by adverse possession because no question of adverse possession arises in between co-mortgagors and other co-mortgagors are entitled to redeem their respective shares(16)

54. Lis pendens.

A mortgagee under a mortgage made during the pendency of a suit on another mortgage, will take his interest only subject to the incidents of the suit Thus, a *purchaser* from the mortgagor pending a redemption suit takes subject to the event of the suit and must redeem within the time fixed by the decree passed in the suit(1) Where the property is sold in execution of the decree, the purchaser will get a good title against all persons whom the suit binds Consequently the mortga-

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10. AIR 1967 Raj 258 · 1957 Raj LW 519
11. AIR 1969 Pat 171 (172, 173) : 1968 Pat LJR 551.
12. AIR 1971 Guj 239 (240) : (1971) 12 Guj LR 801
13. 1999 AIHC 4421 (4425) : 1999 (3) Ker LT 189
14. (1972) 38 Cut LT 450
15. ILR (1966) Andh Pra 1084.
16. 1982 Pun LJ 126 (127)

Section 60 — Note 54

1. (1885) 9 Bom 141 (145) (DB) ** AIR 1926 Nag 21 (22, 23) 23 Nag LR 86

[**See also AIR 1967 SC 1390 (1395) : ILR 46 Pat 870.** (Lease by mortgagor during pendency of suit by mortgagee — Lease not one granted in the ordinary course of management — Lessee not applying for being made party to ask for opportunity to redeem property — Decree passed in suit binds lessee and he cannot resist claim of auction-purchaser for possession.)]

Also see S 62, Note 18.

gee *pendente lite* cannot claim to redeem the mortgage after the sale(2). A subsequent mortgagee of an equity of redemption made during the pendency of a suit on the earlier mortgage for foreclosure is bound by the decree though not made a party thereto(3). Similarly, if the mortgagee purchases the equity of redemption after a suit for redemption has been filed, he is liable to be redeemed as to the whole of the property including the share purchased by him(4). Where successive mortgagees brought suits on their mortgages without impleading the subsequent mortgagees but the prior mortgagee's suit as well as his purchase in execution of the decree was the earliest in point of time, it was held that he was entitled to redeem the subsequent mortgagees and the rule of lis pendens did not apply to the case(5).

55. Mortgage pending attachment.

A mortgage made pending an attachment is void, as against the person claiming under the attachment. *A* mortgaged certain property to *B* pending attachment in execution of a decree obtained by *C* against *A*. The property was sold in execution and purchased by *D*. *D*, however, allowed his right to get possession to be barred by limitation Then he claimed to sue *B* for redemption of the property It was held that he had no right to do so(1)

56. Amendments in section not retrospective.

It has been held that the amended section is not retrospective in its operation(1).

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^[60A. OBLIGATION TO, TRANSFER TO THIRD PARTY INSTEAD OF RE-TRANSFERENCE TO MORTGAGOR.— (1) Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions, on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of re-transferring the property, to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly.

(2) The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance: but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.]

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2. **(1891) 18 Cal 164 (178) : 17 Ind App 201 (PC).**

   Also see S. 52, Note 18

3. (1805) 32 ER 1062 (1063) 11 Ves 194 (199) : 8 RR 131, Bishop of Winchester v Paine.
4. (1886) 10 Bom 648 (655) (DB).
5. AIR 1957 Ker 48 (51) : ILR (1957) Ker 35.

Section 60 — Note 55

1. AIR 1926 Mad 966 (967) (DB).

Section 60 — Note 56

1. 1964 Ker LT 153 (153, 154) (Right of redemption arising before application of T P Act to Travancore Law then allowing partial redemption — Subsequent application of S 60 of Act cannot alter the nature of right of redemption already vested in mortgagor) ** 1957 Ker LT 1289 1958 Ker LJ 78 (80) ** AIR 1934 Cal 775 (776) 61 Cal 894 (DB) **(Overruled** on another point in AIR 1942 PC 50.)

[A] Sections 60A and 60B were *inserted* by the Transfer of Property (Amendment) Act, 1929 (20 of 1929), S. 23.

Synopsis

1. **Scope of section.**
2. **Assignment must be by registered instrument.**
3. **Costs.**

1. Scope of the section.

Section 60 gives the mortgagor a right to require the mortgagee, under the circumstances stated therein, to *re-transfer the mortgaged property* to the mortgagor or to such persons as he may direct Before in introduction of S 60A in 1929, the mortgagee could not be *compelled* by the mortgagor or any other person to *assign* the *mortgage-debt* to any one else, though, at his own option, the mortgagee was entitled to assign the mortgage-debt to any of one he pleased

The section was introduced by the amending Act of 1929 and is framed on the lines of S 95 of the English Law of Property Act, 1925 (15 Geo V, Ch 20)(1). Sub-section (1) gives the mortgagor a right to *compel* the mortgagee, under the circumstances mentioned, to assign the mortgage-debt to such persons as he may direct Sub-section (2) extends the right conferred by sub-section (1) to encumbrancers of the property, but provides that the requisition of an encumbrancer shall prevail over that of the mortgagor and that, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer Sub-section (3) of the section excepts *a mortgagee with possession* from the operation of the section, as he is a person liable to account for the rents and profits under S 76 and it might prejudice him to assign away the debt until the accounts are passed.

2. Assignment must be by registered instrument.

The interest of a mortgagee is intangible immovable property and the transfer of such interest can be effected only by a registered instrument (1) It was held in the nothing in the Act which

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Section 60-A — Note 1

1. Section 95 runs as follows :

"95 (1) Where a mortgagor is entitled to redeem then subject to compliance with the terms on compliance with which he would be entitled to require a reconveyance or surrender he shall be entitled to require the mortgagee instead of re conveying or surrendering to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs, and the mortgagee shall be bound to assign and convey accordingly

(2) The rights conferred by this section belong to and are capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance but a requisition of an incumbrancer prevails over a requisition of the mortgagor and as between incumbrancers, a requisition of a prior incumbrancer prevails over a requisition of a subsequent incumbrancer

(3) The foregoing provisions of this section do not apply in the case of a mortgagee being or having been in possession.

(4) Nothing in this Act affects prejudicially the right of a mortgagee of land whether or not his charge is secured by a legal term of years absolute to take possession of the land but the taking of possession by the mortgagee does not convert any legal estate of the mortgagor into an equitable interest.

(5) This section applies to mortgages made either before or after the commencement of this Act, and takes effect notwithstanding any stipulation to the contrary

Section 60-A — Note 2

1. AIR 1941 Rang 122 (126) (DB) (AIR 1936 Rang 152, followed) ** AIR 1929 All 161

expressly required that an assignment of a valid existing equitable mortgage treated before the T P Act was made applicable should be in writing and registered and that it could be assigned by delivery of the title deeds.

3. Costs.

Section 60 provides that where the mortgagor requires the mortgagee to *re-transfer the mortgaged property*, the costs of such transfer shall be borne by the mortgagor Ths section says nothing about the costs of the assignment of the mortgage but on the same principle, it is clear that it should be borne by the mortgagor.

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^[60B. RIGHT TO INSPECTION AND PRODUCTION OF DOCUMENTS.— A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, as his request and at his own cost, and on payment of the mortgage's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.]

[A] See Foot-note (a) under S. 60A.

1. Scope of the section.

Prior to the year 1882 in England a mortgagee could noT be compelled to deliver up to the mortgagor any documents of title until actual payment or tender of all that was due to him. Nor was the mortgagee bound to allow inspection of such documents, though, under special circumstances, inspection of the mortgage deed itself was allowed (1) By the Conveyancing and Law of Property Act, 1881,(2) however, it was provided that the person entitled to redeem was entitled to inspect and take copies or extracts of the documents of title in the possession of the mortgagee. In this country also there was no provision corresponding to this, and it was held in some cases(3) following the English law, as it was before 1882, that the mortgagee was not bound to allow inspection of the documents of title until he was paid what was due to him under the mortgage. The English Law of Property Act, 1925, reproduced the said provision of the Conveyancing and Law of Property Act, 1881.

This section was newly added in this Act by the Amending Act of 1929 substantially reproducing section 96, sub-sec (1) of the English Law of Property Act, 1925.(4) A mortgagor is now entitled to inspect and make copies of the documents of title relating to the mortgaged property which are in the custody or power of the mortgagee He can exercise this right so long as his right of redemption subsists, but only at reasonable times and at his own costs and on payment of mortgagee's costs and expenses in that behalf.

(163, 164) 51 All 494 (DB) ** AIR 1918 Cal 411 (413) (DB) (A mortgage-debt is immovable property both for the purposes of S 54, T P Act and for the purpose of S 17(b) Registration Act) ** (1879) 3 Bom 312 (329) (DB) ** AIR 1926 Mad 903 (904) (AIR 1921 Mad 277 and AIR 1921 Mad 681, **Followed.**)

2. (1909) 5 LBR 93 (94) (DB).

Section 60-B — Note 1

1. Fisher, Law of Mortgage, 6th Edition, 1910, Pages 361, 362, 364

   [**See also** (1865) 14 WR (Eng) 166 (166) · LR 1 Eq 436, Patch v Ward.]

2. 44 & 45 Vict., Chap. 41, Section 16.

3. (1868) 5 Bom HCR (OC) 152 (157) ** AIR 1922 Bom 433 (435)

4. Section 96, sub-section (1) runs as follows :

A[61. RIGHT TO REDEEM SEPARATELY OR SIMULTANEOUSLY.— A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.]

[A] *Substituted* for the original section by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 24.

Synopsis

1. **Analogous law.**
2. **Scope of the section.**
3. **"Mortgagor."**
4. **"Same mortgagee."**
5. **"Contract to the contrary."**
6. **Right of consolidation where some charges barred by limitation.**
7. **"Redeem any one such mortgage."**
8. **Persons against whom the right of consolidation, if at all, is available.**
9. **Mortgagee, if bound to sue on all the mortgages together.**— See Notes on S 67A See also the Code of Civil Procedure, O 34, R 1, Note 10 in the Appendix
10. **Section, if retrospective.**
11. **Waiver of right to consolidate.**

1. Analogous law.

This section corresponds to S 93 of the Law of Property Act, 1925 (15 Geo V Chap 20(1) which runs as follows :

"93 (1) A mortgagor seeking to redeem any one mortgage is entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims solely on property other than that comprised in the mortgage which the seeks to redeem

This sub-section applies only if and as far as contrary intention is not expressed in the mortgage deeds or one of them.

(2) This section does not apply where all the mortgage were made before the first day of January eighteen hundred and eighty-two

(3) Save as aforesaid, nothing in this Act in reference to mortgages affects any right of consolidation or renders inoperative a stipulation in relation to any mortgage made before or after the commencement of this Act reserving a right to consolidate."

2. Scope of the section.

This section abolishes what is known in England as the doctrine of *consolidation* (1) Under

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"96 (1) A mortgagor as long as his right to redeem subsists shall be entitled from time to time at reasonable times, on his request and at his own cost and on payment of the mortgagee's costs and expenses in this behalf to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee. This section applies to mortgages made after the thirty-first day of December, eighteen hundred and eighty-one, and takes effect notwithstanding any stipulation to the contrary."

Section 61 — Note 1

1. Special Committee's Report, Transfer of Property (Amendment) Act XX of 1929 Cl 23 **** AIR 1916 Mad 934 (936) : 38 Mad 927 (FB).** (Section 61 is modelled on S 17 of the Conveyancing Act of 1881.) ** (1894) 16 All 295 (298) (DB).

Section 61 — Note 2

1. Special Committee's Report, Transfer of Property (Amendment) Act XX of 1929 Cl 23 **** AIR 1916 Mad 934 (936) : 38 Mad 927 (FB)** ** AIR 1956 Mad 467 (468) ** AIR 1921 Mad 183 (184) 44 Mad 301 (DB) ** AIR 1937 Oudh 321 (322) 13 Luck 215 (DB) ** AIR 1925 Pat 59 (63) 3 Pat 829 (DB) ** (1902) 25 Mad 108 (115) 11 Mad LJ 373 (DB) ** (1894) 16 All 295 (298) (DB) ** (1912) 15 IC 605 (606) (DB) (Mad) ** AIR 1921 Cal 321 (326) (DB).

the English law as it stood prior to 1882, where *A* held a mortgage on property *x* and also a separate mortgage on property *y* belonging to the same mortgagor, the mortgagor could not exercise his right of redemption of one of the properties alone without redeeming the other also at the same time. This is known as the *doctrine* of *consolidation of mortgages* (2). As was stated by Lord Selborne in *Jennings v. Jordon*(3) :

> "A mortgagee, who holds several distinct mortgages under the same mortgagor, redeemable, not by express contract, but only for virtue of the right which (in English jurisprudence) is called *equity of redemption*, may, within certain limits, and against certain persons (entitled to redeem all or some of them), *consolidate* them, that is, treat them as one, and decline to be redeemed as to any, unless he is redeemed as to all."

This doctrine was applied in this country also before the Act came into force (4).

The doctrine rested upon the principle enunciated by the maxim "he who seeks equity must do equity(5)". Thus, if *A* held a mortgage for Rs. 500 over property *x* worth Rs. 1,000, and another mortgage for Rs. 1,000 over property *y*, and the latter property became depreciated and its value reduced to Rs. 500, the mortgagor would be glad to clear off the mortgage on property *x* by payment of Rs. 500, while the mortgagee would be anxious to get the mortgage over property *y* cleared off as the security became insufficient. The right of redemption being an equitable right, the Court, in such cases, applied the maxim "he who seeks equity must do equity" and held that the mortgagee

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2. AIR 1956 Mad 467 (468) ** AIR 1921 Mad 183 (184) · 44 Mad 301 (DB) ** (1794) 30 ER 679 (681) · 2 Ves Jun 376, Jones v. Smith ** (1839) 160 ER 839 (844) · 3 Y & C Ex 597 · 51 RR 413, White v. Hillacre ** (1692) 23 ER 784 (784) · 2 Vern 286, Pope v. Onslow ** (1761) 28 ER 825 (826) · 2 Eden 78, Willie v. Lugg ** (1880) 49 LJ Ch 209 (211) . 13 Ch D 639, Mills v. Jennings ** (1896) 65 LJ Ch 449 (451) . 1896 App Cas 187, Pledge v. White ** (1880) 49 LJ Ch 563 (563, 564) · 14 Ch D 699, Cummins v. Fletcher (Rule of consolidation, has no application, unless there has been default as to both the mortgages.) ** (1870) 40 LJ Ch 137 (139), Crickmore v. Freeston (Rule only applies where the mortgagee has mortgages ready to be redeemed.)

   [**See also** (1851) 42 ER 544 (547) · De GM & G 240, Watts v. Symes.]

3. (1881) 51 LJ Ch 129 (130) · 6 App Cas 698 · 45 LT 593 . 30 WR (Eng) 369.

4. Special Committee's Report, Transfer of Property (Amendment) Act 20 of 1929, Cl 23 ** (1869) 6 Bom HCR (AC) 90 (93) ** (1872) 4 NWPHCR 161 (163) (DB) (Where several share-holders in an estate have executed a joint mortgage of it, and have all subsequently executed deeds of further charge to which one or more have been parties, a purchaser of a portion of the estate from all the co-sharers, suing for redemption of the whole estate must discharge all the debts which they jointly or severally charged on the property, for he represents all the co-sharers.)

   [**See also** AIR 1952 Trav-Co 363 (364) (DB) (Usufructuary mortgage — Further advance — Provision making the advance charge on property — Mortgagee held could consolidate the two documents and could claim the amount due thereunder. AIR 1952 Trav-Co 150, Foll.) ** AIR 1952 Trav-Co 150 (151) (DB) (Law before Cochin T. P. Act (17 of 1111). S. 65 whereof is similar to S. 61.) ** AIR 1951 Trav-Co 17 (20) (DB) (Law in Cochin before the Act.)]

   [**See however** the following cases where the rule of consolidation was not recognized · (1869) 11 Suth WR 310 (310) (DB) ** AIR 1917 Nag 137 (138) : 14 Nag LR 184 ** (1883) 7 Bom 526 (529) (DB).]

5. Halsbury, Laws of England, Vol. 21, Art. 381, (1761) 28 ER 825 (826) : 2 Eden 78, Willie v. Lugg ** (1880) 50 LJ Ch 187 (189) · 16 Ch D 117 · 44 LT 4 · 29 WR (Eng) 314, In re Rugett, Ex parte Williams ** (1876) 45 LJ Ch 165 (167) : 1 Ch D 491 · 33 LT 721 : 24 WR (Eng) 171, Baker v. Gray ** (1880) 49 LJ Ch 209 (211) . 13 Ch D 639 · 42 LT 169 · 28 WR (Eng) 549, Mills v. Jennings ** (1880) 49 LJ Ch 563 (563) . 14 Ch D 699 . 42 LT 859 . 28 WR (Eng) 772, Cummins v. Fletcher.

could consolidate both the mortgages and that the mortgagor could not redeem the one without redeeming the other(6).

But the rule became so extended as to cause an intolerable grievance to persons dealing with estates in mortgage. Accordingly, the rule was partially abolished by S 17 of the Conveyancing and Law of Property Act, 1881 (44 and 45 Vict , C 41) (7) Under that section, there was no consolidation of mortgages except where *there was a contract to the contrary* The old S 61 of the Indian Transfer of Property Act was enacted in the same terms as S 17 of the Conveyancing and Law of Property Act, 1881, which has been repeated in S 93 of the Law of Property Act, 1925 (15 Geo V Ch. 20.(8)

The old S 61 did not apply where several mortgages were executed over the *same* property There was a conflict of opinion on the question whether in such case, the mortgagor was bound to redeem all the mortgages together One set of cases held that the mortgagor was entitled to redeem each mortgage separately(9) and another set of cases held that he was not so entitled (10) In *Ramaravanimgar v Maharaja of Venkutagiri*(11) the question came up before the Privy Council and their Lordships held that the section implied that the mortgagor could not redeem one or some only of such mortgages And this view was followed in later cases(12)

The present section alters the law as laid down by the said Privy Council decision As the section stands, it is quite clear that where a mortgagor has executed several mortgages in favour of the same mortgagee over the *same* property, he is, in the absence of a contract to the contrary

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6. Topham, New Law of Property, 4th Edn , 1932 pages 304-305 Fisher Law of Mortgage 6th Edn., 1910, para 1210.
7. Fisher, Law of Mortgage, 6th Edn , 1910 paras, 1210 and 1211 ** AIR 1956 Mad 467 (468).
8. AIR 1956 Mad 467 (468) ** AIR 1921 Mad 183 (186) 44 Mad 301 (DB)
9. (1894) 16 All 295 (299) (DB) ** (1904) 27 All 313 (316) (DB) (16 All 295 Followed) ** (1906) 3 All LJ 672 (674) DB) (Section 61 refers to mortgages upon different properties) ** AIR 1917 Lah 446 (447 448) (DB) (A mortgagor can redeem the mortgage under which the mortgagee holds possession without redeeming other mortgages which give no right to possession.) ** AIR 1926 Oudh 59 (60, 61)
   [See also AIR 1929 Oudh 214 (215) (DB) (A usufructuary mortgage followed by simple mortgage — No consolidation though intention of parties was that both the mortgages should be paid off together — Mortgagor held could redeem first without paying up amount due on the second — AIR 1926 Oudh 59, Foll As regards the second mortgage deed time began to run only when the debt became payable according to the terms of the deed and not when money was paid in the redemption suit on the first deed)]
10. (1902) 25 Mad 108 (115) (DB) ** AIR 1921 Cal 321 (326) (DB) ** (1911) 11 Ind Cas 629 (630) (DB) (Mad) (Per White, C J) ** AIR 1914 Mad 290 (291) (DB) (11 Ind Cas 629 Followed) ** AIR 1927 Mad 1039 (1042) (DB) ** (1905) 8 Oudh Cas 132 (138) (DB) ** (1909) 31 All 482 (485) (DB) (Section 61 seems to provide that a mortgagor can insist on redemption of individual mortgages when the several mortgages comprise different properties) ** AIR 1919 Mad 1188 (1189) (DB) (Per Spencer J)
    [See AIR 1921 Mad 183 (186, 187, 193) 44 Mad 301 (DB) (The rule subjecting the assignee of the equity of redemption to the same limitation as the mortgagor is a harsh one and should not be extended by analogy.)]
11. **AIR 1927 PC 32 (36) : 50 Mad 180 : 54 Ind App 68 (PC).** (Rule applied to charges too)
12. **AIR 1930 All 136 (147, 148) : 52 All 281 (FB).** (Per King J) ** AIR 1952 Trav-Co 295 (297) ILR (1952) Trav-Co 152 (DB) (Notwithstanding the fact that the Transfer of Property Act was not law in Travancore and Cochin before its introduction there the principle which S. 61 (before its amendment in 1929) impliedly recognised was applicable to Travancore and Cochin.) ** AIR 1947 Mad 18 (31) (DB) (Decision on S 61 as it stood before amendment.) ** AIR 1928 Oudh 273 (276) 3 Luck 459 (DB) (AIR 1927 PC 32, Followed) ** (1930) 125 Ind Cas 27 (27, 28) (DB) (All) ** AIR 1937 Pat 156 (159, 160) 15 Pat 742 (DB). (The new law is also stated.)

entitled to redeem any of them without at the same time redeeming the other.(13) Hence even if there is a mortgage with possession and a leaseback of the mortgaged properties to the mortgagor and a charge is created on the equity of redemption for arrears or rent, still the two transactions cannot be treated as one and the same compelling the mortgagor to redeem the same as such(14).

In a suit for redemption the mortgagor should state, in the event of there being more mortgages than one, which mortgage he is seeking to redeem(15).

3. "Mortgagor."

The word "mortgagor" includes not only the mortgagor himself but also his heirs and survivors.(1) and successors in title This is made clear by S 59A which enacts that persons in this chapter to mortgagors . . shall be deemed to include references to persons deriving title from them" Thus, if *A* as a manager of the joint Hindu family, executes a mortgage deed, and after his death *A's* as manager of the joint Hindu family, executes another mortgage deed in favour of the same mortgagee, agreeing to repay the second mortgage money along with the first, this section will apply(2).

It is, however, necessary that the title of the mortgagor in respect of each mortgage must be in the same hands. This section, therefore, will not apply where one mortgage is by *A* as the sole mortgagor, and the other mortgage, by *A* jointly with *B*(3) On the same principle, where there are two or more mortgagors, one of them alone cannot, by executing a mortgage with a contract for consolidation, affect the right of his co-mortgagors to redeem the original mortgage(4).

4. "Same mortgagee."

A executes a mortgage *x* in favour of *B*, *B* transfers the mortgage in favour of C A, thereafter executes another mortgage *y* in favour of *C* in which he contracts that he will not redeem mortgage *x* without redeeming *y* Can it be said in this case that the mortgages *x and* y are in favour of the "same mortgagee" and can *C* claim to consolidate the two mortgages? Yes, *C* having taken a transfer of mortgage *X* from *B* is the "mortgagee" under mortgage *x* (see S 59A). The subsequent mortgage *y* was executed in favour of the "mortgagee" of mortgage *x*, that is, the "same mortgagee" This section will, therefore, apply.(1) In England also, the rule of consolidation has been held to apply to mortgages to different persons becoming vested by transfer in the same mortgagee (2) It

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13. AIR 1956 Mad 467 (468) ** 1969 Ker LJ 83 1969 Ker LT 82 (Suit for redemption and recovery of possession with prayer that if plaintiff is not entitled to recover possession he should be allowed to redeem puramkadam charge — Absence of contract to the contrary in kanom-deed preventing plaintiff from redeeming puramkadam alone — In view of Kerala Land Reforms Act (IV of 1961) plaintiff held not entitled to redeem kanom — But he was entitled to redeem puramkadam) ** AIR 1956 Mad 434 (438) ILR (1956) Mad 983 (DB) ** AIR 1937 Oudh 321 (322) 13 Luck 215 (DB) ** AIR 1937 Pat 156 (158) · 15 Pat 742 (DB).
14. AIR 1956 Mad 434 (441) : ILR (1956) Mad 983 (DB).
15. (1912) 13 Ind Cas 650 (651).

Section 61 — Note 3

1. AIR 1934 Oudh 246 (249) . 9 Luck 657 (DB) ** AIR 1935 Oudh 213 (216) 10 Luck 481 (DB)
   Also see S. 59A, Note 3.
2. AIR 1934 Oudh 246 (249) : 9 Luck 657 (DB).
3. AIR 1955 Trav-Co 232 (233) ((1927) All 144 and AIR 1936 Oudh 202, Rel on.) **AIR 1927 Mad 1039 (1042) (DB) ** AIR 1920 Pat 67 (69) · 5 Pat LJ 644 (DB).
4. AIR 1927 All 144 (144) ** (1907) 4 All LJ 176 (180) ** AIR 1936 Oudh 202 (203) (DB) (AIR 1920 Pat 67, Foll.) ** (1913) 20 Ind Cas 667 (668) (Oudh) **** AIR 1922 All 174 (177) : 44 All 37 (FB).**
   [See also (1911) 33 All 393 (395) (DB) ** (1912) 34 All 416 (418 419) (DB)]

Section 61 — Note 4

1. AIR 1927 Mad 1039 (1042) (DB).
2. (1896) 65 LJ Ch 449 (451) 1896 App Cas 187 74 LT 323 · 44 WR (Eng) 589, Pledge v

is, however, necessary that the *title* of the mortgagee in respect of each mortgage, must be shown to be vested in one and the same hand. Thus, a mortgage to *A* and *B* jointly could not be consolidated with a mortgage in favour of *A* alone(3).

If there are several mortgages or charges on the same property and the mortgagee is in possession in a suit for redemption the mortgagee can use it as a shiled to compel the redemption of all the mortgages and there is no bar of limitation to such a defence in Travancore Cochin(4).

5. "Contract to the contrary."

It has been seen in the Notes on section 60 that any provision in a mortgage document which prevents, evades or hampers redemption, is a clog on the equity of redemption and is, as such, void. This section may be said to be statutory exception to a certain extent to the said rule. In other words the right conferred by Ss. 60 and 62 to redeem a mortgage upon payment of the mortgage-money due under *that* mortgage is qualified by the provisions of this section (1). It is open to the parties under this section to enter into a contract to combine two or more mortgages, and to agree that one shall not be redeemed without redeeming the others also(2).

Thus, a contract, that the first mortgage shall not be redeemed unless the second mortgage is redeemed,(3) or that the second mortgage shall not be redeemed unless the first is

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White ** (1880) 49 LJ Ch 209 (211) ; 13 Ch D 639 ; 42 LT 169 ; 28 WR (Eng) 549. Mills v. Jennings ** (1875) 45 LJ Ch 165 (167) ; 1 Ch D 491 ; 33 LT 721 ; 24 WR (Eng) 17. Baker v. Gray ** (1882) 51 LJ Ch 129 (130) ; 6 App Cas 668 ; 45 LT 593 ; 30 WR (Eng) 369. Jennings v. Jordon ** (1894) 63 LJ Ch 651 (652) ; 1894 2 Ch 328. Pledge v. Carr ** (1861) 45 ER 1009 (1010) ; 4 LT 3,4 ; 9 WR (Eng) 583 ; 7 Jur NS 815. Selby v. Pomfret

3. (1898) 47 WR (Eng) Dig 137 ; 79 LT 244. Riley v. Hall ** (1894) 8 Bom 591 (593) (DB) ** (1912) 15 Ind Cas 605 (606) (DB) (Mad)
4. AIR 1952 Trav-Co 150 (153) (DB)

Section 61 — Note 5

1. **AIR 1930 All 136 (149) : 52 All 281 (FB). (Per King J.)**
2. AIR 1956 Mad 691 (692) ** AIR 1956 Mad 434 (438) ILR (1956) Mad 983 (DB) (Mortgagor is given a latitude to redeem one or more of mortgages separately unless there is a contract to the contrary.) ** AIR 1952 Trav-Co 552 (554) (DB) ** AIR 1946 Oudh 329 (330, 331) ** AIR 1922 All 403 (403) ** **AIR 1930 All 136 (149, 156) : 52 All 281 (FB)** ** AIR 1914 All 542 (542, 543) (DB) ** AIR 1926 All 171 (171, 172) (DB) ** AIR 1928 All 99 (100) (DB) ** (1905) 9 Cal WN 789 (791) (DB) ** (1911) 9 Ind Cas 52 (53) (DB) (All) ** (1909) 1 Ind Cas 345 (346) (DB) (All) ** (1906) 3 All LJ 768 (770) (DB) ** AIR 1935 Oudh 213 (214) : 10 Luck 481 (DB).
3. **AIR 1947 Lah 278 (280) (FB).** (Punjab Restitution of Mortgaged Lands Act (4 of 1938), S. 7 — Mortgage or charge after 1901 tacked on to mortgage with possession prior to 1901 — Stipulation that possession will remain with the mortgagee till second mortgage is redeemed or the charge is paid — Collector cannot order possession to be handed over to mortgagor without payment of additional charge — 1944 Lah LT 3. **Overruled**.) ** AIR 1926 All 506 (508, 509) ; 48 All 282 (DB) ** AIR 1922 Oudh 58 (59) ; 25 Oudh Cas 134 ** AIR 1921 Oudh 172 (173) ; 24 Oudh Cas 240 ** AIR 1919 Oudh 338 (339) ; 22 Oudh Cas 159 ** AIR 1919 Oudh 240 (241) ** AIR 1918 Oudh 27 (28) ** AIR 1916 Oudh 329 (331) ** AIR 1937 Nag 54 (55) ; ILR (1938) Nag 160 ** AIR 1933 Lah 864 (865) (DB) ** AIR 1940 All 101 (103) ** AIR 1927 All 743 (744) (DB) (AIR 1922 All 174 ; 44 All 37 (FB), Foll.) ** (1909) 2 Ind Cas 144 (145) (DB) (All) ** (1910) 32 All 651 (656) (DB) ** (1911) 10 Ind Cas 222 (223) (All) ** AIR 1924 All 832 (832, 833) ** AIR 1914 All 151 (152) ** AIR 1923 Oudh 143 (144) (DB) (Doctrine of clog relates only to dealings at the time when the dealing of mortgage is entered into — Parties are at liberty to vary the terms of redemption subsequently.) ** (1928) 110 Ind Cas 689 (690) (DB) (Oudh) ** (1926) 96 Ind Cas 197 (198) (DB) (All) * AIR 1929 Oudh 40 (41) (DB) (The mortgagee conveyed all his haq murtahim to a third party — **Held**, that the transferee could insist on the charges being paid before the mortgage was redeemed since they were inseparable.) ** AIR 1925 Oudh 458 (458) ; 29 Oudh Cas 15 ** (1931) 132 Ind Cas 376 (377) (DB) (Lah) ** 1890

redeemed,(4) or that neither the first nor the second shall be redeemed separately(5) is perfectly valid and binding on the mortgagor.

The section refers to "two or more *mortgages*" but will, in view of S 100, apply where one document is a mortgage and the other a charge. Consequently, where there is a contract that a further charge created on property shall not be redeemed without redeeming an earlier mortgage, the contract is perfectly valid and enforceable.(6)

But, where the mortgagor executes subsequently a simple bond and agrees that he will not pay up the simple bond without redeeming the mortgage, and such agreement cannot be construed as creating a charge on the property, this section can have no application(7).

The contract to the contrary, being in derogation of the right of redemption, must be clearly and unequivocally expressed and must be strictly construed.(8) An agreement under the second mortgage that it would be redeemed within specified time and would pay the amount under the second mortgage before redeeming the first mortgage cannot be construed as amounting to the mortgagor agreeing not to redeem the first mortgage until the second mortgage was redeemed (9) The *onus* of establishing such a contract is on the mortgagee(10).

Subsequently stipulation by the mortgagor that the advance will be paid before the mortgage property is redeemed is not bad in law(11).

Illustrations.

(1) *A* covenant in the later of two mortgages ran "When the whole of the mortgage-money due under this deed together with the amount due under the previous deed shall be paid, the mortgage shall be redeemable" It was held, that it was a contract to contract to the contrary within the meaning of this section(12).

(2) *A* executed a usufructuary mortgage in favour of *B* Later, *A* borrowed a further sum from *B* and executed a document, which provided "I shall first pay this debt including principal and interest and thereafter, I can redeem the mortgaged village (the subject of usufructuary mortgage) having paid up the mortgage-money. Without the payment of this debt, I cannot redeem the mortgaged village. It was held by the Chief Court of Oudh that the deed was a deed of further charge and that the contract to

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Pun Re No 2, p 4 (4, 5) ** (1908) 11 Oudh Cas 248 (251) ** (1926) 95 Ind Cas 134 (134, 135) (Lah) ** AIR 1932 All 558 (559) (DB) (This is so even if the second mortgage is barred by limitation at the time of redemption of the first mortgage) ** AIR 1930 All 416 (417) : 52 All 539 (DB) (Do.).
[See also 1899 Pun Re No. 33, p. 166 (169).]

4. AIR 1928 Pat 582 (583, 584) 8 Pat 68 (DB) ** (1913) 18 Ind Cas 718 (719) (DB) (All) (Covenant to repay prior mortgage was part and parcel of subsequent mortgage transaction.)
5. AIR 1931 All 197 (198) (Simple mortgage can be tacked on to usufructuary mortgage.) ** AIR 1934 Oudh 246 (249) 9 Luck 657 (DB) (Stipulation in second mortgage deed for simultaneous redemption amounts to a contract for consolidation) ** AIR 1921 Lah 170 (171) (DB) ** AIR 1926 Lah 633 (633, 634) (DB) ** AIR 1938 Mad 562 (564) (DB) ** AIR 1935 Oudh 213 (216) 10 Luck 481 (DB) (AIR 1934 Oudh 246 · 9 Luck 657, Foll) ** AIR 1922 All 41 (42) (DB) ** AIR 1917 Lah 80 (81) (DB) ** AIR 1926 Lah 494 (495) : 7 Lah 297 (DB).
[See also AIR 1914 Lah 344 (345) (DB).]
6. 1961 Ker LT 52 (54) ** AIR 1916 Oudh 329 (331) ** (1910) 6 Ind Cas 165 (166) (DB) (All) ** (1885) 9 Bom 236n ** (1909) 31 All 482 (485, 494) (DB).
7. (1913) 18 Ind Cas 461 (463) (Oudh).
8. AIR 1956 Mad 691 (692) (Contract to the contrary must be specific and explicit in terms.) ** AIR 1914 Oudh 23 (24) 16 Oudh Cas 267 ** AIR 1926 Oudh 59 (61) ** AIR 1920 Lah 387 (388) : 1 Lah 105 (DB)
9. AIR 1972 Mys 178 (181) : (1972) 1 Mys LJ 52
10. AIR 1920 Lah 387 (388) 1 Lah 105 (DB) ** AIR 1917 Oudh 388 (389).
11. AIR 1972 Raj 230 (234) : 1972 Raj LW 581.
12. AIR 1922 All 403 (403).

the contrary was enforceable(13) The decision was affirmed by their Lordships of the Privy Council(14) Compare the undermentioned cases(15) in which the words in the subsequent mortgage deed to the effect that the mortgage-money due under the deed would be paid first or along with the mortgage money due under the earlier deed, without any words restraining the mortgagor from redeeming the earlier mortgage without payment of the money due under the later mortgage have been held not sufficient to constitute a contract to the contrary within the meaning of this section

(3) The later of two mortgages contained in provision "The mortgagor shall not be entitled to redeem this present mortgage without paying to the trustees (meaning the mortgagees) all subscriptions or other moneys that may be secured to the trustees by any other mortgage executed by the mortgagor or by any person through whom he may claim " It was held that a *contrary intention* within the meaning of S 17 Conveyancing and Law of Property Act, 1881 (44 and 45 Vict C 41) corresponding to this section, was clearly expressed(16).

(4) *A* mortgaged distinct estates to a building society *A*'s first mortgage contained a covenant to observe all the rules of the society One of the rules provided that if the society had more than one mortgage from any member, such member should not have power to redeem one property alone without the consent of the Board It was held that the covenant to observe the rules amounted to an express convenant that the society should have power to consolidate(17).

(5) *A* executed in favour of *B* different mortgage deeds relating to different plots of land at the same time Each deed contained a clause which ran " When I, the mortgagor, will pay up the entire money secured on the other mortgage deeds which have been executed today I would get my land redeemed from the mortgagee "It was held by the High Court of Lahore that the agreement did not amount to consolidation of the transactions into one transaction The clause merely contained a collateral agreement as to the date when the right of redemption in each was to be exercised(18)

(6) *A* executed a usufructuary mortgage in favour of *B* and later on a second mortgage in his favour to secure further advances It was agreed at the time of the second mortgage that if he not paid annually, the mortgagee could if he so desired sue to recover the money due on the second mortgage It was also agreed that the first mortgage should not be redeemed without the redemption of the second mortgage also being effected It was held that as the money due under the second mortgage bond could be realized notwithstanding that the first mortgage bond remained unredeemed the agreement did not amount to a contract to the contrary within the meaning of this section(19)

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13. AIR 1928 Oudh 273 (275, 276) : 3 Luck 459 (DB)
    [See also AIR 1925 Oudh 506 (507) (Express condition that subsequent advance would first be paid before redemption of prior mortgage Deed held to be of further charge and binding on the mortgagor.)]
14. AIR 1930 PC 176 (177) : 57 Ind App 173 : 4 Luck 365 (PC).
    [See also AIR 1933 All 257 (258) : 55 All 359 (FB). (AIR 1930 PC 176 Fo)
15. AIR 1956 Mad 691 (692) (Clause in later mortgage providing that notwithstanding period stipulated in deed and even though that period has expired mortgagor undertakes to pay amount along with sum due under earlier mortgage as and when it is paid — Clause amounts only to extending period for payment under deed to a date when payment is made under earlier deed Clause does not amount to a contract to contrary within S 61 ** AIR 1937 Oudh 321 (322) 13 Luck 215 (DB) ** AIR 1914 Oudh 23 (23 24) 16 Oudh Cas 267 ** (1911) 33 All 393 (395) (DB) ** AIR 1917 Oudh 388 (388 389) (Covenant postponing redemption till another deed is redeemed is no contract of consolidation) ** AIR 1923 Oudh 24 (25) (An undertaking by a mortgagor who took a fresh advance that he would not redeem the mortgage until he had repaid the advance, held, only a personal obligation and did not create a charge.)
16. (1906) 75 LJ Ch 739 (741) (1906) 2 Ch 607 95 LT 327 22 TLR 806 Hughes v Britannia Permanent Benefit Building Society
17. (1881) 29 WR (Eng) Dig 138 (138) 44 LT 651 Andrews v City Permanent Benefit Building Society.
18. AIR 1940 Lah 98 (99, 100) (DB).
19. AIR 1923 All 454 (454, 455).

- See also the undermentioned cases(**20**)

6. Right of consolidation where some charges barred by limitation.

A executes two mortgages *x* and *y* in favour of *B*, *y* contains an 'express contract' that *A* shall not redeem the one without redeeming the other also. *B* allows mortgage *x* to be barred by limitation *A* thereafter sues for redemption of mortgage *y*. It was held in cases arising under the old section that *B* could claim that *A* should redeem both *x* and *y*, notwithstanding that a suit on mortgage *x* would be barred by limitation, inasmuch as the Limitation Act did not to *defence*.(**1**) This view would be good law even under this section.

A executes two mortgages *x* and *y* in favour of *B* over the *same* property there being no contract for consolidation *B* allows mortgage *x* to be barred by limitation. It was held in some cases under the old section that in a suit by *A* for redemption, *B* could claim that *A* should redeem both the

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20. *In the following cases the words of the agreement held created a charge* .
AIR 1927 Oudh 510 (511) 3 Luck 113 (DB) ** (1905) 8 Oudh Cas 227 (230) (DB) (A mortgaged village G to B Later A borrowed a further advance from B and executed a deed, which after reciting the sum borrowed, went on : 'unless the aforesaid bond debt is paid I shall not be in a position to redeem G ' — **Held**, that the deed was intended to create a further charge on G) ** (1902) 71 LJ Ch 500 (504) (1902) 1 Ch 954 50 WR (Eng) 453.. Farmer v. Pitt

In the following cases the words held did not create a charge :
(1885) 9 Bom 233 (235) (DB) ** (1888) 12 Bom 231 (234) (DB) (The clause in the later mortgage deed was "the principal sum of huns (coins) due on that document (a separate earlier bond under which mortgagor owed Rs 100) as also this document I will pay at the same time, and take back the land along with this document as well as that document. Till then you are to continue to enjoy the land " — **Held**, that there were no words in the mortgage deed making old debt charge on the property) ** AIR 1925 Oudh 593 (594) (Covenant in later deed not to redeem original mortgage without paying amount due under later deed — Later deed giving no details of property — Deed held was not to create a charge but only a personal covenant) ** AIR 1934 Lah 938 (939, 940) (DB)

Section 61 — Note 6

1. See the AIR Commentaries on the Limitation Act 7th (1997) Edn., S. 3, Notes 14 and 15 and Article 62, Note 25.
[**See also** *the undermentioned cases* :
AIR 1952 TC 150 (151, 152) (Case before Cochin T P Act 17 of 1111 (S 65 whereof is similar to S 51) came into force) ** AIR 1930 All 416 (417) 52 All 539 (DB) (Two mortgage deeds of *same* property to *same* mortgagee — Covenant that subsequent deed must be discharged before redeeming prior — Suit on subsequent mortgage barred — Covenant held still binding and mortgagor not entitled to redeem prior deed alone.) ** AIR 1926 Lah 90 (90, 91) (DB) ** AIR 1926 Lah 494 (495) 7 Lah 297 (DB).
[**But see** AIR 1917 All 405 (405) (DB) (Mortgage usufructuary — Further single mortgage — Condition that simple mortgage to be paid off before redemption of usufructuary mortgage — Simple mortgage time-barred — Mortgagor held entitled to redeem usufructuary mortgage without paying off simple mortgage) ** AIR 1915 All 480 (480, 481) 37 All 634 (DB) (Mortgage usufructuary — Second mortgage of same property — Covenant to pay second mortgage first — Suit on second mortgage barred by limitation — Mortgagor could recover possession by redeeming first mortgage only) ** AIR 1914 All 151 (152) (Where a mortgagor executes two different mortgages in respect of the same property to the same person, stipulating in the later mortgage not to redeem the earlier mortgage without paying sum due under later mortgage the convenant remains in force until the earlier mortgage is redeemed or becomes irredeemable by the law of limitation) ** AIR 1919 Mad 1188 (1189, 1191) (DB). (Semble) ** AIR 1919 Mad 129 (130) (DB) (Two mortgages over *same* property — One barred by time — Mortgagor is free to redeem one mortgage only.)]

mortgages notwithstanding that one of them was barred by limitation (2) *A* contrary view was expressed in the undermentioned cases (3) Under the present section it is clear that *B* cannot make any such claim in the absence of a contract to the contrary

7. "Redeem any one such mortgage."

The words "redeem any one such mortgage" mean merely "pay off any one such mortgage" and not necessarily redeem the *property* by compelling the performance of the several acts in relation to the mortgaged property referred to in clauses (a), (b) and (c) of S 60 Thus, where *X* executes three different mortgages of the same property to *A* *X* will, under this section, be entitled to pay off any one of them without, at the same time, paying off the others But so long as *any* one of the mortgages remains unpaid, he cannot compel the mortgagee to perform the several acts referred to in clauses (a), (b) and (c) of S 60 In *Raja Janaki Nath Roy v Raja Pramatha Nath Mullick*(1), *X* executed four mortgages on different dates to *Y* over the same properties He then mortgaged the four mortgages on different dates to *Y* over the same properties He then mortgaged the same properties to *Z* and he latter paid the first three mortgages, but not the fourth The question arose as to whether *Z* was entitled to priority over *Y* in respect of the mortgages paid off Their Lordships of the Privy Council held that by paying off the three mortgages, *Z* must be deemed to have "redeemed" them within the meaning of S 92, although he could not have compelled *X* to perform any of the acts mentioned in clauses (a), (b) and (c) of S 60 Their Lordships after stating that there is a distinction between the redemption of a mortgage and the redemption of the *property* mortgaged,observed :

> "In their Lordships' opinion it is clear that the words in the section 'mortgage has been redeemed' refer, merely to the payment of the mortgage-money and not to an extinction of the mortgagee's rights over the mortgaged property."

8. Persons against whom the right of consolidation, if at all, is available.

The right to consolidate, in cases where it is applicable is available against the original mortgagor,(1) against his successors-in-title, if the equities of redemption remained united(2) and against the assignee of the equity of redemption of part only of the lands mortgaged, if the mortgagee has acquired the right to consolidate previously to the assignment(3)

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2. AIR 1952 Trav-Co 295 (297 298) ILR (1952) Trav-Co 152 (DB) ** AIR 1947 Mad 18 (33) (DB) ** AIR 1923 Bom 199 (200) 47 Bom 652 (DB) (Simple mortgage followed by usufructuary mortgage — Simple mortgage barred — Mortgagee entitled to retain possession till all the mortgages are paid off) ** 1910 Pun Re No 93 (Mortgage with possession followed by simple mortgage — Second mortgage barred by time Still both mortgages must be redeemed together)
3. AIR 1917 Lah 446 (447) (DB).

Section 61 — Note 7

1. **AIR 1940 PC 38 (44) : 67 Ind App 82.**

Section 61 — Note 8

1. Williams and Eastwood, Principles of the Law of Real Property 1932 Edn p 328
2. (1881) 51 LJ Ch 129 (130) 6 App Cas 698, Jennings v Jordan ** (1858) 65 ER 994 (995) 28 LJ Ch 21, Vint v Padget ** (1896) 65 LJ Ch 449 (453 454) 1896 App Cas 187 Pledge v White ** (1857) 53 ER 134 (136) 23 Beav 341 Tweedale v Tweedale (Union of different mortgages in the same mortgagee taking place after the assignment of the equity of redemption of both the mortgaged properties, held did not matter) ** (1761) 28 ER 825 (826) 2 Edn 78, Willie v Lugg ** (1894) 63 LJ Ch 651 (652) (1894) 2 Ch 328, Pledge v. Carr
3. (1881) 51 LJ Ch 129 (130) 6 App Cas 698, Jennings v Jordan (Tassel v Smith (1858) 27 LJ Ch 694, **Overruled**, Beevor v Luck (1867) 36 LJ Ch 865 questioned) ** (1880) 49 LJ Ch 209 (211, 212) 13 Ch D 639, Mills v Jennings ** (1906) 75 LJ Ch 739 (741 742) (1906) 2 Ch 607, Hughes v. Britania Permanent Benefit Building Society ** (1882) 51

9. Mortgagee, if bound to sue on all the mortgages together.

See Notes on Section 67A See also the Code of Civil Procedure, O 34, R 1, Note 10 in the Appendix.

10. Section, if retrospective.

The amendment of the section has no retrospective effect(1).

The principle applicable to Travancore and Cochin before the amendment of Section 61 was that all mortgages over the same property and in favour of the same person must be simultaneously redeemed and Section 61 as amended is not retrospective(2)

11. Waiver of right to consolidate.

A right to consolidate can arise under the present section only when there is a *contract* for consolidation But the mortgagee may waive his right and when once it is waived, it cannot be enforced subsequently. *A* made four mortgages in favour of *B* and subsequently made another mortgage in favour of *C* the consideration being that *C* should discharge *B s* mortgages. *C* discharged the first three mortgages in favour of *B*, but not the fourth Subsequently *B* sued on his fourth mortgage impleading *C* as a subsequent mortgagee The latter set up prior mortgage rights in respect of the mortgages discharged by him. It was held that *B's* conduct in receiving payment in respect of the three prior mortgages operated as a waiver of his right to consolidate his mortgages and that consequently *C* was entitled to priority in respect of the mortgages so paid off(1)

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62. RIGHT OF USUFRUCTUARY MORTGAGOR TO RECOVER POSSESSION.— In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property [A][together with the mortgage-deed and all documents relating to the morgaged property which are in the possession or power of the mortgagee],—

(a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,— when such money is paid :

(b) where the mortgage is authorized to pay himself from such rents and profits [B][or any part thereof a part only of the mortgage-money], — when the term, if any, prescribed for the payment of the mortgage-money has ex-

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LJ Ch 481 (485) 19 Ch D 630, Harter v Colman (A mortgagor mortgages x to A and y to B – Subsequently, equity of redemption in x conveyed to C – B then conveys his mortgage to A – A cannot consolidate against C) * (1839) 160 ER 839 (844, 845) 51 RR 413, White v Hillacre ** (1875) 45 LJ Ch 165 (167) 1 Ch D 491, Baker v Gray ** (1894) 63 LJ Ch 705 (707) (1894) 3 Ch 498, Minter v Carr ** (1733) 27 ER 474 (474) Amb 733 Ex parte Carter (Two separate mortgages of different estates to same person — Purchaser of equity of redemption of one cannot redeem that mortgage only but must redeem both)

[But see (1867) 4 Eq 537 (546) 36 LJ Ch 865, Beevor v Luck (A person holding two mortgages created by the same mortgagor on two separate estates by distinct deeds, may charge each estate by the aggregate of two debts even against a person, who purchased the equity of redemption of one mortgage before the second mortgage **Doubted in Jennings v. Jordan, (1881) 51 LJ Ch 129.**)]

Section 61 — Note 10

1. 1957 Ker LT 838 (840) ** AIR 1947 Mad 18 (32) (DB) ** AIR 1937 Pat 156 158) 15 Pat 742 (DB)
2. AIR 1976 Mad 273 (276)

Section 61 — Note 11

1. AIR 1937 Cal 194 (198) (DB).

pired and the mortgagor pays or tenders to the mortgagee [C][the mortgage-money or the balance thereof] or deposits it in Court as hereinafter provided.

[A] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S 25

[B] *Substituted* for the words "the interest of the principal money", *ibid*

[C] *Substituted* for the words "the principal money", *ibid*

Synopsis

1. **Legislative changes.**
2. **Scope of the section.**
3. **Suit for possession by co-mortgagor.**
4. **"Recover possession."**
5. **Clause (a).**
6. **Clause (b).**
7. **Lease to mortgagor.**
8. **"When the term . . . . has expired."**
9. **Successive suits for possession.**
10. **Claim for surplus collections.**
11. **Limitation.**
12. **This section and section 61.**

1. Legislative changes.

This section has been amended by S 25 of the Transfer of Property (Amendment) Act, 20 of 1979, by making the following changes :

(1) The words "together with the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee" are new "In order to make S 62 comprehensive" observe the Select Committee, " we have on the lines of S 60 provided that the mortgagor has a right to require the mortgagee to deliver back the mortgage deeds and other documents relating to the mortgaged property"**(1)**

(2) The words "or any part thereof a part only of the mortgage money" in Cl (b) have been substituted for the words "the interest of the principal money" in order to bring it in conformity with S. 58(d)**(2)**.

(3) The words "the mortgage-money or the balance thereof" in Cl (b) have been substituted for the words "the principal money" The reason for the amendment given by the Special Committee is : "Clause (b) of the section is limited to a case where out of the rents and profits of the mortgaged property the mortgagee is entitled to recover only the interest due to him on his principal The clause should also be made applicable to cases where the rents and profits are to be appropriated in payment of a part of the mortgage-money, i e in payment of either interest in part or principal in part or both in part To effect this change the words "principal money" should be changed into the balance of the mortgage-money**(3)**."

2. Scope of the section.

Section 60 deals with a right of redemption, i.e a right to require the mortgagee on *payment of the mortgage-money* to do the various things referred to in that section It applies to all mortgages generally. This section is a special provision which is supplementary to the general provisions of S 60 **(1)** and deals with *insufauctuary* mortgages only **(2)** It provides for a right to *recover possession from* the

Section 62 — Note 1

1. See Second Report of the Select Committee, 1929, Cl 24 (now Cl 26)
2. See Report of the Special Committee, Cl. 24
3. See Report of the Special Committee, Cl. 24.

Section 62 — Note 2

1. **AIR 1930 All 136 (157) : 52 All 281 (FB).** (Per Niamatullah J) ** AIR 1953 All 33 (36) ILR (1954) 2 All 76 (DB) ** AIR 1914 Oudh 376 (377) 17 Oudh Cas 388
2. **AIR 1927 PC 32 (36) : 50 Mad 180 : 54 Ind App 68** ** AIR 1957 Pat 452 (455) ** AIR **1953 All 33 (36) : ILR (1954) 2 All 76 (DB).**

usufructuary mortgagee in the two cases specified Although a suit for redemption of a usufructuary mortgage necessarily involves a prayer for possession and is in substance a suit for possession(3), a suit for possession under this section is not necessarily a suit for redemption. For, in a case falling within Clause (a) of the section, the mortgagor is not entitled to *pay* the mortgage-money and claim back the property He has to allow the mortgagee to continue in possession till the mortgage debt is paid off from the usufruct of the property itself His suit for possession is, therefore, not one for "redemption."(4) (See S. 60, Note 4). But a right to recover possession on payment of the mortgage-money or the balance thereof under Clause (b) of the section appears really to be a suit for redemption Such a right has been provided for under S 60 itself and *prima facie* clause (b) seems to be redundant (5) If after the mortgage-money has been paid, the mortgagor goes to Court to enforce his demand as to recovery of documents and possession, that would not be to enforce his right of redemption which was really his right to make those demands *on* payment of the mortgage-money The right to demand the mortgagee to do certain things on payment of the mortgage-money is different from enforcing the demands subsequent to the payment of the money(6)

But there is this distinction . Clause (b) comes into operation where by contract between the parties the mortgagee is authorised to appropriate the rents and profits of the mortgaged property towards partial deduction of either the principal amount or interest or both There may be cases where accounts may have to be taken before a redemption of the mortgage is granted. Wherever the mortgagor claims satisfaction of the mortgage debt with the usufruct the suit is not necessarily a suit for possession. In a pure redemption suit also there may be a prayer for account for redemption and for possession. If the mortgagor claims that the entire mortgage-money had been satisfied and nothing is due on the basis of the mortgage, it is for the Court to determine whether or not there is satisfaction of the mortgage. Therefore such an allegation is immaterial so far as the determination of the question whether the suit is one for possession or one for redemption is concerned. A suit purely for possession arises only when the case falls under Cl. (a) of S 62(7)

In cases covered by clause (a) of Section 62 the mortgagor's suit cannot be a suit for redemption but for recovery of possession. But a right to recover possession on payment or tender of the mortgage money or the balance under Clause (b) is in substance right of redemption and to that extent Section 60 and Section 62(b) overlap(8)

All suits where relief claimed is possession of the property from the mortgagee are covered by Section 6(x) of the Court-fees Act(9).

Where the mortgage debt is already discharged in a self-redeeming mortgage a suit for redemption is unnecessary(10).

In England the position of a mortgagee who is to continue in possession till the satisfaction of the mortgage-money by reception of the rents and profits is that of a tenant by *elegit* and as soon as the principal amount and interest are satisfied his estate ceases and the mortgagor may maintain an ejectment (11) This corresponds to the provision in Clause (a) of this section(12)

3. (1903) 25 All 115 (120) : 30 Ind App 54 (PC) ** AIR 1914 Cal 894 (895) (DB) ** AIR 1924 Mad 292 (294) : 47 Mad 203 (DB) ** AIR 1935 All 578 (578)
   See also the AIR Commentaries on the Limitation Act 7th (1997) Edn Art 61, Note 1a
4. AIR 1957 Pat 452 (455) (DB) ** AIR 1946 All 400 (402) (DB) ** (1897) 11 CPLR 103 (105) ** AIR 1930 Mad 160 (166) (DB)
5. AIR 1957 Pat 452 (455) (DB) ** AIR 1953 All 33 (36) ILR (1954) 2 All 76 (DB) (To a certain extent Ss. 60 and 62 overlap with each other — Compare Cl (b) of S. 62 with S 60)
6. AIR 1963 SC 1041 (1044).
7. AIR 1957 Pat 452 (455) (DB).
8. ILR (1966) Andh Pra 1084.
9. AIR 1969 Bom 395 : 71 Bom LR 279
10. AIR 1970 Mys 84 (85) : (1969) 2 Mys LJ 222.
11. (1742) 26 ER 618 (620) 2 Atk 360, Yates v Hambly
12. See AIR 1918 Nag 28 (29) 15 Nag LR 101 (Where the right to possession of the

As has been seen in the Notes on S. 58, usufructuary mortgages are of three kinds

(1) Where the rents and profits are to be appropriated in lieu of *interest*

(2) Where they are to be appropriated in lieu of the *principal and interest*

(3) Where they are to be appropriated *in part* towards the principal or interest or both

Clause (a) of this section applies to the second class of cases and clause (b) to the first and third classes of cases.

Prior to the amendment of 1929, clause (b) applied only to the *first* class of mortgages referred to above, and not to the third It was held that the section provided a summary remedy and did not apply when an elaborate accounting was necessary **(13)** The amendment has now widened the scope of the section and in cases now coming under clause (b), the Court will have to go into the question of accounts between the parties.

Though a mortgage may not be a self-liquidating mortgage in the first instance, it may become a self-liquidating mortgage at a later stage, e g by virtue of a statutory provision like that contained in the U P Debt Redemption Act, 1940, which by reducing the rate of interest and providing that the usufruct shall be calculated and its excess over the interest will be taken in satisfaction of the principal amount, has effected a change in the terms of subsisting usufructuary mortgages**(14)**.

The Act dos not apply to transactions arising prior to the Act But the rule in the section was applied as the general law in force before the Act was passed**(15)**

3. Suit for possesson by co-mortgagor.

Where a usufructuary mortgage is to be redeemed on *payment* one of the serveral co mortgagors can redeem and recover possession of the entire property on making the necessary payment Under S 92, such a redeeming co mortgagor is subrogated to the rights of the mortgagee whom he redeems But the right to redeem and recover possession accrues only where the *whole* of the mortgage-debt is paid for mortgagee is entitled to hold possession till the whole of the debt secured by the mortgage has been paid One of several co-mortgagors, therefore cannot bring a suit to recover possession of a share of the mortgaged property on the allegation that the amount of the loan due on that share has been satisfied**(1)**.

Where the mortgage-debt is fully satisfied *out of the rents and profits* of the property one of the several co-mortgators has no right to take possession of the shares of his co-mortgagors, he can recover possession only of his own individual share**(2)**

Where, however, a co-mortgagor *redeems* the mortgaged property and obtains possession he will be *subrogated* to the position of the mortgagee and his possession, therefore, will be that of a *mortgagee* and not adverse, as against the other co-mortgagors. As seen in S 60 Note 4, the question whether the mortgage has been "redeemed" does not necessarily depend upon whether the mortgagor has actually *paid* any amount under the mortgage Even in a case where the mortgage has been paid out of the usufruct of the property, it may be held in the particular circumstances of the case, that a co-mortgagor *has redeemed* the property**(3)**

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usufructuary mortgagee is automatically determined by the terms of the contract the mortgagor can maintain a suit for ejectment.)

13. (1898) 11 CPLR 103 (105).

14. AIR 1953 All 620 (621) : ILR (1954) 1 All 691 (DB)

15. AIR 1925 Cal 862 (865) (DB) ** (1886) 8 All 402 (405) (DB) ** 1864 Suth WR Gap No. 219 (219) (DB) (Section 2, Regulation I, 1798, had the same effect)

Section 62 — Note 3

1. 1864 Suth WR Gap No. 75 (76) (DB).

2. (1885) 7 All 376 (378) (DB) ** (1894) 16 All 254 (255) (DB) ** (1913) 16 Oudh Cas 163 (172) ** (1868) 3 Agra 33 (35) (DB) ** (1866) 1 Agra 36 (37) (DB)

3. AIR 1943 Bom 191 (193) (DB) (16 All 254 distinguished on the ground that in that case

4. "Recover possession."

On payment of the mortgage-money by the mortgagor to the mortgagee the mortgage comes to an end and the right of the mortgagee to remain in possession also comes to an end.(1) If after the receipt of the mortgage-money the mortgagee refuses to deliver back the possession and perform the acts he is bound to do, the non compliance with the demands does not make the mortgage continued.(2) But the mortgagor can enforce his right to get back the possession and the mortgage deed and other documents relating to the mortgaged property, through Court(3).

Where the property is mortgaged by landlord with tenant by way of usufractuary mortgage, question whether in redemption of mortgage, mortgagor is entitled to recover actual physical possession of property depends upon recitals in the mortgage deed The mortgage deed in instant case showed that tenancy rights were to be surrendered on redemption Therefore mortgagor was entitled to recover possession Mere absence of signature of mortgagee as one of the executant of document is insignificant(4).

Where the mortgagor has executed two mortgages both "*usufructuary*, in favour of the mortgagee, the former cannot, on the satisfaction of *one* of the mortgages only, recover possession of the property. The reason is that the mortgagee, under the second mortgage, is entitled to continue to hold possession of the property till the debt on that mortgage also is paid off(5) But where a usufructuary mortgage is followed or preceded by a mortgage, under which the mortgagee is not entitled to hold possession of the property, the satisfaction of the usufructuary mortgage will entitle the mortgagor to get back the possession of the property(6)

Where the usufructuary mortgagee is in possession for more than prescribed time the mortgage is deemed to be discharged and the mortgagor is entitled to recover possession from the sub-mortgagee who cannot claim to prescribe any adverse title(7).

Where on refusal of a usufructuary mortgage to accept the mortgage amount the mortgagor deposited the entire amount in Court under Section 83 of the T P Act and obtained possession of the mortgaged house, but the mortgagee filed a suit for injunction and possession, the suit cannot be decreed though mortgage subsisted due to the mortgagee's refusal to receive the amount(8).

The mortgagee is bound to give possession of the mortgaged property to the mortgagor in the condition in which it was mortgaged. Thus, where there was a *Kompura* in the mortgaged property when the mortgagee took possession of the property, the same was not existing at the time of redemption, and there was no evidence that it fell down by natural causes, it was held that the mortgagee was liable to pay damages for the *Kompura* to the mortgagor(9).

Upon redemption of a usufructuary mortgage a tenant-mortgagee whether could be directed to deliver actual or physical possession of the mortgaged property to the lessor-mortgagor depends upon whether there was implied surrender of lessee's rights when the usufructuary mortgage was executed in his favour by the lessor mortgagor And this obviously depends upon what was the

there was no suit for redemption while the mortgage in the present case was one which could only be brought to an end by a suit for redemption, though it had been found on taking accounts under the Dekkan Agriculturists Relief Act that the mortgage had been discharged out of the usufruct. 16 All 254 was also doubted.)

Section 62 — Note 4

1. **AIR 1963 SC 1041 (1042) ** AIR 1967 Ker 247 (248) : ILR (1967) 2 Ker 1 (FB).** (AIR 1963 SC 1041, Foll.)
2. **AIR 1963 SC 1041 (1044).**
3. **AIR 1963 SC 1041 (1044).**
4. AIR 2001 Raj 95 (97) : 2000 (2) Rajasthan LR 652.
5. AIR 1961 Guj 129 (130).
6. **AIR 1930 All 136 (139, 157) : 52 All 281 (FB).**
7. (1971) 2 Cut WR 151
8. 1981 UPLT (NOC) 99 : (1981) 7 All LR 63.
9. AIR 1963 Ker 261 (263).

intention of the parties at the time of execution of the mortgage deed in favour of the sitting tenant to be gathered from the terms and conditions of the mortgage transaction in the light of the surroundingly circumstances of the case(10)

A contractual right of pre-emption expressly given to the mortgagee under a deed of usufructuary mortgage cannot be pleaded as a valid defence to a suit to recover possession brought by the vendee of the mortgagor, it can only be enforced by a suit for specific performance(11)

Where the tenants were inducted in the property and the owner thereof executed successive usufructuary mortgage however the tenants, continued as such the tenants on redemption of mortgage would be entitled to protection of Rent Control Act(12)

It was concurrently found by both lower Courts that a tenant was inducted by the mortgagee during subsistence of usufructuary mortgage and after the mortgage was redeemed, the tenancy came to an end The mortgagor was therefore entitled to recover possession Since no substantial question of law was involved, the High Court refused to interfere in second appeal(13)

5. Clause (a).

This clause applies to that form of usufructuary mortgage in which the creditor is let into possession on the understanding that he is to enjoy the usufruct till the *whole* of the mortgage debt is liquidated (1) This form of mortgage resembles a *vivum vadium* in which *no time is fixed* for redemption.(2) and the mortgagee is entitled to remain in possession till the entire mortgage debt is wiped off from the rents and profits of the property(3) The words, "when the money is paid" in this clause, mean when the money is paid *from the rents and profits* and do not include a payment by the mortgagor (4) A suit therefore, to recover possession of the property by the mortgagor before the debt is satisfied out of the rents and profits is premature and must be dismissed (5) The undermentiond decisions(6) which have allowed the mortgagor to recover possession of the property by making a cash payment before the mortgage-money is recovered out of the rents and profits it is submitted, are not correct.

The clause does not say that a different rule is to be applied when, by the contract *a term of years* is fixed. Where it is the intention of the parties as expressed in the deed that the mortgagee is to take the rents and profits for a certain period, on the expiry of which the mortgage-money is to be *deemed* to be satisfied, the mortgagor cannot, before the expiry of the period recover possession

10. AIR 1984 SC 1728 (1730) : (1984) 4 SCC 382 ** (1990) 3 Cur Civ C 544 (547) (Ker)
11. AIR 1962 Cal 457 (458, 459)
12. 1985 Guj LH 132 (138).
13. ILR (1997) Kant 468 (472).

Section 62 — Note 5

1. R. B Ghose The Law of Mortgage in India, 5th Edition, 1922 Vol 1, Page 99
2. (1893) 16 Mad 486 (489, 490) (DB).
3. AIR 1925 Mad 825 (826) (Affirmed in Letters Patent Appeal reported in AIR 1930 Mad 160.) ** (1888) 1 Cal LR 256 (258) ** (1910) 7 Ind Cas 871 (871) (DB) (Mad) (Recital that mortgage-money is to be recovered from the rents and profits must be express), [See also AIR 1928 Nag 223 (225) (DB).]
4. (1893) 16 Mad 486 (489, 490) (DB) ** AIR 1930 Mad 160 (162) (DB) (Letters Patent Appeal from AIR 1925 Mad 825) ** (1893) 6 CPLR 43 (48)
5. (1893) 16 Mad 486 (488) (DB) ** (1893) 6 CPLR 43 (48) * AIR 1919 Mad 819 (820) (DB). (Usufructuary mortgage executed in 1902 — Mortgage amount to be worked off by applying usufruct of the property — Option given to mortgagor to pay money due in 1912 but if option not exercised discharge to take place as aforesaid — Mortgagor failing to pay under the option but suing for redemption in 1916 — As mortgage amount not satisfied suit held premature and must be dismissed) ** (1898) 11 CPLR 103 (105)
6. AIR 1926 Oudh 281 (283) 1 Luck 367 29 Oudh Cas 336 (DB) ** (1910) 13 Oudh Cas 128 (134) (DB).

of the mortgaged property.(7) But the mere creation of a term is by no means conclusive on the point. The term fixed must form the essence of the contract Where it does not form the essence of the contract, the mortgagor is entitled to recover possession of the property as soon as the mortgage-debt is satisfied from the rents and profits, even *before* the expiry of the term(8).

Even in cases where the term fixed forms the essence of the contract, the mortgagor may be allowed to recover possession of the mortgaged property before the end of the term on equitable grounds(9). Thus, where the mortgagee breaks any of the conditions agreed upon between the parties, he cannot insist on the condition that he must be allowed to remain in possession of the property for the term fixed (10) In *Narasimha Rao v Seshayya*,(11) it was, under the contract of mortgage, agreed that the mortgagee should pay three different sums for different purposes and appropriate the balance, namely eighty rupees, towards the mortgage-debt. The debt was to be wiped off within 55 years. The mortgagee failed to pay any of the amounts as agreed to by him for several years Devadoss, J., while allowing the mortgagor to recover possession before the end of the term observed :

> "In this case the mortgagee undertook to pay three different sums for three different purposes and he not having paid those sums as agreed to by him, I think, it is equitable that he should not be allowed to insist upon one of the terms of the mortgage deed being given effect to, when he himself gives a go-by to the other terms of the deed The mortgagee remaining in possession for a number of years is in consideration of his not only applying a portion of the rents and profits towards his debt but also in consideration of his meeting certain demands which ought to be met out of the income of the property. In a case like this, I think a Court of Equity ought to give relief to the mortgagor and allow him to redeem the property before the expiry of the term."

A mortgagor suing under this clause to recover possession sues on his *proprietary* right In *Nidha Sah v Murli Dhar*,(12) *A* executed in favour of *B*, what purported to be a mortgage with possession for 14 years The deed provided that on the expiration of the term, the mortgagor shall come into possession without settlement of account When the term expired, *B* refused to give up possession of the property on the ground that owing to the misrepresentation of the mortgagor he had not received the entirety of the premises comprised in the deed *B* claimed the right to hold the property until he had recouped himself It was held by the Judicial Committee that *A* was entitled to rely on his proprietary right and in the absence of any stipulation express or implied in the mortgage-deed depriving him of the right to recover possession, he was entitled to succeed It has been held in the undermentioned cases(13) that it is open to a mortgagor in a suit for redemption of a usufructuary mortgage to rely upon his title and recover possession, if it is found that the mortgage relied upon is void.

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7. (1880) 2 Mad 314 (316) (DB) ** AIR 1925 Mad 825 (827) (Mortgagee did not comply with terms of mortgage, mortgagor was consequently allowed to redeem before expiry of term)
   [See also (1870) 14 Suth WR 455 (455) (DB).]
8. AIR 1918 Oudh 432 (434) (DB) ** AIR 1914 Oudh 160 (162) · 17 Oudh Cas 218
   [See also AIR 1914 PC 36 (38) : 36 All 195 : 41 Ind App 84.]
9. AIR 1925 Mad 825 (827) ** AIR 1917 Cal 853 (854) (DB) ** (1912) 34 All 659 (662) (DB) ** AIR 1918 Oudh 432 (434) (DB).
10. AIR 1954 Mys 187 (189) ILR (1955) Mys 180. (Usufructuary mortgagee entitled to appropriate usufruct of property for a period of 50 years in discharge of mortgage debt allowing mortgaged property to be sold for arrears of revenue — Mortgagor bringing suit for redemption and possession before expiry of period — Mortgagee is not entitled to resist suit on the ground that it is premature.)
11. AIR 1925 Mad 825 (827).
    Also see S. 60, Note 5.
12. (1903) 25 All 115 (120) : 30 Ind App 54 (PC).
13. AIR 1961 Assam 48 (50) ILR (1961) 13 Assam 23 (Mortgage deed not attested) ** (1954) 2 Mad LJ 654 (657). (Notwithstanding the melkanom a Janmi continues to be the owner of the property and his title is not transferred by virtue of a melcharth or a melkanom

In a suit to recover possession of the property on the allegation that the usufruct has liquidated the principal and interest, it is for the mortgagor to show that the whole of the mortgage-debt is paid off **(14)** In such a suit, the production of accounts by the mortgagee showing the actual collections made by him during his possession becomes necessary.**(15)** except where the rents and profits are estimated and the term fixed, or where the receipts from the mortgaged property are agreed to be taken in lieu of interest and a defined portion of the principal**(16)**.

As to what is "mortgage-money" see Note 17 on S 58 and Note 10 on S 60)

6. Clause (b).

Clause (b) contemplates two classes of usufructuary mortgages (i) where the rents and profits are to be appropriated in lieu of interest, and (ii) where they are to be taken in part-payment of interest, or of principal or of both. Prior to the amendment of this section in 1929 this clause was as seen in Note 2, restricted to the first class of mortgages only

In usufructuary mortgage the stipulation that mortgage shall be redeemed within a period of five years is incapable of changing the character of mortgage as usufructuary because such term may only act as a proviso for redemption In a usufructuary mortgage, it is proper to have such a term in view of S 62(b)**(1)** Where no term for the payment of the mortgage money has been prescribed, the right accrues as soon as that part of the mortgage-debt which has to be satisfied out of the rents and profits has been so satisfied Where a term is prescribed the right arises after the expiry of the period.**(2)** See Note 8.

Where the rents and profits are to be taken in lieu of the interest the mortgagee takes his chance of the rents and profits being greater or less than the interest which might have been reserved by the mortgage-bond**(3)** and the mortgagor is entitled to recover possession of the mortgaged property on payment of the principal money only**(4)**

Under S 76, the mortgagee in possession is bound to apply the receipts from the property towards the satisfaction of the mortgage-debt Any sum therefore which the mortgagee retains in violation of the terms of the contract must be applied in reduction of the mortgage-money Thus where under the terms of the mortgage, the mortgagee was to receive the rents and profits in lieu of interest and pay a certain sum of the rents and profits as *malikana* to the mortgagor which sum never paid, the mortgagor was held entitled to redeem on paying the principal after deducting the unpaid *malikana***(5)** But the principle stated above has not been applied in cases where the mortga-

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Where, therefore, a melkanomdar brings a suit for redemption but the melkanom is found to be void he being in the position of a person entitled to only a limited right to redeem the mortgagee is not entitled to recover possession of the suit property)

14. (1867) 12 Moo Ind App 157 (192) : 11 Suth WRPC 19 (24) (PC) ** (1878) 1 Cal LR 256 (258).

15. See Section 76

[**See also** AIR 1950 All 466 (467) (DB) (Application for redemption on the ground that usufruct has satisfied whole mortgage debt Burden lies on mortgagee to prove how much is due to him) ** (1866) 6 Suth WR 84 (85) (DB) ** (1867, 7 Suth WR 82 83) (DB).

16. See Section 77

Section 62 — Note 6

1. AIR 1985 Madh Pra 1 (3) : 1984 MPLJ 518
2. AIR 1926 Mad 966 (967).
3. **(1902) 24 All 521 (531) : 29 Ind App 148 (PC).**
4. **(1902) 24 All 521 (531) : 29 Ind App 148 (PC).**
   [See 1913 Pun Re No. 45n : 1907 Pun LR No. 6.]
5. AIR 1924 All 591 (592) 46 All 633 (DB) ** AIR 1927 Pat 285 (285) (DB) (Mortgagor is entitled to set off the rent payable to him as against the zurpeshgi money at the time of redemption.)
   [**See also** (1911) 11 Ind Cas 713 (716) (DB) Cal).]
   Also see S. 77. Note 1.

gor has not suffered any loss due to the violation of the terms.. Thus, in *Prosanna Kumar v. Girish Chandra*,(6) it was held by the High Court of Calcutta that the mortgagor could not get credit for any rent paying on account of the mortgaged properties to the landlord, which was not actually paid by him. See also the undermentioned cases(7).

A executed a usufructuary mortgage in favour of *B*, the rents and profits to be appropriated in lieu of interest *A* failed to deliver possession of a portion of the mortgaged property, but *B* took no steps to call for additional security. It was contended in the redemption suit that the failure on the part of *A* to secure to *B* the possession of the mortgaged property entitled *B* to claim interest in lieu of the rents and profits of the property, of which he was dispossessed It was held that *B* had acquiesced in his dispossession and was, therefore, not entitled to claim interest on the mortgage-money on account of dispossession (8) In cases covered by Cl (a) if the mortgagee loses some lands due to partition and fails to bring in suit for making up the deficiency as provided in the contract, in a suit for redemption by the mortgagor he could not claim deficiency of profits due to loss of a part of the mortgaged property (9) Where there was no express provision for the payment of interest but there was a clause that, should the mortgagor fail to compensate from his other properties for the loss of possession suffered by the mortgagee, the latter would be entitled to whole mortgage-money with costs and damages, it was held that the mortgagee was entitled to interest for the part of the debt proportionate to the portion of the property of which possession was not given to him(10).

A personal covenant by the mortgagor to pay year by year, the deficiency in the profits is not sufficient to enable the mortgagee to add the deficiency to the principal(11).

There can be no question of accounting in cases where the rents and profits are to be appropriated in lieu of interest. See section 77.

7. Lease to mortgagor.

Where the mortgagee leases back the property to the mortgagor, the question arises whether the arrears of rent can be taken into account at the time of redemption of the mortgage If the mortgage and the lease form part of one transaction, namely the transaction of mortgage, the lease providing only the mode in which the interest upon the mortgage is to be paid, the mortgagor cannot redeem the mortgaged property without paying the arrears of rent (1) In *Imdad Hasan v Badri Prasad(2)* Knox, Acting C.J and Banerji, J , observed .

"In this view, the arrears of the lease money due to the mortgagee must be deemed to be arrears of interest As under the terms of the mortgage, the mortgagee is entitled to remain in possession until the principal amount and interest have been realized, he has the right to continue in possession so

6. AIR 1934 Cal 149 (150) (DB).
7. AIR 1950 All 466 (467) ** 1991 Har Rent R 572 (574) (P & H) (Where under the terms of the usufructuary mortgage deed, rent and interest were equal the question of excess payment of rent by way of interest as such would not arise The other loan advanced subsequently, by the mortgagee could not be made the subject-matter of the suit for redemption) ** AIR 1929 All 348 (349). (Usufructuary mortgagee cannot claim sums spent for repairs or mortgaged house because he is bound to pay all normal expenses from rents and profits of the property.) ** (1911) 10 Ind Cas 113 (113) (All).
8. (1900) 24 All 521 (531) : 29 Ind App 148 (PC) ** AIR 1934 Cal 149 (150) (DB) ((1902) 29 Ind App 148 (PC), Foll.) ** (1904) 27 All 313 (317) (DB).
9. AIR 1927 Oudh 87 (88).
10. AIR 1925 Oudh 30 (32).
11. AIR 1927 All 165 (165) (DB)

Section 62 — Note 7

1. AIR 1957 Pat 24 (26) ** (1898) 20 All 401 (407) (DB) ** (1905) 32 Cal 576 (580) (DB) (Rents though barred by limitation can be considered.) ** AIR 1918 Mad 942 (944) (DB) (Rent time-barred will not be allowed.)
[See also AIR 1933 Lah 289 (290).]
2. (1898) 20 All 401 (407) (DB)

long as the interest payable to him is in arrear, and the plaintiffs are not entitled to redeem without payment of the arrears."

This view has, however, been dissented from in the undermentioned case (3) Where, however, the two transactions of lease and mortgage are independent transactions, the mortgagor cannot be compelled, as a condition precedent to the redemption of the mortgage, to pay off the arrears of rent due under the lease.(4)

8. "When the term..... has expired."

There is nothing to prevent a term being fixed in a usufructuary mortgage, for the mortgagee's enjoyment, during which the mortgage cannot be redeemed (1) That this is so, is clear from the words "when the term, if any, prescribed for the payment of the mortgage-money has expired" in clause (b) of the section But the term fixed must not operate as a clog on redemption As to when a term fixed in the mortgage for payment will or will not amount to a clog on redemption, see Note 32 on Section 60.

A mortgagee who has failed to get possession for a portion of the period fixed, by reason of the fault of the mortgagor, is not thereby entitled to get the period extended or added to (2)

This section cannot prevail against the provisions of S 26G of the Bengal Tenancy Act (VIII of 1885 as amended by Bengal Act VI of 1938) Even if a term is fixed until the expiry of which the mortgagor is not entitled to redeem the mortgagor can sue to recover possession of the property after 15 years.(3)

Quite often debt laws provided for redemption of mortgage before expiry of fixed term For example under Bihar Money Lenders Act 22 of 1975 a mortgage is automatically redeemed after 7 years and in such a case the mortgagor is entitled to possession whatever other terms of the mortgage may provide.(4)

Where, under the terms of the usufructuary mortgage, the mortgagee is to take the profits in lieu of interest and the mortgagor is to redeem on payment of the principal at the end of the stipulated period, the mortgagor cannot recover possession at the end of the period until he pays or tenders or deposits into the Court the principal (5) If in such a case the mortgagor is also liable under the terms of the mortgage to pay interest in default of payment of principal at the end of the stipulated period and there is nothing in the deed to show that such interest is not to be a charge on the property then the mortgagor cannot recover possession until he pays or tenders or deposits into Court the principal together with such interest (6) Even where the mortgagee fails to advance the

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3. AIR 1959 Ker 112 (116) ** AIR 1959 Ker 155 (156)
4. AIR 1971 SC 310 (314) . (1971) 1 SCJ 171. (AIR 1958 Bom 8 AIR 1957 Pat 24 AIR 1944 Pat 5, **Overruled**) ** AIR 1956 Mad 434 (441) ILR (1956) Mad 983 (DB) ** (1904) 27 All 313 (316) (DB) ** AIR 1937 Lah 790 (791).
   [**See also** AIR 1943 Mad 109 (110, 111) (Usufructuary mortgage — Subsequent lease by mortgagee to mortgagor and another — Mortgagee subsequently obtaining decree for arrears of rent — **Held** that the claim for rent being only a personal one could not be put forward in a suit for redemption of the mortgage)]

Section 62 — Note 8

1. AIR 1939 Lah 235 (236) (DB) ** AIR 1940 Cal 437 (438) (DB) ** AIR 1928 Pat 637 (638) : 8 Pat 243 (DB) ** (1876) 25 Suth WR 10 (11) (DB)
   [**See also** (1869) 11 Suth WR 408 (410) (DB).]
   Also see S. 58, Note 35
2. AIR 1927 Mad 173 (174) (DB) ** (1875) 7 NWPHCR 57 (58) (DB)
3. AIR 1942 Cal 55 (57) (DB) ** AIR 1940 Cal 499 (501) (DB) (Mortgagor in possession as Adhar of mortgagee — He can claim to be restored to possession in his own right)
4. AIR 1981 Pat 172 : 1981 BLJR 361 (DB).
5. (1909) 31 All 318 (322) (DB).
6. AIR 1943 Mad 109 (110) (Such a clause for payment of interest is however penal and can be relieved against in a suit for redemption of the property.)

full amount contracted for, the mortgagor cannot sue for possession before the expiry of the period fixed. The remedy of the mortgagor lies in damages (7) Where premises in possession of a tenant were mortgaged to him and the tenant to remain in possession as mortgagee and no interest was to be paid the period of redemption being fixed for 10 years the tenancy right is extinguished after the period and the owner mortgagor is entitled to possession.(8) See also S 58, Note 18 and S 60, Note 5.

9. Successive suits for possession.

A dismissal of a suit for possession under this section on the ground that it is premature, does not bar a subsequent suit claiming the same relief.(1) As to whether where a conditional decree for possession on payment of the amount due is passed and nothing is done under it, the decree bars a subsequent suit for possession · see section 11, Notes 40 and 116 of the AIR Commentaries on the Code of Civil Procedure, 10th (1985) Edition.

10. Claim for surplus collections.

It is well established that a claim to surplus profits against the mortgagee is one arising from and connected with the right to redeem the property. The cause of action for both the claims is the same and consequently, the mortgagor suing for redemption of a usufructuary mortgage, must also claim surplus profits therein Where a suit for redemption is filed in the first instance and subsequently a suit for the surplus profits is filed, the latter would be barred under the provisions of O 2, R. 2 of the Code of Civil Procedure, 1908.(1)

11. Limitation.

A suit to recover possession under this section was governed by Art 148 of the Limitation Act, 1908(1) (see now Art. 61 (a) of the Act of 1963).

A deed of usufructuary mortgage was executed on 14-4-1842. This deed did not contain any provision for repayment of the mortgage-money In a subsequent document executed on 26-4-1862 between the mortgagors and mortgagees, while affirming the prior mortgage, there were alterations in its terms, one of which was that the mortgaged properties would be enjoyed by the mortgagees for a period of 40 years from the date of the document K, a minor member of the mortgagee family, was not a party to this subsequent document On 20-4-1944, a suit for redemption was filed by an alienee of the mortgagors The defence to this suit was that K was not bound by the deed of 1862, and that in respect of K's share that deed could not save limitation It was held that in view of the fact that K had obtained the enjoyment of the mortgage in respect of his share for a period of 40 years certain, he must be taken to have elected to apply to his share the terms of 1862 document Having in this way accepted benefit and thus approbated that document, neither he nor his successors could be heard to say that the mortgage in 1842 was independent of 1862 and that the limitation ran out on the lapse of 60 years from 1842 Time would run only from 1902 because the mortgagors could not redeem the property including K's share for 40 years from 1862 (2)

A suit for possession brought more than 12 years after deemed redemption is not time barred (3)

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7. AIR 1945 Mad 340 (342)
8. **AIR 1976 SC 1565 (1568) : 1976 UJ (SC) 389.**

Section 62 — Note 9

1. (1899) 21 All 251 (259) (DB)

Section 62 — Note 10

1. See the AIR Commentaries on the Code of Civil Procedure, 10th (1985) Edn , O 2, R 2, Notes 18 and 24

Section 62 — Note 11

1. See The AIR Commentaries on the Limitation Act, 7th (1997) Edn , Notes on Art 61
2. **AIR 1965 SC 241 (246).**
3. (1972) 1 Cut WR 893 (896)

Recovery of possession on redemption of a usufructuary mortgage will be barred only after the lapse of 12 years from the date when the Court under Section 19A of Madras Act 4 of 1978 declares that the mortgage/debt had been completely scaled down under Section 9-A of that Act as a result of the mortgagee being in possession of the property for 30 years **(4)**

In the case of a non-self-liquidating usufructuary mortgage of 1884 the right to redeem or recover possession extinguished in 1944 and a suit brought in 1951 under the provisions of the U P Debt Redemption Act 15 of 1940 will not be tenable **(5)**

Where usufructuary mortgage of 1909 was redeemed in 1921 but possession continued with the mortgagee in some other capacity suit by the mortgagor for possession in 1966 would be barred as a result of the combined effect of Art 148 of the Limitation Act, 1908 read with Section 30 and Art 61(a) of the new Limitation Act, 1963 and it would not be a suit for redemption but a suit to which Art. 65 of the Limitation Act 1963 would apply **(6)**

12. This section and section 61.

Section 61 allows consoldiation of mortgages only where there is a contract to that effect in the mortgage deed. In the absence of such a contract, no right to consolidate can be claimed Where therefore, a usufructuary mortgage is followed or preceded by a simple mortgage or a deed of further charge (to which all the provisions applying to simple mortgages apply under S 100) and there is no contract to the contrary within the meaning of S 61, the mortgagor has a right, on the mrotgage-debt being satisfied, to recover possession of the mortgaged property under this section without at the same time redeeming the other mortgages **(1)** On the other hand where the mortgage deed contains a contract to consolidate the charges, the mortgagor cannot recover back the possession of the property without redeeming all the charges **(2)**

The old section 61 did not apply where several mortgages were executed over the same property, and in such a case, the mortgagor was compelled to redeem all the mortgages together even in the absence of a contract to the contrary **(3)** Where, therefore, a usufructuary mortgage was followed by a simple mortgage over the same property the mortgagor could not exercise the right conferred by this section.**(4)** To avoid this inconsistency it was held in *Zahid Ali v Kedar Nath* **(5)** that S 62 contemplated the existence of one transaction and did not at all touch the case where the usufructuary mortgage having been executed, other mortgages by way of further charge had been executed A similar view of this section was taken by Niamatullah, J , in the Full Bench decision of

4. AIR 1974 Mad 352 (353, 354) : (1973) 2 Mad LJ 457.
5. AIR 1974 All 435 1974 All LJ 29 (DB) (Non self liquidating usufructuary mortgage being of 1884, the right to redeem or to recovery of possession was extinguished in 1944 Suit in 1951 barred provisions of U P Debt Redemption Act (15 of 1940) was not applicable in such case.)
6. AIR 1977 (NOC) 255 (All).

Section 62 — Note 12

1. AIR 1914 Oudh 23 (24) : 16 Oudh Cas 267
2. **AIR 1933 All 257 (258) : 55 All 359 (FB) ** AIR 1930 PC 176 (177) : 5 Luck 365 : 57 Ind App 173.** (AIR 1928 Oudh 273 **Affirmed**) ** AIR 1933 Lah 864 (865) (DB) ** AIR 1926 Lah 494 (495) 7 Lah 297 (DB) ** AIR 1930 All 416 (417) 52 All 539 (DB) ** (1907) 2 Ind Cas 144 (145) (DB) (All) ** (1909) 31 All 482 (485) (DB) ** (1908) 32 Bom 386 (390) (DB) ** AIR 1932 All 558 (560) (DB) ** (1926) 96 Ind Cas 197 (198) (DB) (All)
   [See also AIR 1922 All 174 (177) : 44 All 37 (FB).
   Also see S. 100, Note 5
3. See Section 61, Note 2.
4. **AIR 1927 PC 32 (36) : 50 Mad 180 : 54 Ind App 68** ** AIR 1928 Oudh 273 (277) 3 Luck 459 (DB).
5. AIR 1914 Oudh 376 (377) : 17 Oudh Cas 388.

the High Court of Allahabad (6) The amendment of S 61 in 1929 has removed the inconsistency and made it quite clear that even in the case where the several mortgages relate to the same property, the mortgagor is, in the absence of a contract to consoldiate, entitled to redeem any one of them without at the same time redeeming the others. In view of this amendment, the above decisions are no longer law.

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63. ACCESSION TO MORTGAGED PROPERTY.— Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession

Accession acquired in virtue of transferred ownership.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property; the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money. [A][with interest at the same rate as is payable on the principal, or where no such rate is fixed, at the rate of nine per cent. per annum].

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall in the absence of a contract to the contrary, be set off against interest, if any. payable on the money so expended.

[A] Substituted for "at the same rate of interest" by the Transfer of Property Amendment Act, 1929 (XX of 1929), S 26

Synopsis

1. **Scope of the section.**
2. **Accretions to land.**
3. **Buildings, etc., erected on mortgaged land.**
4. **Tree fallen on land.**
5. **Acquisition by the mortgagee.**
6. **"During the continuance of the mortgage."**
7. **"Be entitled as against the mortgage to such accession."**
8. **Suit to recover accession to mortgaged property — Nature of.**
9. **Costs of acquisition.**
10. **Consent of mortgagor may be oral.**

1. Scope of the section.

This section and S. 70 are both based on the principle enunciated by the maxims *accessio cedit principale* (the increase follows the principal) and *accessorium non ducit sed sequitur suum principale* (that which is the accessory or incident does not lead but follows, its principal)(1) This

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6. AIR 1930 All 136 (157) : 52 All 281 (FB).

Section 63 — Note 1

1. AIR 1921 Mad 627 (628) (DB) (NOTE — It is gratifying that the exposition of the law in

section provides that the mortgagor shall, upon redemption, be entitled to the accession received during the continuance of the mortgage, and S 70 provides that the mortgagee shall be entitled to such accession as part of his security They merely enact the law as it was applied before the Act was passed.(2)

It is however, necessary for the application of this section or of S 70, that the property or right claimed by the mortgagor under this section or by the mortgagee under S 70 should constitute an "accession" The word "accession" has not been defined in the Act In the Roman law "accessio" is the general name given to every assessory thing, whether corporeal or incorporeal that has been added to a principal thing from without, and has been connected with it, whether by the powers of nature or by the will of man, *so that in virtue of this connection it is regarded as part and parcel of the thing* (3) The question whether a particular thing is regarded as part and parcel of another thing must be decided in the light of various facts(4) — in some cases, upon the intention of the parties, in some, upon the law applicable thereto and in some, upon both The following notes dealing with various forms of accessions will make this clear It must be remembered that the expression "accession" is not confined to *physical* acquisitions or additions to the mortgaged property but will include also the acquisition of an *interest* in property (5)

2. Accretions to land.

Where there is an acquisition of land from the sea or a river by gradual slow and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land (1) Such an accretion will be an "accession" to

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this Note has been approved clearly though impliedly in a judgment of Narayan J of the Patna High Court (Sheo Pujan v Bhagwati Dubey AIR 1949 Pat 99) where the major part of this Note has been practically incorporated as it is Vide Para 3 of the AIR Report)

2. (1874) 11 Bom HCRAC 32 (33) (DB) ** **(1880) 5 Cal 198 (210, 211) : 6 Ind App 145 (PC).** (Usufructuary mortgage acquiring subordinate *birt* tenures by purchase — Mortgagor held entitled to them on payment of original mortgage debt plus the sum spent by mortgagee in purchasing the *birts*.)
3. Mackeld. Roman Law, 155 156 cited in Broom A Selection of Legal Maxims 10th Edition 1939, Page 317.
4. AIR 1949 Pat 99 (100) 27 Pat 705 (DB) ** AIR 1939 Mad 684 685 (DB
5. **AIR 1951 TC 109 (117) : ILR (1951) TC 209 (FB).** (Possessory sub mortgagee obtaining advantage of puduval registry — That advantage constitutes accretion to mortgaged property) ** (1949) 1 Pepsu LR 430 (432) (DB) (The ejectment of the tenants by the mortgagee from the property mortgaged at the most can be considered to be an accession to the land which under S 63 must go in the absence of a contract to the contrary along with the land on its redemption) ** 1931 Mad WN 595 (597 598) (Property when mortgaged was inam land — Enfranchisement subsequently — Right acquired by enfranchisement is an accession) ** (1909) 4 Ind Cas 357 (359) (DB) (Mad) (Usufructuary mortgage of an ijara lease for a term — Mortgaged lands in possession of occupancy tenants — Mortgagee purchasing lands in execution of decree for rent — Right acquired by mortgagee is an accession to the mortgaged lands) ** (1902) 25 All 46 47 (DB (Mortgagee mortgaging his mortgagee rights and afterwards acquiring the equity of redemption in the mortgaged property from his mortgagor — Such acquisition will enure for the benefit of the sub mortgagee) ** AIR 1924 Nag 155 (155) (DB) (Acquisition of *sir* rights by mortgagor passes to mortgagee as security) ** AIR 1914 All 199 (201) (Obiter — Mortgagee acquiring tenancy rights in *sir* lands — Mortgagor is entitled to those rights on redemption.)

   [**See also** (1909) 3 Ind Cas 395 (397) (DB) (Cal) (Usufructuary mortgagee of a village share acquiring by foreclosure an occupancy holding mortgaged to him by conditional sale — Mortgagor is entitled to treat the holding as an accretion though he has redeemed the usufructuary mortgage previously.)]

Section 63 — Note 2

1. **(1870) 13 Moo Ind App 467 (473) : 5 Beng LR 521 (PC)** (2 Bligh NR 147 Rex v Lord

the adjoining land within the meaning of this section, and if the accession is made while the adjoining land is in the possession of the mortgagee, the mortgagor will, on redemption, be entitled to such accession also (2) Where a village was mortgaged without specification of boundaries and subsequently additions to the village were made by the Survey Officers, it was held in an old Bombay case, that the mortgagor was entitled on redemption to the additions so made (3) Where through mistake the mortgagee was put in possession of more land than that specified in the mortgage deed, it was held that though the mortgagee did not come in possession of the extra land as accretion to the land specified in the mortgage he was bound to deliver possession of the whole land on redemption to the mortgagor.(4)

3. Buildings, etc., erected on mortgaged land.

Where the owner of mortgaged land himself builds thereon, the maxim *quicquid plantatur solo solo cedit* (whatever is attached to the earth becomes part of it) will apply, and the building will become an accession to the mortgaged property and the mortgagee would be entitled to the security of such accession under S 70.(1) See illustration (b) to that section

But the maxim referred to above has no application in this country to cases where a *stranger* builds on the land of another upon a *bona fide* but mistaken belief of title.(2) The rule of law applicable to such cases is that the stranger may *remove* the building erected by him on being evicted by the true owner (3) Unless and until, therefore, the person erecting the building *gives up* his right to remove the building, it cannot be said that it is an accession to the property If he gives up such right the building will become an accession to the property (4) The question whether he has given up the right and so rendered the building an accession will depend upon the facts of the particular case.(5) Where, under a contract with the mortgagor A built a *pucca* house on the mortgaged property, one of the stipulations in the contract being that A should live in it for a certain rent as long as the house stood on the land, it was held that the house must be regarded as an accession to the mortgaged property.(6)

Yarborough, Relied on) ** (1906) 28 All 256 (260) (DB) (Land is said to be acquired by alluvion when it is acquired so gradually that one cannot say how much is added at any particular moment of time) ** **(1899) 22 Mad 464 (469) . 26 Ind App 107 (PC).** (Gradual alluvion enures to the land to which the accretion is made, following the ownership of that land.)

2. AIR 1914 Mad 290 (293) (DB).
3. (1874) 11 Bom HCRAC 32 (33) (DB).
4. AIR 1923 Bom 42 (42)

Section 63 — Note 3

1. AIR 1933 Lah 771 (773) 14 Lah 749 (DB) (Improvements effected and new buildings constructed by mortgagor on such lands must be treated as accessions to it) ** (1906) 30 Bom 250 (262) ** (1902) 29 Cal 803 (808) (DB) (Houses built by mortgagor on mortgaged property conceded to be accessions to it) ** (1888) 1 CPLR 38 (39)
   [See AIR 1939 Cal 275 (277) (DB) (Additions to the mortgaged house made by the mortgagor would go as security to the mortgagee) ** AIR 1935 Rang 522 (522, 523) (Pucca building erected by mortgagor on mortgaged land after demolishing the old semi-pucca building — Mortgagee is entitled to it as accession)]
2. See AIR 1936 Lah 511 (512). (Maxim is not applicable in India in view of the provisions of Ss. 51, 63 and 108 the Act.)
3. **AIR 1931 All 277 (280, 284, 285) : 53 All 334 (FB).** (Per Niamatullah, J and also Per Sulaiman J.)
   See also Note 1 and Note 22 on S 51.
4. **AIR 1931 All 277 (285) : 53 All 334 (FB).**
5. **AIR 1931 All 277 (281) : 53 All 334 (FB).**
6. AIR 1935 Rang 420 (422) (DB) (The rule as to accession applies to representatives of mortgagor and mortgagee also.)

The fact that the person building on the mortgaged land is the *mortgagee* himself does not, it is submitted, make any difference in the application of the principles stated above. *Prima facie* he would also be entitled to remove the building unless he has given up such right and treated the building as part of his security. If he had so treated it, then it will be an "accession," with the result that he cannot remove it but can only enforce his mortgage against it as part of his security and claim the costs of the erection, if any, allowable under the second paragraph of the section.

In the undermentioned case(7) it was, however, assumed that a stable built by the mortgagee on the mortgaged land was an *accession* to the mortgaged property but the mortgagee was allowed to remove the building. It is submitted this view is not correct.

Where the mortgaged property is a *kachcha* house and the mortgagee in possession substitutes in its place an entirely new building it has been held that it is not an *accession* within the meaning of this section as there is no addition to the old building but that the case is one of *improvement* governed by S. 63A.(8)

In the case of machinery brought into a mortgaged building, it may not be possible always to treat it as an "accession." It may be necessary in some cases to consider how far the definition of the expression "attached to the earth" in S. 3 of the Act will bear upon the decision of the question (9). Where the machinery installed in a building is in the nature of a "fixture" thereto (i.e., a thing attached to another thing for the *permanent* use of the latter)(10) as, for example, an electric installation in a building, it will be an "accession" to the building (11).

4. Tree fallen on land.

Where, by natural causes, a tree falls on the mortgaged land in the possession of a mortgagee under a mortgage under which he is entitled to take the produce of the property for interest, the tree cannot be said to be an addition to the property and is therefore not "accession" to the property within the meaning of this section. The mortgagee is entitled to it as part of the produce of the property (1). It was, however, held in the undermentioned case,(2) by the High Court of Travancore-Cochin, that a mortgagee under an Otti deed does not get a right to appropriate fallen trees, his right being restricted to taking the income of the poperties and that consequently in such a case the mortgagee is liable for the value of the timber found missing.

5. Acquisitions by the mortgagee.

An acquisition made by a mortgagee is not necessarily an "accession" to the mortgaged property.

[See also AIR 1936 Rang 65 (66) : 14 Rang 86 (DB) (Per Puge C.J.) on an application for leave to appeal to His Majesty in Council from the decision in AIR 1935 Rang 420.)]

7. AIR 1932 All 500 (502) (DB).
8. AIR 1944 All 204 (205) : ILR (1944) All 302 (DB).
9. AIR 1939 Mad 684 (685) (DB).
10. See Note 6 on S. 3.

AIR 1933 Rang 195 (197) : 11 Rang 322 (DB) ** AIR 1925 Rang 250 (251, 252) (DB) (In this case it was held that the electric machinery in the building was not an accession as there was no evidence to show whether it was installed for the permanent use.) ** (1880) 50 LJ Ch 212 (215) : 16 Ch D 226 : In re Kitchin : Ex parte Punnett ** (1866) 36 LJ Ch 173 (174) : LR 3 Eq 249. Cullwick v. Swindell (Mortgagor held entitled to trade fixtures, as they were affixed to the freehold.) ** (1901) 70 LJQB 225 (227) : (1901) 1 QB 205 (207) : Monti v. Barnes. (What constitutes an annexation must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, namely, the degree of annexation and the object of the annexation.)

11. AIR 1935 Lah 350 (354) : 16 Lah 881 (DB) ** AIR 1933 Rang 195 (197) : 11 Rang 322 (DB).

Section 63 — Note 4

1. AIR 1932 All 500 (502) (DB).
2. AIR 1957 Trav-Co 189 (194) : ILR (1956) Trav-Co 998 (DB).

within the meaning of this section so as to entitle the mortgagor to claim its redemption. In order that it may constitute an "accession" it must have been acquired in the manner mentioned in S. 90 of the Trusts Act, 1882. that section runs as follows :

> "Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage."

In *Sorabji v. Dwarkadas*(1) it was argued before their Lordships of the Privy Council that S. 63 of this Act entitles the mortgagor on redemption to treat acquisitions by the mortgagee as accessions to the mortgaged property *without regard to the question whether the mortgagee had any special advantage by reason of his* position as mortgagee in acquiring them an element necessary for the application of S. 90 of the Trusts Act, 1882. Their Lordships negatived this contention and observed as follows :

> "There is nothing inconsistent with that section (S 90 Trusts Act) in the provisions of S 63 of the Transfer of Proeprty Act, as to accessions to mortgaged property and the terms on which the mortgagor may upon redemption obtain the benefit of them. The word "accession" is not defined in the Act, but the section deals expressly with accessions which have been acquired at the expense of the mortgagee and wuold appear to be clearly applicable to cases in which a subordinate tenure has admittedly been acquired by the mortgagee *as an accession to the mortgaged property*. Whether the term 'accession' as used in this section, should also be held to cover acquisitions which the mortgagee has made for his own benefit but is bound under S. 90, Trusts Act, to hold for the benefit of the mortgagor need not be decided..... In the present case it is sufficient to say that their Lordships are clearly of opinion that S 63, Transfer of Property Act, cannot be read as entitling the mortgagor to recover acquisitions made by the mortgagee for his own benefit in circumstances which do not bring him within S. 90, Trusts Act."

See also the undermentioned cases holding the same view.(2)

Section 63 — Note 5

1. **AIR 1932 PC 199 (201) : 59 Ind App 366. (Affirming** 113 Ind Cas 887.)
2. AIR 1961 Ker 124 (125). (*Kandukrishi* lease in favour of plaintiff — Mortgage of plaintiffs rights to defendant — Government granting patta to defendant during subsequent settlement — **Held** granting of patta to defendant extinguished relationship of mortgagor and mortgagee — S. 90, Trusts Act did not apply — Suit for redemption was not maintainable.) ** 1959 Ker LR 279 (280) (Usufructuary mortgagee getting adjoining *Kumki* lands utilising his position as mortgagee — Acquisition is accession.) ** 1959 Ker LR 236 (237, 238). (Mortgagee taking advantage of his position as mortgagee acquiring adjoining land and obtaining registry — Mortgagor not party to registry proceedings — Mortgagee can redeem land along with mortgaged property by paying amount paid by mortgagee for registry.) ** **AIR 1951 TC 109 (117, 118) : ILR (1951) TC 209 (FB).** (Advantage obtained as sub-mortgagee is available to mortgagee.) ** (1949) 1 Pepsu LR 420 (432) (DB). (Ejectment of tenants by mortgagee — It is an accession to the land and must go in the absence of a contract to the contrary along with the land on its redemption.) ** AIR 1949 Pat 99 (103) : 27 Pat 705 (DB) (Accretion to mortgaged property — Test to determine is whether mortgagee availing himself of his position as such has gained advantage in derogation of rights of other persons interested in that property.) ** AIR 1935 Pat 360 (363) (DB). (Acquisition of occupancy rights by mortgagee taking advantage of his position as mortgagee is an accession.) ** AIR 1929 Pat 730 (730, 731) (DB). (Acquisition of occupancy tenure by mortgagee by availing himself of his position as mortgagee is accession.) ** AIR 1939 Pat 358 (359, 360). (Interest of recorded persons that of tenants-at-will — There is no accession to mortgaged property if mortgagee acquires these plots by buying these persons out.) ** AIR 1918 Lah 179 (180) : 1918 Pun Re No. 63. (Case not

It has been held by the Patna High Court in the undermentinoed case(3) that a mortgagee may, if he chooses, keep an acquisition made by him taking advantage of his position as a mortgagee, for his own benefits, and that the question whether it is to be treated as part of the security depends upon the *intention* of the mortgagee It is submitted that this view is not correct The case is clearly one governed by S 90 of the Trusts Act, and if the acquisition is one falling within the section, then it will be an accession to the mortgaged property quite apart from any intention of the mortgagee (4) It is open to the mortgagee to show that he acquired the advantage by the mortgagor's consent, or after a contest with him before the grant of the advantage, or otherwise so openly and fairly that he is equitably entitled to keep it (5) A mortgagee in possession, while purchasing any subordinate interest under his mortgage in execution of a decree for rent for that subordinate interest which he was entitled to receive as a mortgagee, cannot be said to have purchased it by taking advantage of his position as a mortgagee or in derogation of the rights of the mortgagor His purchase stands on the same footing as a purchase by a stranger Hence it cannot be an accession to the mortgaged property under S 90, Trusts Act or S. 63, Transfer of Property Act (6)

It has been held by the Rangoon High Court that an extension into adjoining Government waste land made by the mortgagee is not an accession to the mortgaged property (7) The reason

governed by Transfer of Property Act — **Held**, acquisition not made as a mortgagee is not an accession) ** (1901) 14 CPLR 169 (171, 172) (Acquisition of a ryoti holding by mortgagee in his capacity as such is an accession) ** AIR 1932 Bom 526 (528 529) (DB) (Mortgagee of khoti lands purchasing khoti nisbat lands from tenants without khot's permission Subsequently all rights in equity of redemption sold to mortgagee — Lands purchased are to be treated as accretion and vest in mortgagee) ** AIR 1918 Bom 152 (153) (DB) (Mortgagee of khoti lands purchasing land from occupancy tenants without khot's permission — Lands become accession to mortgage property) ** (1873) 10 Bom HCRAC 369 (371) (DB) (Case before the Act — Mortgagee of survey tenure purchasing from Government fruit trees in his capacity as occupant by virtue of his mortgage — Fruit trees become accession.)

[**See however** AIR 1952 Trav-Co 552 (553) (DB) (Mortgage of plaint item 1 Partition in mortgagor's tarwad — By partition mortgagee obtaining jenmon right over 3/8 of the whole property and plaintiff getting right over 5/8 share of the same Plaint item 2 which was Sirkar Puramboke land obtained on registry by mortgagee by virtue of his position as mortgagee of neighbouring land — Mortgagee held entitled to 3/8 share and mortgagor to 5/8 share of the accretion of item 2 — Neither of them held could claim exclusive right.)

The following cases must, in view of the above decision of the Privy Council be held to be no longer good law :

(1913) 19 Ind Cas 90 (91) (DB) (Cal) (Mortgagor's right to accession does not depend upon whether the mortgagee had any special advantage by reason of his position as mortgagee in acquiring the accession) ** AIR 1920 Nag 177 (180) (Do)

3. AIR 1921 Pat 59 (60) (DB).
4. **See** AIR 1925 Pat 336 (336) (DB) (This case was a decision after remand in the case reported in AIR 1921 Pat 59 — Das, J., appears to consider his view in the previous judgment erroneous.)
5. AIR 1951 Trav-Co 94 (96) (DB) (The fact that the mortgagor after ten years of persistent endeavour to get the registry in favour of his tarward, as against the mortgagee, withdrew from the contest evidently allowing the registry to be made in favour of the rival claimant cannot lead to the inference of any sharp practice by the mortgagee At best it will only amount to a consent given by the mortgagor's tarwad to the claims of the mortgagee for the registry of the land in his favour in his own independent right)
6. **AIR 1958 Pat 302 (303) : 37 Pat 236 (FB). (Overruling** AIR 1949 Pat 16)
7. AIR 1924 Rang 131 (131, 132) ** AIR 1923 Rang 127 (127) ** (1911) 11 Ind Cas 808 (809) (Low Bur.) ** AIR 1936 Rang 127 (127, 128).

   [**See also** AIR 1917 UPP Bur 18 (20) (Extension into adjoining private land held, not an accession)]

appears to be that such an acquisition was not made by reason of his position as mortgagee.

Under the section the mortgagor is entitled to the accession *on redemption*. The combined effect of S. 90, Trusts Act, and this section is that till the redemption of the security, the accession does not become the absolute property of the mortgagor.(8)

When a co-sharer acquires Sri and Khudkasht rights or plants a grove in his dual capacity as a co-sharer and mortgagee he cannot be said to have acquired these rights as co-sharer only and those rights would be governed by Section 63.(9)

A mortgagee in possession of an Undukoor or undivided half share of property and obtains assignment of adjoining property belonging to the Government on the strength of his possession of the former property he holds the other property for benefit not only of his mortgagor but of all persons interested in the former property in the other half share. The latter property is not an accession to the mortgaged within the meaning of Sec. 63 (10)

Where joint family property subject to mortgage is purchased by the mortgagee in a revenue sale it is not an accession to the mortgaged property.(11)

6. "During the continuance of the mortgage."

The section applies only to accessions received *during the continuance of the mortgaged* (1) Where a usufructuary mortgagee of a share of a village took, during the currency of his mortgage, a mortgage by way of conditional sale of an occupancy holding of a tenant of the village, but subsequent to the expiry of his own mortgage, foreclosed the mortgage by conditional sale, it was held that the mortgage by conditional sale having been taken during the currency of the mortgage, the right acquired by foreclosure of such mortgage must be held to be an accession to the mortgaged property and that the mortgagor would be entitled thereto on redemption.(2)

7. "Be entitled as against the mortgagee to such accession."

A mortgagor is not obliged to take an accession to the mortgaged property and pay for it. If he wishes to take it he must pay the mortgagee the costs of the acquistion if any under the second paragraph of the section.(1) It follows that he may give up his right to the accession and if he does so he cannot afterwards again claim it. Where the mortgagor never treated certain acquisitions as

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8. AIR 1950 Cal 1 (6) : ILR (1950) 2 Cal 183 (DB). (A a darputnidar making deposit under S. 13(4), Bengal Patni Regulation 1819 entering into possession of putni — A is in a position of mortgagee of putnidar — A obtaining decree for arrears of rent against B, another darputnidar, and purchasing same in execution sale — Darputni so purchased would not be accession *ipso jure* so far as mortgagor putnidar was concerned — So there is no extinguishment of darputni interest of B, upon the purchase of it by A.)
9. 1972 All WR (HC) 305
10. AIR 1971 Ker 9 : 1970 Ker LT 438 (FB).
11. (1975) 1 Mad LJ 85.

Section 63 — Note 6

1. AIR 1931 All 277 (283) : 53 All 334 (FB) ** AIR 1961 Ker 124 (125) (*Kandukrishi* lease in favour of A — Mortgage of A's right to B — Government granting patta to B during subsequent settlement — **Held** granting of patta to B extinguished relationship of mortgagor and mortgagee — Section 90, Trusts Act, did not apply — Suit for redemption not maintainable.) ** AIR 1931 All 201 (202) : 52 All 831 (DB) (Mortgage by certificate guradian on behalf of minor without permission of District Court declared void — Section does not apply.) ** AIR 1921 Mad 627 (628, 629) (DB). (Acquisition by mortgagor after sale under mortgage decree does not enure for benefit of auction purchaser at such sale.)
2. (1909) 3 Ind Cas 395 (397) (DB) (Cal) ** (1901) 14 CPLR 169 (170) (In this case the mortgage by conditional sale was foreclosed before the expiry of the usufructuary mortgage.)

Section 63 — Note 7

1. AIR 1917 Lah 430 (431) ** AIR 1926 Pat 572 (574) (DB).

accessions or made any claim thereto and allowed the mortgagee to remain in possession of the lands as occupancy raiyat, it was held by the High Court of Patna that he could not subsequently claim the same as accessions.(2) See also the undermentioned case.(3)

8. Suit to recover accession to mortgaged property — Nature of.

It has been held by the High Court of Lahore in *Khan Muhammad v Girdhari Ram*(1) that a suit, after redemption, to take over accessions to the mortgaged property is not one for *redemption* within the meaning of Art 148 of the Limitation Act of 1908 but is one that will be governed by Art. 144 of that Act. Chevis, J., observed :

> "The law is that the mortgagor is upon redemption entitled (not obliged) to take over the accession and if he desires to take it over he must pay the cost of acquisition Only one redemption is spoken of There may I conceive be cases in which the mortgagor is entitled to redeem first and to take over the accessions later on e g see *Ram Brich Narayan Singh v Ambika Prasad Singh* (2) a case in which it appears that plaintiff only became aware of the accessions after redeeming and retaking possession But what is redeemed is the property mortgaged What was mortgaged in this case did not include the occupancy rights now in question, and though plaintiff had a right to take over these rights at redemption I conceive that taking over these rights would have been, not part of the actual redemption, but an optional right which by law goes along with the right of redemption I hold therefore, that when a mortgagor after redemption, sues to take over accessions his suit is not really one for redemption The redemption is already complete everything that was once mortgaged having been already redeemed The redemption being already complete the relationship of mortgagor and mortgagee no longer subsists and the subsequent suit for accessions is not a suit against a mortgagee, and Art 148 is not, in my opinion applicable (See now Arts 61(a) and 65 of the Limitation Act of 1963)

It must, however, be noted that in the above case, the separate possession and enjoyment of the accession was held to be 'clearly possible' and so the case fell under the first part of the second paragraph of this section. It is conceived that under the second part of the paragraph a suit for accession would be one for redemption.

9. Costs of acquisition.

The second paragraph of the section provides for the payment by the mortgagor of the costs of the acquisition of an accession in two cases —

(1) where the accession has been acquired at the expense of the mortgagee and is *capable of separate possession and enjoyment without detriment to the principal property* and

(2) where such separate possession and enjoyment is not possible but the acquisition was made with the *assent* of the mortgagor or was *necessary to preserve the property* from destruction, forfeiture or sale.(1)

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2. AIR 1926 Pat 572 (574) (DB)
3. AIR 1951 Trav-Co 94 (96) (DB) (The fact that the mortgagor after ten years of persistent endeavour to get the registry in favour of his tarwad, as against the mortgagee, withdrew from the contest evidently allowing the registry to be made in favour of the rival claimant will only amount to a consent given by the morgagor s tarwad to the claims of the mortgagee for the registry of the land in his favour in his own independent right)

Section 63 — Note 8

1. AIR 1917 Lah 430 (431, 432).
2. (1913) 19 Ind Cas 90 (92) (DB) (Cal).

Section 63 — Note 9

1. (1949) 1 Pepsu LR 430 (432, 433) (DB) (Ejectment of occupancy tenants by mortgagee Mortgagee not authorised to spend for ejectment — Accession not capable of separate possession or enjoyment without detriment to mortgaged property — Nor necessary to preserve the property from destruction forfeiture or sale — Mortgagee held not entitled to the costs of acquisition) ** AIR 1929 All 348 (349). (Usufructuary mortgagee re-building fallen

The question whether a particular accession is capable of separate possession and enjoyment without detriment to the principal property must be decided with reference to the facts of each case It has been held in the undermentioned cases(2) that a building or a grove which was an accession to the land was not capable of such separate possession and enjoyment and if the construction or the planting of the grove was not made with the mortgagor's assent and was not necessary for the preservation of the principal property the mortgagor was not bound to pay any costs to the mortgagee on redemption. The contrary view held in some cases, namely that a grove planted(3) or a house built(4) on the mortgaged land is capable of separate possession and enjoyment within the meaning of this section, is, it is submitted, not correct. A well newly constructed on the mortgaged land by the mortgagee cannot be said to be capable of separate possession and enjoyment within the section. Nor can it be said that its construction is necessary to preserve the property from destruction or deterioration. Consequently, unless it is constructed with the mortgagor's consent, it should be delivered over to the mortgagor on redemption, and he is not bound to pay the cost thereof (5) Where an old well on mortgaged land which had been rendered useless from natural causes, was repaired by the mortgagee with the mortgagor's consent, it was held in the undermentioned case(6) that the new well may be looked upon as an accession to the mortgaged property and that the mortgagee can claim the amount spent therefor.

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house is not entitled to costs thereof because it is impossible to preserve a fallen house from destruction — The only remedy of the mortgagee would be under S 68 if that section is applicable.) ** AIR 1922 Lah 252 (253) (DB). (Reconstruction of house with assent of mortgagor — Mortgagee is entitled to costs) ** AIR 1930 Rang 63 (63, 64) 8 Rang 233 (DB) (Fruit trees planted by mortgagee — Not capable of separate enjoyment — Mortgagor not liable to pay compensation) ** AIR 1926 All 67 (68) 48 All 70 (DB) (Grove planted without mortgagor's consent — Mortgagor need not pay for it) ** AIR 1925 All 427 (429) · 47 All 582 (DB) (Grove planted with consent of the mortgagor — Later must pay for it)

2. **AIR 1931 All 277 (283, 284, 287) : 53 All 334 (FB).** (Per Sulaiman, J and Per King J — AIR 1925 All 427 47 All 582 Foll AIR 1928 All 381, **Not approved**.) ** (1899) 22 All 83 (85, 86) (Grove) ** 1883 All WN 208 (208) (DB) (Building) ** (1926) 92 Ind Cas 262 (262, 263) (Oudh) (Grove.) ** AIR 1930 Rang 63 (64) 8 Rang 233 (DB) (Fruit trees) ** AIR 1926 All 67 (68) 48 All 70 (DB) (Grove) ** (1829) 116 Ind Cas 894 (895) (DB) (Lah) (Construction of a large building after pulling down greater portion of the old building which was not in a dilapidated condition) ** AIR 1915 All 99 (100) : 37 All 81 (DB) (Mortgagee constructing new room in place of old dilapidated room is entitled to be reimbursed, but is not entitled to costs of any additional rooms build by him.)
[**See also** AIR 1925 All 427 (429) 47 All 582 (DB) (Grove planted with consent of mortgagor — Latter must pay the costs) ** (1866) 1 Agra 281 (281) (DB) (Usufructuary mortgagee of a share in a joint estate is not entitled to the trees planted by him in his mortgage term. Yet as a cparcener in the estate he is entitled to a share in the trees)]
[**But see** (1912) 16 Ind Cas 635 (638) (All) (Where an addition to a building is an accession, mortgagee who made the addition without the mortgagor's consent is entitled to the value thereof if the addition is a lasting improvement reasonably made for the benefit of the property increasing its selling value.)]
3. **AIR 1921 All 353 (356) : 43 All 638 : 61 Ind Cas 812 (SB).** (Trees planted by mortgagee — he is not entitled to compensation but he may remove them) ** AIR 1929 All 330 (331). (The question whether particular trees can be removed with their roots is one of fact) ** AIR 1925 All 794 (794) (Mortgagee planting trees — He can remove them) ** AIR 1925 All 748 (751) (Trees planted by mortgagee — Mortgagor unwilling to pay for them on redemption — Mortgagee may be allowed to remove them)
4. AIR 1932 All 500 (502) (DB). (A stable erected on mortgaged land was assumed to be capable of separate possession and enjoyment) ** AIR 1928 All 381 (386) (DB) (Mortgagee building pakka house in place of old katcha house on mortgaged land — Accession is capable of separate enjoyment) ** AIR 1925 All 748 (751)
5. **AIR 1914 Nag 68 (70) : 10 Nag LR 166**
6. **(1895) 17 All 282 (284).**

10. Consent of mortgagor may be oral.

The consent of the mortgagor spoken of in the second paragraph of the section, may be oral or even tacit.(1)

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^[**63A. Improvements to mortgaged property.**— (1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.]

(A) Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S 27

Synopsis

1. Scope of the section.
1A. "During the continuance of the mortgage."
2. Improvements by auction-purchaser in execution of mortgage decree.
3. Nature of improvement, to the cost of which the mortgagee is entitled.
4. "Contract to the contrary."
5. The mortgagor shall be liable to pay the proper costs thereof.
6. "As an addition to the principal money."
7. Interest on costs.
8. Re-valuation of improvements at the time of execution of decree for redemption.
9. Law prevalent in Malabar, Travancore and Cochin.

1. Scope of the section.

This section is new and was inserted by the amending Act of 1929 The section is not retrospective.(1) Section 51 is a general provision dealing with the improvements effected by transferee to the transferred property while Section 63-A is a special provision dealing with improvements effected by mortgagee in possession and the special excludes the general (2)

Before the introduction of this section there was a difference of opinion as to whether a mortgagee who had effected improvements on the mortgaged property was entitled to claim the costs thereof from the mortgagor. According to one set of cases, the mortgagee was not entitled to charge or to obtain any compensation for improvements effected by him unless such improvements constituted necessary repairs of the property or were necessary for the preservation of the prop-

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Section 63 — Note 10

1. AIR 1922 Nag 262 (263).

Section 63-A — Note 1

1. AIR 1955 NUC (Kutch) 4309 (Section was not applicable to transactions in Kutch State made before 1-8-1949)
2. (1971) 1 Mad LJ 345.

erty.(3) In another class of cases(4) following English decisions(5) it was held that a mortgagee was entitled to a charge for improvements if they were *reasonable* In some cases(6) the value of improvements was allowed to the mortgagee by *custom* According to the English law as summarised by Fisher on *Mortgage* :

> "The improvements must always be reasonable having regard to the nature and value of the estate for, if it were not so, a weapon would be put in the mortgagee's hands with which he might greatly clog the right of redemption, which he has no right to make more expensive than is necessary to keep the estate in good repair and working order and to protect the title."

This section is based on the view so expressed above (7) In their report, the Special Committee after referring to the above cited passage from Fisher on *Mortgage* observed as follows :

> "We prefer to adopt in India the view summarised in Fisher on Mortgage except that we do not consider it desirable to leave it to the Court to determine in each case what improvements are reasonable and what not We accordingly propose to have a uniform and definite rule, namely that no mortgagee shall be entitled to charge for any improvements unless they are made to preserve the property from destruction or deterioration or unless they are necessary to prevent the security from becoming insufficient or made in compliance with the lawful order of any public servant or public authority We accordingly propose to add a new S 63-A dealing with improvements We have throughout guarded the right of private contract."

This section has no application to the Punjab to which Province this Act has not been extended In some early decisions(8) It was held in cases arising in that Province that a mortgagee in

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3. (1896) 19 Mad 327 (329) (DB) (Expenditure not within S 72 cannot be allowed as improvements) ** (1867) 2 Agra 187 (187) (DB) (Expenditure for improvements not being necessary was not allowed.) ** (1892-96) 2 Upp Bur Rul 548 (549) (Expenditure for improvements not being necessary for preservation of property not allowed) ** AIR 1922 All 405 (407) 44 All 708 (DB) (Improvements not being repairs — Expenditure not allowed) ** (1869) 5 Bom HCR (AC) 116 (117) (DB) ** 1883 All WN 208 (208) (DB) (Improvements not necessary for maintenance or preservation of property — Costs not allowed) ** AIR 1924 All 47 (48) 73 Ind Cas 985 (DB) (Improvements not falling within S 72, Cl. (b) — Costs not allowed.)
4. AIR 1918 Bom 84 (85) 47 Ind Cas 751 (DB) (Mortgagee in possession effecting lasting improvements) ** AIR 1930 Oudh 337 (338) 126 Ind Cas 397 (DB) (Usufructuary mortgage of house House in precarious condition and mortgage deed authorising mortgagee to rebuild it if it fell in the rains — House falling and mortgagee rebuilding the former katcha house in more substantial manner with pucca materials the house being of the same size and pattern — Mortgagee must be allowed reasonable cost of improvements) ** (1922) 70 Ind Cas 1 (3) (Pesh) ** (1912) 16 Ind Cas 635 (638) (All) (Lasting improvements reasonably made for the benefit of the property, which added to the selling value of the property) ** AIR 1928 Bom 150 (152) 109 Ind Cas 532 (DB) (Amount spent on improvements five times the mortgage amount — Claim was not allowed.) ** (1899) 26 Cal 1 (8) : 25 Ind App 241 (PC) ** AIR 1921 Bom 250 (250, 251) : 64 Ind Cas 16 (DB) ** (1862-65) 1 Bom HCR 199 (203, 204) (SB) ** (1869) 5 Bom HCR AC 109 (115) (DB)
   [See also AIR 1925 Oudh 685 (686) 88 Ind Cas 474 (Mortgagee of the katchha structure cannot convert it into pucca house without the consent of the mortgagor and demand compensation for the improvements) ** AIR 1920 Oudh 61 (62) · 54 Ind Cas 112.]
5. (1882) 31 WR (Eng) 308 (310, 311, 312) . 21 Ch D 469 (478, 479) . 47 LT 604 ** (1885) 33 WR (Eng) 341 (341), Houghton v Sevenoaks Estate Co ** (1861) 127 RR 158 (159, 160) : & Jur (NS) 206, Powell v. Trotter.
6. (1885) 8 Mad 415 (418) (DB).
   [See also AIR 1917 Mad 135 (135) 37 Ind Cas 664 (DB)]
7. AIR 1956 Mys 14 (17) ILR (1955) Mys 562 (DB) (The mortgagee should inform the mortgagor as soon as possible of the necessity or the intention to incur extraordinary expenses) ** AIR 1944 All 204 (206)
8. 1888 Pun Re No. 123, p 334 (335) (DB) ** 1896 Pun Re No 67, p. 192 (198) (DB) ** 1900 Pun LR No 30, p 135 (136) ** 1903 Pun LR No 33, p 143 (145) ** (1909) 4 Ind Cas 939 (940) (Lah)

possession was not entitled to compensation for the improvements he had effected without the consent of the mortgagor. But in later decisions(**9**) it was held that the mortgagee in possession was entitled to be paid at the time of redemption the amounts spent by him on such improvements provided the sum spent was not unreasonable and the improvements had increased the value of the property. In *Ramsaran Das v. Bhagwan Singh*(**10**) it was observed that there was

> "Nothing but ordinary Justice that the increase in the price of the property should not go into the pocket of the mortgagor without his reimbursing the mortgagee whose money was instrumental in raising the price of the property."

After the introduction of this section in the Act the decisions of the Lahore High Court have been in conformity with the provisions of this section (**11**).

The mortgagor cannot claim that the additional income to the mortgagee from the improvements should be taken into account at the time of redemption where the mortgagee is not entitled under the section to the cost of the improvements (**12**). Where the mortgagee allowed preliminary decree to be passed in a redemption suit without raising the plea that he had made certain improvements to the mortgaged property, and also did not file any appeal against the preliminary decree, he could not be allowed to raise the plea relating to improvements at the stage of final decree (**13**). Transfer of Property Act proceeds on the basis that in law ownership of a building is different from ownership in the land and that land and building could be owned by different persons in the eye of law. Therefore by relying upon Section 63A and S. 108(4) it cannot be said that the concept that the owner of the land becomes the owner of the building as it comes up, is recognised in this country (**14**). But the additional income due to the improvements must be credited to the mortgagor where the improvements are of the type mentioned in sub-s. (2) and the mortgagor is bound to pay their costs with interest.

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9. AIR 1919 Lah 372 (373) : 1919 Pun Re No. 58 : 51 Ind Cas 689 (Mortgagee by conditional sale making improvements after expiry of period of redemption *bona fide* believing himself to be owner — Mortgagor must pay its costs on redemption when the improvements are of a permanent character and increase the value of mortgaged property.) ** AIR 1919 Lah 398 (399) : 1919 Pun Re No. 78 (Improvements enhancing value and costs not making redemption difficult — Mortgagee is entitled to such costs.) ** AIR 1923 Lah 587 (588, 589) : 75 Ind Cas 183 (DB) ** AIR 1929 Lah 509 (509) : 115 Ind Cas 852 (DB) ** 1898 Pun Re No. 18, p. 43 (45) (DB) ** AIR 1929 Lah 516 (518) : 117 Ind Cas 84 (DB) ** (19, 2) 17 Ind Cas 243 (244) (Lah)

[**See also** 1892 Pun Re No. 91, p. 319 (322) (DB) (Suit for pre-emption — Court has power to award compensation to vendee for improvements made in good faith.)]

10. AIR 1928 Lah 160 (161) : 106 Ind Cas 303 (DB)

11. AIR 1934 Lah 242 (243) : 149 Ind Cas 969 (Mortgagee is not entitled to compensation for the "kacha" kotha built by him on the mortgaged property — He can only remove the material.) ** AIR 1939 Lah 129 (135) : 187 Ind Cas 705 (DB) (Mortgage deed providing that mortgagees were entitled to effect repairs to mortgaged property on failure to do so by mortgagor in case property fell into ruins or was destroyed on account of some unexpected calamity - Repairs not shown to have been effected after property had fallen into ruins or had been destroyed — No loss of income proved — Mortgagees held not entitled to sum spent on improvements.)

12. AIR 1949 All 681 (682) (Mortgagee in possession of mortgaged property demolishing property and rebuilding same in pucca structure — It is improvement within meaning of cl. (1) — In absence of contract to the contrary, upon redemption, mortgagor is entitled to it without paying its costs — But he cannot claim benefit of additional income derived by mortgagee from such improvement at his own cost.)

13. AIR 2000 Kant 232 (234) : 2000 (2) Kant LJ 568

14. AIR 1990 Mad 251 (283) : 1989 TLNJ 375

1A. "During the continuance of the mortgage."

In order that the section may apply the mortgaged property must have been improved during the continuance of the mortgage. If the improvements are made before the execution of the mortgage or after it is extinguished, the section has no application. In the undermentioned case of the Punjab(1) (decided before the introduction of this section) A mortgaged certain land to B who was already in possession as a tenant and had made considerable improvements during the period of his tenancy. There was no clause in the mortgage-deed providing for payment of compensation to the mortgagee in the form of value of improvements A sued for redemption of his mortgage. B pleaded that he could not be ousted before he was awarded compensation for the improvements effected during the term of his tenancy It was held that A was entitled to redeem the mortgage without paying any compensation for the value of the improvements and to be put in the same position as regards the mortgagee, *qua* the mortgage, as he was at the time when he entered into the mortgage In the case noted below,(2) the High Court of Jammu and Kashmir allowed compensation for the improvements made by the tenant of the mortgagee, upon redemption before the time fixed, by virtue of the Jammu and Kashmir Restoration of Mortgaged Property Act, 2006.

2. Improvements by auction-purchaser in execution of mortgage decree.

An auction-purchaser in execution of a decree under a prior mortgage to which the puisne mortgagee was not a party, cannot claim the amount spent by him on improvements, firstly, because he is not in the position of a mortgagee in possession and secondly, because the improvement cannot be said to be effected during the continuance of the mortgage (1) The position of a private purchaser from the prior mortgagee is however different.(2) He steps into the shoes of his vendor, as the expression "mortgagee" would include his representatives. (See S 59A) Similarly, when a purchaser from the mortgagor pays off a prior mortgagee he steps into the shoes of the prior mortgagee and is entitled to the costs of improvements effected by him as a prior charge as against the subsequent mortgagee.(3)

There is distinction between a suit against a mortgagee and a suit against an absolute transferee from the mortgagee. In latter case he is entitled to claim value of improvements.(4)

3. Nature of improvement, to the cost of which the mortgagee is entitled.

In order that a mortgagee may be entitled to the costs of an improvement made by him on the mortgaged property it must be shown that—

(1) it was necessary to preserve the property from destruction or deterioration, or

(2) it was necessary to prevent the security from becoming insufficient, or

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Secton 63-A — Note 1-A

1. 1912 Pun Re No. 54 : 14 Ind Cas 78 (81) (DB).
2. AIR 1964 Punj 365 (367) (DB) ** AIR 1953 J & K 14 (13) 11 J & K LR 134.

Section 63-A — Note 2

1. **AIR 1931 All 277 (289) : 53 All 334 : 132 Ind Cas 401 (FB)** ** AIR 1922 All 104 (105) : 44 All 418 (DB) ** (1897) 20 Mad 120 (123, 124) (DB)
2. **1950 Trav-Co LR 511 (517) (FB).** (Prior mortgagee suing on his mortgage without impleading subsequent mortgagee and purchasing mortgaged property in execution — Prior mortgagee auction-purchaser's possession constitutes possession as mortgagee and not as representative of mortgagor (Minority view in AIR 1931 All 277 (FB). Approved) — Subsequent sale of property — Transferee making improvements *bona fide* — As against subsequent mortgagee, transferee is entitled to costs of improvements.)
3. AIR 1926 Lah 430 (431) : 7 Lah 212 (DB).
4. (1970) 1 Mad LJ 132 : 82 Mad LW 439

(3) it was made in compliance with the lawful order of any public servant or public authority.(1)

The mortgagee is entitled to claim compensation for the improvements alleged to have been effected by her in the property comprised in the mortgage, in accordance with the provisions of S 17 of Kerala Compensation for Tenants Improvements Act 29 of 1958 (2)

The object of the restriction is to prevent the mortgagee from improving the property in such a way as to make it utterly impossible for the mortgagor, with his means, ever to redeem it, in other words, from "improving the mortgagor out of his estate (3)" Where, therefore, the improvements made by the mortgagee are not covered by sub-s (2), the mortgagor is entitled to the improvements without payment of the cost thereof to the mortgagee and the mortgagee or his assignee is debarred even from removing the materials of the improvements made by them on the property (4)

Entitlement for improvement as envisaged under S 63 A (1) is made subject to the requirement under S 63-A (ii) Digging up of well cannot be stated to be an improvement as contemplated under S. 63-A Mortgagee would not be entitled to reimbursement of such expenditure (5)

A mortgagee not acting bona fide in effecting improvements is not entitled to the claim (6)

Section 63-A — Note 3

1. AIR 1939 Lah 129 (134) 187 Ind Cas 705 (DB) ** 1985 Guj LH 74, (745) ** (1984) 10 All LR 757 (759)
   [See AIR 1960 Punj 480 (481) (DB) (Amount spent by mortgagee in effecting improvement in order to increase yield from mortgaged land - Mortgagee not entitled to compensation) ** AIR 1956 Bom 575 (576, 577) (Where the mortgagee had not claimed that he improved the property in the circumstances mentioned in sub-s (2) of S 63 A nor was it his case that the mortgagor was ever called upon to preserve the property and he failed to take proper and timely steps to preserve the property it was held that the mortgagee was not entitled to be credited for the amount spent by him) ** ILR (1956) Mad 27 35) (DB) (Putting up a new building was held to be necessary for proper conservation of the land i e , to prevent the security from becoming insufficient or to preserve the property from destruction or deterioration) ** (1955) 2 Mad LJ 30 (34) (DB) (**Held**, on particular facts of the case considering the extent of property (nearly 2 000 acres consisting of 11 tanks) requiring the assistance of a large number of agents and servants for its management construction of a new office building and quarters would be necessary and the amount spent should not be disallowed) ** AIR 1955 Pepsu 87 (90) ILR (1955) Patiala 16 (DB) ** AIR 1951 Ajmer 10 (11) (Construction of a well may improve the value of the land but it does not follow that a well is always necessary to preserve agricultural land) ** AIR 1937 Nag 54 (56) ILR (1938) Nag 160 (Improvements by mortgagee — Mortgagee not entitled to compensation.)]
   Also see S. 72, Note 3.
2. 1980 Ker LT 26 (28).
3. AIR 1960 Pat 503 (504) ** (1843) 6 Beav 246 (248) 49 ER 820 (Per Lord Langdale)
   [See also 1876 Pun Re No. 119, p. 246 (247) (DB).]
4. AIR 1981 (NOC) 113 1981 Sim LC 239 (247) (Him Pra) (Mortgagee is not entitled to claim compensation in respect of improvements made as they were not necessary to preserve the land from destruction/deterioration Neither the improvements were made in compliance with the lawful order of any public authority) ** 1978 Punj LJ 142 (143) 1978 Rev LR 336 (**Held** mortgagor had no right to make any improvements on the property without the consent of the mortgagor) ** AIR 1960 Pat 503 (503, 504)
   [See also AIR 1963 Ker 179 (181) : ILR (1962) 2 Ker 395 (FB). (Suit for redemption — Defendant building on property in violation of order of injunction issued by Court — Not entitled to value of building as part of price of redemption — AIR 1958 Ker 105 Overruled.)]
5. 1999 AIHC 2163 (2166) : 1998 (3) Mad LJ 497.
6. AIR 1973 Mad 454 (457) · (1973) 1 Mad LJ 346.

The costs of a suit instituted for recovery of possession of property do not come within any of the purposes mentioned in S 63-A (2) and cannot be considered an improvement and hence the mortgagee would not be entitled to them before redemption.(7)

Where the claimant (mortgagee) had a reasonable ground to entertain a bona fide belief that after expiry of the period stipulated for redemption of mortgage there was no intention on the part of the mortgagor to redeem and that he was therefore owner of the property and under that belief he had made improvements to the property he would be entitled to the improvements made by him under S 51, though his title might be defective His claim could not be defeated by virtue of S 63A (8)

4. "Contract to the contrary"

The right of the mortgagor to the improvement and the right of the mortgage to the costs thereof are subject to any contract entered into by the parties in respect thereto.(1) Thus, if a mortgagor has agreed to become liable for the costs of any improvement that the mortgagee might make, he would be so liable even though the improvements are not of the nature referred to in sub-sec (2) of this section (2) Again, if the mortgagor binds himself to pay only for *certain specified* improvements, the mortgagee will not be entitled to the costs of *other* improvements even though they may be of the nature referred to in the sub-section (3) Before a mortgage can recover the costs of im-

7. AIR 1954 Mad 89 (90)
8. (1970) 1 Mad LJ 132 : ILR (1969) 3 Mad 535 (555) (DB)

Section 63-A — Note 4

1. AIR 1955 NUC (Kutch) 4309 AIR 1955 Pepsu 87 (90) ILR (1955) Patiala 161 (DB) (Section 63A applies where there is no condition between the parties with regard to improvements made by the mortgagee) ** ILR (1955) Trav Co 196 (205) (DB) ** AIR 1951 Ajmer 28 (30) ** AIR 1950 Kutch 74 (75) (Mortgage of house with possession Mortgagee to get annual maintenance and repair costs — Suits for redemption after about 15 years — Mortgagee held entitled to special repair costs incurred in keeping house in sound condition) ** AIR 1944 All 204 (205, 206) ILR (1944) All 302 (DB) (Section 63A does not say anything about improvements made with the consent of the mortgagor — Section applies only in those cases where there is no contract between the parties with regard to improvements made by mortgagee during continuance of mortgage)
2. AIR 1960 Mad 24 ** AIR 1951 Ajmer 10 (11) (Construction of well may improve value of land but is not necessary to preserve property — Case falls under Cl (1) and if there is no contract to pay for costs, mortgagee is not entitled to it) ** (1949) 2 Sau LR 215 (217) (Covenant that mortgagee has the authority to build as he liked) ** AIR 1944 All 204 (206) (ILR (1944) All 302 (DB) ** AIR 1922 Lah 252 (254) 66 Ind Cas 755 (DB) (Case before the enactment of S 63A) ** (1890) 14 Bom 28 (30) (DB) (Do)
[See AIR 1947 Mad 197 (202) ILR (1947) Mad 411 (DB) (Where a mortgagee seeks to make the mortgagor liable for a large amount as cost of improvements, it is his duty to establish by indubitable evidence the fact of the execution of such improvements and the actual expenses incurred by him for effecting them.)]
[See also AIR 1955 NUC (Kuch) 4309 (Case from Kutch State before T P Act was applied to it — Where according to the stipulation in the mortgage deed, the mortgagee, upon redemption, was entitled to the "costs of repairing the house falling or crumbling down and of big or small construction made by the mortgagee" — It was held that not only the mortgagee was authorised to repair and reconstruct the house if it fell or crumbled down but he was also authorised to add expenses incurred for big or small construction made)]
3. ILR (1960) Ker 102 (105) (DB) ** AIR 1955 Pepsu 87 (90) · ILR (1955) Patiala 161 (DB) ** AIR 1952 Trav-Co 295 (299) ILR (1952) Trav-Co 152 (DB) (Stipulation to pay for specified improvements — Mortgagee making only some of the improvements — He is not entitled to more than rateable proportion of cost) ** 1949 Ker L Times 92 (98) (DB) (Specific sum provided for well and building — Entire value of well and building could not be claimed)
[See (1906) 9 Oudh Cas 18 (24, 25) (DB).]

provement on the mortgaged property he must prove a contract permitting him to make the constructions and enabling him to recover the amount before redeeming the property **(4)** The question whether there is a contract to the contrary and what is its nature depends upon the facts and circumstances of each case **(5)** Where under the mortgage agreement the mortgagor made himself liable for reasonable improvements by the mortgagee, it was held that this condition did not justify the demolition and rebuilding of a house at a cost equal to several times the mortgage-debt **(6)** But where, under the terms of the mortgagee, the mortgagor expressly agrees to pay at the time of redemption the costs of construction of any new building which the mortgagee may erect upon the mortgaged property after demolition of the old building, it has been held that the mortgagee would be entitled to such costs at the time of redemption even though the costs incurred are several times the mortgage-debt **(7)** The stipulation that the mortgagor shall pay the costs of 'shakasht' (breakage), and 'rekhat' (destruction) cannot be taken to mean that the mortgagor thereby binds himself to pay the expenses which the mortgagee may incur in breaking or demolishing the mortgaged property and then in rebuilding the same Reasonably interpreted, the stipulation only means that the mortgagor takes upon himself to pay the costs of repairs or rebuilding in case of breakage or destruction, which are due to natural deterioration or by some other act of nature beyond the control of the mortgagee and not undertaken by him at his own initiative and out of his own sweet will **(8)** Where the mortgagor agree in the mortgage-deed that if the mortgagee constructed wells on the land he would recoup the mortgagee the costs thereof but the mortgagee after having constructed wells in a portion of the property purchased such portion himself It was held that the contract did not contemplate the mortgagee himself purchasing the land and that it would be inequitable to allow the mortgagee to have the benefit of the wells and also to claim the costs-thereof from the mortgagor **(9)** Where under the contract between the parties the mortgagor is not entitled to the improvements and the improvements are such that they cannot be severed from the land, the mortgagor must be held liable for the costs of the improvements as he will have the benefit of them **(10)**

The fact that the mortgagor did not object to the mortgagee constructing a house on the mortgaged property will not show that the property cannot be redeemed unless the amount spent by the mortgagee is also paid**(11)**.

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4. AIR 1956 Bhopal 13 (14).

5. AIR 1947 Mad 197 (202) ILR (1947) Mad 411 (DB) (Under Malabar custom a usufructuary mortgagee is entitled to make improvements and claim their cost — But the mere fact that part of the mortgaged property is in Malabar and the mortgage deed is in Malayalam will not mean that there is a contract to make the mortgagor liable for cost of improvement.)

6. AIR 1955 Pepsu 87 (99) ILR (1955) Patiala 161 (DB) (Stipulation that mortgagor would pay cost of repairs or re-building in case of breakage or destruction which are due to natural causes — Mortgagor is not liable for cost of re-building undertaken on mortgagee's initiative and out of his sweet will.) ** AIR 1920 Lah 28 (29) 59 Ind Cas 764 (DB)

7. AIR 1944 All 204 (206) ILR (1944) All 302 (DB) (Such a condition in the mortgage is not a clog on the equity of redemption and would be enforceable.)
[**See also** AIR 1949 All 681 (682) (Demolition of building and construction of new pucca building by mortgagee — No consent by mortgagor — Mortgagee is not entitled to cost of improvement upon redemption.)]

8. AIR 1955 Pepsu 87 (89) ILR (1955) Patiala 161 (DB) (Such an interpretation would be authorising mortgagee to improve out the mortgagor of his estate and thus clog the right of redemption which is not permissible under the law or the principles of justice.)

9. (1906) 28 All 593 (596) 1906 All WN 150 (DB) (**Reversed** on another point in 32 All 612 (PC).)

10. AIR 1947 Mad 197 (201) ILR (1947) Mad 411 (DB) (Sub-sec (1) does not speak of a contract to the contrary under which mortgagor can be compelled to pay the mortgagee the cost of improvements — The "contract to the contrary" in sub-sec (1) refers to the mortgagor's right to the improvements to which he will be otherwise entitled under the sub-section.)

11. AIR 1956 Bhopal 13 (14)

5. The mortgagor shall be liable to pay the proper costs thereof.

The expression "mortgagor" would include his representatives (See section 59-A). A purchaser from the mortgagor must pay the mortgagee the costs of the improvements if he claims possession of the property as it stands(1). The mortgagor is liable to pay only those costs of improvements which have been properly and reasonably incurred(2). "Proper cost" means actual expenses or costs incurred for effecting improvements(3) Even in the case of natural decay or destruction of the mortgaged property by some unforeseen calamity, the expenditure on its repairs or rebuilding should be reasonable. What constitutes a proper and necessary expenditure is a question of fact depending upon the circumstances of each case. Among other things regard must be had to the nature, situation and value of the property mortgaged, financial condition and position of the mortgagor, the amount that he could and would have himself spent under the circumstances and the *bona fide* intentions of the mortgagee(4).

Where a person continues in possession as mortgagee he can repair the property keep the property in good condition. But he cannot effect constructions thereon If he does so it is at his own risk and the mortgagors are not liable for expenses(5).

The statutory right of mortgagee to get proper cost is only the right to get out of pocket expenses incurred by him for effecting improvements and not the value or compensation for improvements(6).

In two cases before the introduction of this section, the question was raised before the Bombay High Court as to whether a person on whom the mortgage was not binding was liable to pay compensation to the mortgagee for improvements In the undermentioned case(7) where the mortgagee from a Hindu widow for no necessity, effected improvements on the mortgaged property it was held that he was not entitled to claim from the reversioner any amount for the costs of the improvements. It was further held that the mortgagor could not even remove the materials of the building he had erected In a later case(8), however, it was held that the reversioner would not be entitled to the improvements unless he compensated the mortgagee therefor, and that if the reversioner did not wish to make the compensation the mortgagee was entitled to remove the building erected by him.

The law of landlord and tenant and mortgagor and mortgagee in Travancore does not restrict the freedom of parties to make contracts regarding the cost of improvement. Value can be fixed either before or after the improvements Where all the stipulated improvements have not been effected, the mortgagee is not entitled to claim more than the rateable proportion of the amount provided for in the mortgage deed The mortgagee cannot disregard the directions of the mortgagor and effect such improvements, as in his wisdom he deems fit, and claim compensation for them If

Section 63-A — Note 5

1. AIR 1950 Kutch 14 (14).
2. AIR 1955 Pepsu 87 (90) ILR (1955) Patiala 161 (DB) ** AIR 1952 Madh B 6 (7) (The mortgagee held entitled to recover from his mortgagor the reasonable and proper costs incurred in making lasting improvements — In this case there was a term in the contract that the mortgagor would pay the cost of reasonable improvement)
3. ILR (1974) 1 Ker 201 (DB).
4. AIR 1955 Pepsu 87 (89, 90) ILR (1955) Patiala 161 (DB) (Where the entire structure of three shops mortgaged for Rs 2,000 was demolished from its very foundation and a new double storeyed building was raised in its place at an alleged expenditure of Rs 13,000, that is more than six times the mortgage debt, and with the addition of interest claimed thereon the liability of the mortgagor went to more than twenty times the debt, it was held that the huge expenditure on the new construction could not be regarded reasonable)
5. AIR 1958 Mys 20 (21) . 1957 Kant LJ 48
6. ILR (1974) 1 Ker 201 (214) (DB).
7. (1908) 32 Bom 32 (35, 36) : 9 Bom LR 1181 (DB).
8. AIR 1976 Kant 21 (1975) 2 Kant LJ 300 ** AIR 1923 Bom 385 (386) 47 Bom 696 (DB)

the mortgagor does not wish to pay for them, the mortgagee is entitled to remove the material(9) (See also Note 9).

Where the parties have agreed as to how the improvements have to be valued and paid for at the time of redemption, the rights of the parties in regard to their contractual relationship have to be respected, even though it is at variance with the general rule relating to the value of the improvements. The improvements have to be valued at the time of redemption on the terms previously agreed upon, though such redemption is long after the expiry of the period fixed(10).

There is no justification for restricting the value of improvements payable to the usufructuary mortgagee to the amount advanced under the mortgage(11).

It has been held that full compensation should not be given for improvements in the shape of trees on non-warg lands like *kumki* in South Kanara(12).

Where the mortgagee of a garden plants substitute trees for those lost by age, he cannot claim, in the absence of a contract to the contrary, compensation for them on the expiry of the mortgage(13) This is in conformity with his liability to return the property back to the mortgagor on redemption in the same condition in which he received it Section applies only when there is no contract between the parties In absence of an agreement the question whether the mortgagor has to pay for the improvements will depend on whether the claim of the mortgagee comes within the term of the section and if there is an agreement it prevails over the section But a mortgagee ought not to be allowed to improve the mortgagor out of his estate The question whether the agreement in question amounts to a clog on redemption may be decided on facts(14) (See S 76 Note 10)

The recovery of costs being exceptional the burden lay strictly upon the mortgagee In absence of foundation laid upon facts, there can be no question of the Court awarding any sum to the mortgagee under S. 63-A(15).

6. "As an addition to the principal money".

Before this section was introduced it was held that the costs of improvement cannot be brought under the expression "amount due on the mortgage" within the meaning of S 83(1) The provision in this section that the costs of the improvement are to be regarded as *an addition to the principal money*(2) now makes it clear that such costs will be included in "the amount due on the mortgage"

7. Interest on costs.

In a case before this section was introduced their Lordships of the Privy Council disallowed interest on the costs of improvement(1) See also the undermentioned cases(2) The section now

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9. AIR 1952 Trav-Co 295 (299) : ILR (1952) Trav-Co 152 (DB)
10. AIR 1953 Trav-Co 299 (300) : ILR (1953) Trav-Co 41 (DB)
11. AIR 1953 Trav-Co 441 (442).
12. (1954) 2 Mad LJ 665 (665).
13. (1954) 2 Mad LJ 665 (666).
14. AIR 1976 Kant 21 : (1975) 2 Kant LJ 300
15. (1984) 10 All LR 204 (207).

Section 63-A — Note 6

1. AIR 1919 Mad 272 (272) 52 Ind Cas 834 (DB) (AIR 1917 Mad 619 Foll) ** AIR 1917 Mad 619 (620) : 32 Ind Cas 861 (862) (DB).
2. AIR 1984 (NOC) 297 (All).

Section 63-A — Note 7

1. (1896) 23 Cal 228 (247) : 22 Ind App 183 (PC).
2. AIR 1923 Lah 309 (310) 75 Ind Cas 667 (Interest on the cost of repair not allowed as there was no provision for such interest in the mortgage deed) ** 1893 Pun Re No 67 page 297 (303) (DB) (Interest on such sum will not be allowed where the amount together with interest, considerable exceeds the value of improvements, so as to improve the mortgagor out of his estate)

makes it quite clear that the mortgagee is entitled to interest on the costs of the improvement in cases where such costs are allowable to him under sub-section (2)(3) Where the mortgage deed made an express provision for the payment of the cost of improvements, by the mortgagor and there was no stipulation as to payment of interest on the cost, it was held that there was contract to the contrary and interest on the money spent on the improvements was not payable by the mortgagor(4). Where the mortgagor agreed to pay interest on the costs but the rate of interest was not fixed it was held in the undermentioned case(5), which was decided prior to the introduction of this section, that the intention of the parties was that reasonable interest should be charged and not at the rate at which it was to be paid on the principal. Under the present section this decision cannot be good law.

See also the undermentioned case(6) which was also decided prior to the enactment of this section.

In a complete usufructuary or partially complete usufructuary mortgage cost of improvement does not bear interest for obvious reasons, the usufruct is supposed to wipe out all interest and the principal sum of the debt does not bear any interest either But where the mortgage is not of the above type and the mortgagee is in possession and according to the document accounts of usufruct, expenses and interest have to be taken and interest on the cost of improvements have to be calculated, care should be taken to see that interest on interest is not taken in any form directly or indirectly Costs of improvements have first to be deducted from gross produce and balance only applied to reduction of interest on debt(7).

8. Re-valuation of improvements at the time of execution of decree for redemption.

It has been held by the High Court of Madras in the undermentioned cases(1) that though a decree for redemption fixes the value of improvements made by the mortgagee, a revaluation of such improvements can be made at the time of execution of the decree if circumstances show that the value has increased or decreased subsequent to the decree The decisions rest on the view that the relation of mortgagor and mortgagee continues notwithstanding the decree, until it is fully executed, and the mortgagor has right to ask for a revision of the amount awarded by the decree, if such revision is rendered necessary by events that have occurred since the decree

9. Law prevalent in Malabar, Travancore and Cochin.

According to the custom prevalent in Malabar, Cochin and Travancore the right of possessory

3. AIR 1940 Lah 199 (200) : 188 Ind Cas 570.
4. AIR 1951 Ajmer 28 (30).
   [**See however** (1949) 2 Sau LR 215 (217) (Covenant that mortgagee had authority to build as he liked — Mortgagor binding himself to pay cost — No mention of interest — Mortgagor held liable to pay cost together with interest at 9 PC P.A.)]
5. AIR 1915 Lah 331 (332) : 28 Ind Cas 375.
6. AIR 1923 Lah 632 (633, 634) 4 Lah 406 (DB) (Mortgage with possession — Mortgagee to enjoy profits in lieu of interest on part of the principal money — Mortgagor agreeing to pay interest at Re 1-8-0 per cent per mensum on the remaining part together with costs of improvement — Whole amount payable at a stipulated time — No express or implied stipulation to pay interest after due date for redemption — **Held,** that the mortgagee was entitled to damages on failure of mortgagor to pay amount at stipulated time, the measure of damages being the same as the rate of interest stipulated — But the Court reduced the rate of interest payable on the costs of improvement after the due date as the condition was unusual and onerous upon the mortgagor.)
7. AIR 1950 Kutch 90 (92).

Section 63-A — Note 8

1. (1897) 20 Mad 124 (128) (DB) (Value of improvements decreasing because the trees were in want of water — The loss held, should fall on the mortgagee) ** (1887) 10 Mad 367 (368) (DB) (Improvements at the time of execution, of more value than at the date of decree — Mortgagee held was entitled to re-valuation in execution proceedings)

mortgagees to get value of improvements effected by them, independent of any agreement in that behalf but in the absence of an agreement to the contrary, has been recognised(1) Where all the stipulated improvements were not effected by the mortgagee, he was not entitled to claim more than the rateable proportion of the amount provided for in the mortgage deed (See Note 5).

A mortgagee is considered to be tenant under Travancore-Cochin Compensation for Tenants Improvement Act, 10 of 1956. The tenant on eviction is entitled to compensation for improvements made by him till an order of eviction is made against him The order of eviction can be made only where mortgage money and value of improvements are deposited The plea that relationship of mortgagor-mortgagee comes to an end on payment of mortgage money and so for improvements made thereafter mortgagee cannot get compensation is not tenable(2)

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64. RENEWAL OF MORTGAGED LEASE.— Where the mortgaged property is a lease ^[* * *] and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

[A] The words, "for a term of years" were *omitted* by the Transfer of Property (Amendment) Act 1929 (20 of 1929), S 28.

Synopsis

1-2. **Principle of the section.** See Note 2 on Section 71.
3. **"Obtains a renewal."**
4. **Contract to the contrary.**
5. **Mortgagee of land obtaining re-settlement from Government in his favour.**
6. **Costs of renewal.**

1-2. Principle of the section.

See Note 2 on Section 71.

3. "Obtains a renewal."

The fact that the mortgagee was forced to renew the lease and that there was no collusion between him and the landlord does not prevent the application of the section(1)

The section must be applied so as not to conflict with S 9 of the Agra Rent Act (12 of 1881) and S 20 of the Agra Tenancy Act (2 of 1901).(2) Where an occupancy tenant had made a unsufructuary mortgage of his holding, there being an arrangement between himself and the mortgagees as to the payment of rent and the rent fell into arrears, in consequence of which the landlord determined the tenancy and ejected the tenants and granted a new lease to the mortgagees, it was held that the mortgagor's attempt to treat the new lease as one for his benefit was really asking in

Section 63-A — Note 9

1. AIR 1952 Trav-Co 507 (507) (Suit for redemption — Value of coconut trees on land — Deduction towards dropping of coconuts) ** AIR 1952 Trav Co 19, (191) (DB) (Redemption suit — Mortgagee claiming value of improvements — In previous suit by him against tenants for their eviction mortgagee denying liability for improvements — Mortgagor *pro forma* party to it — It was held that there was neither estoppel nor *res judicata* barring his claim) ** **AIR 1951 Trav-Co 109 (117, 118) . ILR (1951) Trav-Co 209 (FB).** (Improvements by sub-mortgagee in Travancore holding under a usufructuary mortgagee) ** ILR (1951) Trav-Co 282 (285) (DB) ** 1949 Ker LT 92 (98) (DB) (Specific sum provided for well and building — Entire value of well and building could not be claimed)
2. (1987) 100 Mad LW 850.

Section 64 — Note 3

1. (1901) 6 Cal WN 372 (374, 375) (DB)
2. Now See S 23 of the Agra Tenancy Act, III of 1926 and S 33 of the U P Tenancy Act, XVII of 1939

effect for the transfer of the lease to himself, that this was prohibited by S 9 of the Agra Rent Act, 1881, and that the mortgagor could not get the benefit of the lease(3).

Continued existence of relationship of mortgagor and mortgagee is essential in the application of Section 64 and Section 90, Trusts Act With the extinction of the lease on the passing of a decree for eviction the mortgage created by the lessee comes to an end and subsequent lease obtained by the mortgagee does not attract Section 64. Therefore, the suit for redemption in such case is not tenable(4)

A mortgagee continuing in possession after the mortgage is extinguished by payment cannot be said to be adverse to the mortgagor(5).

4. Contract to the contrary.

The mortgagor can claim the benefit of the renewed lease, only if there is no contract to the contrary In the absence of any such contract the section says that the mortgagor *shall* be entitled to the renewed lease. In the undermentioned case(1) Mookerjee, Acting C J., however, expressed the opinion following English decisions that there is only a *presumption* that the mortgagee acquires the renewal of the lease for the mortgagor's benefit, that such presumption might be rebutted, and that where a new lease was obtained *bona fide* by the mortgagee after giving all parties interested notice and an opportunity of renewal, such new lease is not for the benefit of the mortgagor. It is submitted that this view is against the terms of the section.

5. Mortgagee of land obtaining re-settlement from Government in his favour.

In *Khiarajmal v. Daim*(1) their Lordships of the Privy Council observed that the renewal by the mortgagee of the *patta* for the mortgaged land or the making of a new settlement with the Government does not alter the real title to the land and that the mortgagor will be entitled to redeem the land so settled. The same principle will apply where the mortgaged land is *inam* land and is resumed by the Government. Where an *inam* land is resumed, the resumption has merely the effect of converting the land from a service tenure into land liable to pay assessment to Government. The mortgagor is, therefore, entitled to the land on redemption(2).

6. Costs of renewal.

This section does not say anything about the liability of the mortgagor to pay the costs of renewal of the mortgaged lease Under the English law, such costs must be paid by the mortgagor with interest,(1) such interest being regulated by the interest payable on the money originally lent (2)

3. (1905) 2 All LJ 583 (584, 585) (DB) (Section 64 of the T P Act, held had no application.)
4. AIR 1974 Ker 183 (185) : 1974 Ker LT 537 (DB).
5. AIR 1974 Ker 102 (103) : 1973 Ker LT 212.

Section 64 — Note 4

1. (1912) 62 Ind Cas 692 (694, 695) (DB) (Cal).

Section 64 — Note 5

1. (1905) 32 Cal 296 (312) : 32 Ind App 23 (PC).
2. (1921) 36 Bom 539 (542) (DB) ** (1862-65) 1 Bom HCR 22 (25, 26) ** (1885) 9 Bom 419 (421) (DB) ** (1866) 1 Agra 15 (15, 16) (DB) ** (1900) 24 Bom 482 (483) (DB)
Also see S. 60, Note 27.

Section 64 — Note 6

1. (1676) 22 ER 1026 (1026), Rushworth's case ** (1688) 23 ER 664 (664) , 2 Vern 84, Manlove v Bale ** (1809) 12 RR 14 (16) 1 Ball and B 202, Hamilton v Denn ** (1747) 26 ER 1098 (1099) : 3 Atk 518 Godfrey v. Watson.
[See (1787) 29 ER 135 (138) 2 Bro CC 243, Stone v Theed (Apportionment of the cost of renewal) ** (1814) 12 ER 119 (123) 2 Bail and B 548, Stubbs v Roth ** (1728) 24 ER 811 (812) 2 P Wms 456, Addis v Clement (Interest on cost not allowed)]
2. (1857) 145 ER 964 (964) 2 Anst 551 3 PR 628, Woodley v Drage

Under S. 72, clause (e), a mortgagee of a renewed lease may spend money for the renewal of the lease, and add the costs to the principal money due to him See Note 6 on that section

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65. IMPLIED CONRACTS BY MORTGAGOR.— In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee—

(a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same,

(b) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend the mortgagor's title thereto;

(c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;

(d) and, where the mortgaged property is a lease [A][* * *], that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non payment of the said rent or the non performance or non-observance of the said conditions and contracts,

(e) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance

[B][* * * * *]

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

[A] The words "for a term of years" were *omitted* by the Transfer of Property (Amendment) Act 1929 (20 of 1929), S. 29.

[B] Words "nothing in clause (c) or clause (d) so far as it relates to the payment of future rent applies in the case of usufructuary mortgage" omitted, ibid.

Synopsis

1. Analogous law.
2. Legislative changes.
3. Scope of the section.
4. Clause (a).
(A) Breach of covenant when occurs.
5. Clause (b).
6. Clause (c).
7. Clause (d).
8. Clause (e).
9. "In the absence of a contract to the contrary."

10. Remedies of mortgagee on breach of the implied contracts under this section.

(A) Contract falling under cl. (a).

(B) Contract falling under cl. (b).

(C) Contract falling under cl. (c).

(D) Contract falling under cl. (d).

(E) Contract falling under cl. (e).

11. Benefit of contract goes with mortgagee's interest.

1. Analogous law.

The provisions in cls (a) and (d) of this section correspond to the provisions of S 7 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., C. 41), now reproduced in S 76, sub-section (1), cls. (c) and (d) respectively of the Law of Property Act, 1925 (15 Geo V, Ch. 20), which runs as follows :

"Section 76 (1) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly if more than one, to whom the conveyance is made as joint tenants, or with each of the persons if more than one, to whom the conveyance is (when the law permits) made as tenants in common, that is to say

* * * * * * * * *

(c) In a conveyance by way of mortgage (including a charge) a covenant by a person who conveys or charges and is expressed to convey or charge as beneficial owner in the terms set out in Part III of the Second Schedule to this Act;

[Note.— The relevant provision in Part III of the Second Schedule to the above Act is as follows :—

"That the person who so conveys has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed "]

(d) In a conveyance by way of mortgage (including a charge) of freehold property subject to a rent or of leasehold property, a further covenant by a person who conveys or charges and is expressed to convey or charge as beneficial owner in the terms set out in Part IV of the Second Schedule to this Act;

[Note.— The provisions of Part IV of the Second Schedule to the above Act are as follows

"That the lease or grant, creating the term or estate for which the land is held, is at the time of conveyance, a good, valid, and effectual lease . . and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance "

And also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains owing on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained, in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them."]

The last clause of the section exactly corresponds to S. 76 (6) of the Law of Property Act, 1925, which runs as follows

"The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested."

2. Legislative changes.

By the Transfer of Property (Amendment) Act, XX of 1929, the words "for a term of years" occurring in clause (d) were omitted as they were found to be unnecessary. The penultimate para-

graph of the old section which provided that nothing in clauses (c) and (d) so far as it related to the payment of rent, applied in the case of usufructuary mortgages, was also omitted. The reasons for such omission have been given by the Special Committee as follows :

> "This section relates to the implied covenants by a mortgagor, and provides in the penultimate paragraph that covenants regarding payment of public charges and future rent in the case of leasehold property do not apply in the case of a usufructuary mortgage. This provision is not clear. Covenants specified in the section are binding on a mortgagor in consequence of his obligation to preserve the mortgage security. No sufficient reason is apparent why, in the case of a usufructuary mortgage when possession is not delivered to the mortgagee, the mortgagor should not be under a duty to pay the public charges and future rent. It appears from the purpose underlying the Act that the provision at present contained in this paragraph was first introduced in Bill IV of 1879, when clauses (c) and (d) did not contain the words 'so long as the mortgagee was not in possession.' In the case of a usufructuary mortgage, if the mortgagor has not put the mortgagee in possession, it is as much his duty as it is in the case of any other mortgage to preserve the property on the security of which he has obtained a loan. The words 'so long as the mortgagee was not in possession' were added in sub-clauses (c) and (d) of section 65 in the final Bill, but apparently through inadvertence this paragraph was not omitted."

3. Scope of the section.

This section enacts that in the absence of a contract to the contrary, certain contracts *shall be implied* in every transaction of mortgage, and that the benefit of such implied contract shall be annexed to, and go with the mortgagee's interest, and shall be enforceable by every person in whom such interest is, for the whole or any part thereof from time to time, vested.

Such contracts cannot, however, be said to be "covenants running with the land"(1) But a single Judge of the Calcutta High Court, has, in the undermentioned case, expressed a contrary view (2) As to the meaning of the expression "covenants running with the land", see Notes on S. 40.

The section does not apply to mortgages executed before the Act. Where a mortgage was executed in 1880 and the mortgagor lost his title to a portion of the property subsequently, it was held by their Lordships of the Privy Council that the mortgagee could not claim any damages by reason of the diminution of his security(3)

4. Clause (a).

This clause provides for a statutory covenant for title similar to the one contained in S. 55, sub-section (2) with respect to sales. A breach of the covenant will occur where the mortgagor's title or his power to transfer the interest is found to be defective. The consequence of such a breach is not to render the mortgage itself void,(1) but merely to give rise to a right in the mortgagee to claim the reliefs referred to in Note 10.

It has been held in the undermentioned case(2) that the warranty of title contained in this clause, includes a warranty of quiet enjoyment. (As to the meaning of covenant for quiet enjoyment, see S. 55, Note 9.)

The right of the mortgagee on the implied contract under this clause must be distinguished from the doctrine of estoppel that may be applicable between the mortgagor and the mortgagee. As

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Section 65 — Note 3

1. AIR 1917 Mad 228 (230, 231) : 39 Mad 959 (DB). (Covenant created by Cl. (c) of S. 65 is in the nature of a personal covenant.)
2. ILR (1948) 1 Cal 492 (497). (Covenants under the section are instances of covenants running with the land and are binding upon the transferee irrespective of any question of notice.)
3. (1913) 35 All 48 (57) : 40 Ind App 31 (PC).

Section 65 — Note 4

1. (1907) 12 Cal WN 94 (96) (DB).
2. AIR 1944 All 195 (195) : ILR (1944) All 277 (DB).

a general rule the mortgagor cannot derogate from his own grant and he and his representatives will not be allowed to deny his title as against the mortgagee(3) except where the mortgage is forbidden by law,(4) in which case there can be no estoppel against statutes,(5) and except where the truth is

3. **AIR 1922 PC 382 (383).** (And he cannot claim that a personal decree should have been passed) ** (1955) 2 MLJ 14 (15) ** AIR 1949 Nag 81 (82) ILR (1948) Nag 290 (DB) (As a rule, any person who comes into possession of the mortgaged property under the mortgagor is treated as being in privity with him and is estopped from denying the title of the mortgagee) ** AIR 1949 Nag 206 (207) ILR (1948) Nag 936 (DB) ** (1912) 16 Ind Cas 629 (630) (All) (31 All 11, Followed) ** AIR 1935 All 678 (682, 683) 58 All 98 (DB) (But it cannot be rightly said that he is likewise estopped from objecting to the Court selling the property) ** (1911) 36 Bom 185 (188) (DB) ** AIR 1928 Bom 380 (381) ** (1912) 16 Ind Cas 246 (247) (DB) (Cal) ** (1890) 14 Bom 404 (407, 408) (DB) ** (1909) 1 Ind Cas 264 (270) (DB) (Cal) ** AIR 1915 Cal 712 (712) (DB) (If A and B jointly mortgage to X a property which stands in their names, on the allegation that they are proprietors in respect of the shares for which they are registered, A cannot subsequently contend as against X and B had no title to the property) ** AIR 1915 Cal 161 (163 164) · 42 Cal 455 (DB) (A mortgagor cannot set up against the mortgagee the title of a third person) ** AIR 1935 Cal 666 (669) (DB) ** 1894 Pun Re No 114, p 437 (440) (DB) ** AIR 1926 Mad 744 (746) (DB) (It is however, open to third parties to state and prove what the interest of the mortgagor is) ** AIR 1935 All 269 (270 271) (DB) ** (1911) 35 Bom 507 (511) (DB) ** AIR 1925 Oudh 273 (273) (Principle of estoppel between mortgagor and mortgagee works against and in favour of both of them) ** AIR 1926 Oudh 517 (518) ** AIR 1928 Oudh 336 (336) (DB) (A muafidar who has mortgaged his muafi plots cannot assert against the mortgagee his own want of title) ** AIR 1923 Pat 203 (204, 205) (DB) (Mortgagor though trustee is estopped from setting up trust) ** AIR 1933 Lah 262 (262, 263).

The estoppel will apply to his legal representative : see

** (1909) 31 All 11 (13) (DB) ** (1903) 5 Bom LR 652 (654) (DB) (A son held estopped from disputing the validity of the mortgage by his father) ** (1936) 63 Cal 68 (70, 71) (Husband as a legal representative of his wife held estopped from questioning the validity of mortgage by his wife) ** AIR 1914 All 125 (126) (DB) (Hindu son who acquires by birth an interest in the ancestral property does not derive his title from his father alone and hence when his father mortgages his own share in the ancestral joint property, his son can object to the validity of the mortgage) ** (1911) 10 Ind Cas 49 (50) (DB) (Cal) ** AIR 1929 All 483 (484) 51 All 802 (DB) **** (1912) 39 Cal 513 (520) (SB)** ** (1913) 20 Ind Cas 241 (241) (DB) (Cal) ** AIR 1916 Cal 452 (453) (DB) ** (1846) 71 RR 311 (314) 3 CB 176 15 LJ CP 234, Deo v Stone ** AIR 1914 Oudh 426 (430) ** AIR 1923 Cal 53 (55, 56) (DB) (22 Cal 309, Foll) ** (1912) 15 Ind Cas 718 (719) (DB) (Cal) ** (1932) 139 Ind Cas 695 (696) (DB) (All) ** (1911) 10 Ind Cas 530 (530, 531) (DB) (Cal) ** **AIR 1939 Pat 47 (48).**

[See (1906) 7 Cal LJ 72 (77) (DB).]

4. (1912) 34 All 640 (642) (DB) (It is open to the representatives of the mortgagors as Mutwallis to plead that the property was wakf and that the mortgage of it was void) **** AIR 1930 All 136 (140) : 52 All 281 (FB).** (Per Mukherji, J , in Order of Reference) ** AIR 1931 All 38 (40) (DB) (But such objection must be taken before a decree is passed) ** (1896) 19 Mad 200 (206, 208) ** (1903) 6 Oudh Cas 331 (333, 335, 336) (DB). (Transfer of a non-transferable holding) ** AIR 1928 Oudh 500 (501) (DB)

[See AIR 1928 Oudh 41 (41) (Mortgage of tenancy covered by the proviso to S 5 of the Oudh Rent Act is not contrary to law, hence an occupancy tenant cannot challenge the mortgage)]

[See also (1910) 7 Ind Cas 738 (739) (All) (A mortgagor under a void mortgage held, could not recover possession until payment of the mortgage-money on equitable grounds.) ** AIR 1915 Bom 102 (103, 105) 39 Bom 358 (DB) (Mortgage of unrecognised sub-division of bhag is void under S 3 of Bombay Bhagdari and Narwadari Act.)]

5. AIR 1930 Bom 135 (137) · 53 Bom 676 (DB) ** AIR 1915 Cal 161 (164) 42 Cal 455 (DB) ** (1896) 19 Mad 200 (208) ** (1911) 34 All 155 (157) (DB)

known to the mortgagee, in which case also there is no estoppel (6) See also the undermentioned cases(7).

But independent of any question of estoppel if as a matter of fact the title of the mortgagor is found to be defective the mortgagee will, by virtue of this clause, be entitled to claim compensation for breach of the implied contract. (See Note 10.)

The failure to disclose at the time of the mortgage the existence of a prior incumbrance is, according to the High Court of Calcutta, a breach of an obligation imposed by cl (a) of this section (8) A contrary view, namely that the mortgagor is not bound to disclose any prior incumbrances on the property has been expressed by the Judicial Commissioner's Court of Nagpur (9) It is submitted that this last view is not correct. Where a person professes to transfer an unincumbered interest in property, he clearly commits a breach of the implied contract, referred to in cl (a), if there is a prior incumbrance on the property.

It has been held by the High Court of Madras that the mere fact that the mortgagee had *knowledge* of the defect of title does not affect his right under this clause (10) It was observed by Sadasiva Aiyar, J., in the case cited that the mortgagee's "statutory right given by the breach of the covenant attached to the mortgage transaction under S 65, Act IV of 1882, cannot be taken away except by an express release of such rights by the mortgagee or by acquiescence of such a very long duration that the release can be safely presumed" The High Court of Andhra Pradesh has also taken the same view (11) A contrary view that the mortgagee cannot if he was *aware* of the defect of title at the time of mortgage, get any relief on the implied contract under cl (a) has been held in the undermentioned case (12) It is submitted that the fact that the mortgagee and the mortgagor were both aware of the defect in the title would be sufficient to show a "contract to the contrary" such as would prevent the implied contract under cl (a) from coming into existence at all

(A) Breach of covenant when occurs.

Where the mortgagor has power to transfer the property on the date of the sale but the transaction is voidable at the instance of a third person, a breach of the implied contract for title will take place when such transaction is avoided by such third person and not on the date of the mortgage itself (13) (For a full discussion of the subject, see S 55, Note 9)

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6. AIR 1924 Nag 363 (365) ** (1910) 34 Bom 175 (182) (DB)

7. *Trustee acting in private capacity and mortgaging trust property cannot plead that he had as trustee no power to mortgage : see*

** AIR 1923 Pat 203 (204 205) (DB) ** AIR 1915 Cal 161 (164) 42 Cal 455 (DB) (Per Mookerji J 1 Cal WN 493 **Not Followed.**) ** (1935) 63 Cal 68 (70 71) (Trustee's representative also cannot plead it as a defence) ** (1843) 63 RR 72 (74) 6 Beav 246 12 LJ Ch 309 *Sandon v Hooper* ** (1842) 114 ER 698 (701) 3 QB 757 3 Gal and Dav 239 12 LJQB 72 : 7 Jur 38, Doed, *Levy v. Horne.*

But succeeding trustee can raise such a plea; see :

** (1912) 34 All 640 (642) (DB) ** (1890) 15 Bom 625 (636 637) (DB) (**Overruled** on a different point in 20 Bom 721 (FB)) ** AIR 1949 Nag 81 (81, 82) ILR (1948) Nag 290 (DB) (Mortgagor or his legal representatives cannot question the title of the person named as mortgagee in the mortgage deed.)

8. (1910, 7 Ind Cas 251 (252) (DB) (Cal) (Fact of prior encumbrance not disclosed)

9. AIR 1934 Nag 149 (151) : 30 Nag LR 303.

10. AIR 1915 Mad 1215 (1218) (DB).

[**See also** AIR 1944 All 195 (195) ILR (1944) All 277 (DB) (It does not really matter whether the mortgagee had knowledge or not about the property)]

11. AIR 1957 Andh Pra 288 (290).

12. AIR 1931 Lah 694 (695, 696).

13. See AIR 1944 All 195 (196) ILR (1944) All 277 (DB) (Mortgage by Hindu father of joint family property — Mortgage set aside by decree in son's suit, on the ground that mortgage was not for legal necessity — Cause of action held arose on the date of the

5. Clause (b).

This clause is only a legislative recognition of the principle that had been recognised even before the passing of this Act that a mortgagor was bound under the ordinary law of mortgage to indemnify the estate against expenses incurred in protecting the title(1).

A breach of the implied contract under this clause occurs when the mortgagor being in possession does not defend his title, or when the mortgagee is in possession, the mortgagor fails to assist him in defending the title As to the remedy of the mortgagee on breach of this implied contract, see Note 10.

6. Clause (c).

The implied contract under this clause is that the mortgagor will, *so long as the mortgagee is not in possession of the mortgaged property*, pay all public charges accruing due in respect of the property The clause does not apply where the mortgagee is in possession of the mortgaged property. Under S. 76, clause (c) it is the duty of the mortgagee himself in such a case to pay such charges from out of the income of the property.

A mortgagor commits a breach of the implied contract under this clause when he fails to pay any public charges accruing due in respect of the property. As to the remedies of the mortgagee in respect of such breach, see Note 10.

7. Clause (d).

Under S 108, clause (j) a lessee may mortgage his lease hold interest, but the lessee will not, by reason of such mortgage, cease to be subject to any of the liabilities attaching to the lease. The consequence of non-payment of rent, the non-performance of the conditions and non-observance of the contracts binding on the lessee being the forfeiture or the determination of the lease with consequent loss to the mortgagee, this clause provides against such loss by enacting that the lessee (mortgagor) shall be deemed to contract with the mortgagee that the rent payable under the lease, the conditions contained therein and the contracts binding on the lessee have been paid performed and observed down to the commencement of the mortgage, and that the mortgagor will, so long as the security subsists, pay the rent etc., and indemnify the mortgagee against loss by reason of his default in doing so. Under S. 71 where the mortgagor obtains a renewal of the lease, the mortgagee is entitled to the security of the new lease and this clause, consequently, provides that the implied contract extends to the payment of rent, etc , of the renewed lease also.

The first part of the clause applies whether the mortgaged property is in the possession of the mortgagee or not. The second part of the clause relating to the payment of rent, etc., *after the commencement of the mortgage* applies only so long as the mortgagee is *not* in possession. A mortgagee in possession must, under S 76, Cl. (c) pay out of the income of the property, all rent accruing due during such possession and also arrears of rent in default of payment of which the property may be summarily sold.

As to the remedies of the mortgagee on breach of the implied contract by the mortgagor, see Note 10

8. Clause (e)

This clause places the obligation of redeeming prior mortgage on the mortgagor. As to the remedies of the mortgagee in case of a breach of this implied contract by the mortgagor, see Note 10.

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decree NOTE — In this case, the covenant for title was held to include the covenant for quiet enjoyment)

Section 65 — Note 5

1. (1885) 9 Bom 435 (437) (SB).

[See also AIR 1924 Bom 265 (266, 267) (Section 72(c) as it stood before the amendment of 1929 did not apply except to mortgagees in possession — But in such cases the principle stated above was applied.)]

Also see S. 72, Note 4.

9. "In the absence of a contract to the contrary."

An implied contract under this section arises only if there is no contract to the contrary. A contract to the contrary may be express or implied. In the undermentioned case(1) the contract which was alleged to have been broken was one to be implied by reason of clause (a) of this section. The mortgagee in that case knew all the circumstances when he took his mortgage and it was held on the fact of the case that there was an implied understanding between the parties that there should be no such contract as is referred to in clause (a) of this section.

10. Remedies of mortgagee on breach of the implied contracts under this section.

In respect of every one of the contracts referred to in the various clauses of the section the mortgagee has of course the general remedy, by way of damages under S. 73 of the Indian Contract Act, 1872.(1) This right to claim damages is not in any way taken away by S. 68 of the T.P. Act (2). The mortgagee has also other remedies open to him which may, however, vary according to the particular clause of this section under which the implied contract falls.

(A) Contract falling under clause (a).

A breach of the implied contract referred to in this clause will be "default on the part of the mortgagor" by which the security is rendered insufficient within the meaning of S. 68, clause (b) and will entitle the mortgagee to sue for the mortgage-money (3). A mortgagee suing for damages for breach of the covenant of title is entitled to interest on the sum advanced by him (4). But though a usufructuary mortgagee who brings a suit for recovery of mortgage-money on the ground of want of title in the mortgagor is entitled to a decree on the basis of a personal covenant in the mortgage-deed he is not entitled to interest on the amount decreed so long as he continues in possession(5).

(B) Contract falling under clause (b).

Under S. 72, clause (c) the mortgagee may spend the necessary amount for defending the mortgagor's title to the property and add such amount to the mortgage-money. He may also, if the property is lost by reason of the default of the mortgagor under this clause, sue the mortgagor for the mortgage-money under S. 68, clause (c).

Section 65 — Note 9

1. (1908) 4 Mad LT 437(438) (DB).

Section 65 — Note 10

1. 1942 Nag LJ 289 (293) (DB). (Breach of duty under Cl. (e) — Any loss ensuing from this failure of mortgagor's duty should fall on him or those representing him and not on the mortgagee — Subsequent purchasers purchase subject to all equities and burdens created by the mortgage.) ** AIR 1936 Mad 433 (433) ** AIR 1944 All 195 (196). ILR (1944) All 277 (DB) ** (1870) 2 NWPHCR 199 (199) (DB) ** AIR 1925 Rang 130 (131, 132). (The purchaser at a sale under a mortgage-decree acquires the interest of both mortgagor and mortgagee and when the purchaser after purchasing the property finds that a portion of the property does not belong to the mortgagor, he can enforce the implied covenant under S. 65(a) and sue for loss.)
2. AIR 1956 Mad 128 (129). (View that only remedy of the mortgagee for breach of covenant under S. 65 is to sue for mortgage money cannot be supported.) ** AIR 1949 Pat 487 (489) 28 Pat 359 (DB).
3. AIR 1923 All 584 (585) ** (1910) 7 Ind Cas 251 (252) (DB) (Cal). (Mortgagors failing to disclose the existence of prior encumbrance.) ** AIR 1931 Oudh 5 (5) 6 Luck 374. (Omission by a mortgagor to inform of his want of title in the property.) ** (1876) 25 Suth WR 51 (52) (DB). (Non-disclosure of prior incumbrances.)
4. AIR 1944 All 195 (196). ILR (1944) All 277 (DB). (Compensation amount will include not only the sum advanced, but also the interest which mortgagee would have been able to recover if his security had not been taken from him — Interest at 6 per cent per annum from date of mortgage up to date of decree allowed.)
5. AIR 1962 Mad 395 (396).

(C) Contract falling under clause (c).

Under S 72, clause (b) the mortgagee may spend the necessary amount for payment of the public charges and add the amount so spent to the principal money(6) or independent of that section, claim to be reimbursed under S 69 of the Contract Act.(7) If the property is *sold away* and thus lost to the mortgagee by reason of the default of the mortgagor, the mortgagee can treat the surplus sale proceeds as *substituted security* and claim payment of the mortgage-money from out of it, or he can sue the mortgagor for such money under section 68, clause (c). If a mortgagor commits default in his duty under S 65(c) to pay the public charges due on the property in his possession and the land is sold or resumed by the Government for arrears of revenue and the mortgagor subsequently reacquires his original interest in the land, the original mortgagee is not extinguished(8)

(D) Contract falling under clasue (d).

In this case also the mortgagee may under S 72, cl. (b) spend the necessary amount himself and add it to the principal money or may sue the mortgagor for reimbursement under S. 69 of the Contract Act, or, if the property has been lost by reason of the default for the mortgage-money under S. 68, cl. (c).

(E) Contract falling under clause (e).

In this case also the mortgagee will have a remedy under S 72, cl (b) and S. 68, cl. (c) of this Act(9) and S 69 of the Contract Act(10) In addition he can claim subrogation rights under S 92 of this Act.(11) Where a puisne mortgagee of property obtained a decree for sale after redemption of prior incumbrances and the property was put up for sale after redemption of prior incumbrances but the sum realised was not sufficient even to cover prior incumbrances, it was held in the undermentioned case(12) that having regard to this section the pusine mortgagee was entitled to claim a personal decree under S 90 of the Act (now O 34, R 6 of the Code of Civil Procedure) for the amount due to him including the amount paid by him for redemption.

11. Benefit of contract goes with mortgagee's interest.

The general principle is that a contract can be enforced by or against the *contracting parties*

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6. *This was the law even before the Act was passed, see :*
(1866) 1 Moo Ind App 241 (258, 259) : 8 Suth WRPC 17 (PC). (Arrears of revenue paid.) ** (1878) 4 Cal 539 (541, 542) (DB)

7. AIR 1937 Nag 225 (226) (Heirs of mortgagor are also bound by implied terms of mortgage-deed.) ** AIR 1938 Nag 459 (461) ILR (1939) Nag 246 ** AIR 1940 Nag 285 (286, 287).
Also see S. 72, Note 9.

8. AIR 1919 Low Bur 119 (120) ** (1902) 26 Mad 385 (386, 387) (DB) (The principle of law is that a man cannot be allowed to take advantage of his own wrong — Same is case with mortgagee in possession.)
[**See also** AIR 1954 Trav Co 38 (40) (Suit on mortgage pending — Subsequent mortgage on same properties during pendency of suit — Properties sold in execution of decree obtained in suit — Property goes to auction-purchaser free of charge created during pendency of suit — Some items of such property coming back to mortgagor by compromise — Liability again fastens to such property ILR 26 Mad 385, Foll.) ** AIR 1953 TC 563 (566, 567) (DB). (ILR 26 Mad 385, Foll.)]

9. (1890) 13 Mad 192 (195) (DB).

10. AIR 1922 All 153 (154) : 44 All 67 (DB).

11. AIR 1937 Mad 826 (830).

12. (1903) 26 All 93 (95) (DB).
[**See also** AIR 1926 Oudh 207 (208) (Where mortgagee, in order to obtain possession of a portion of the mortgaged property according to the terms of the mortgage deed, is compelled to pay a larger amount than is mentioned in the mortgage-deed, the mortgagor is bound to bear the whole of the expenses incurred by the mortgagee in obtaining possession.)]

or if they are dead, then by or against their *legal representatives* (1) It cannot be enforced by or against *third* persons even though such third persons may be transferees of property from the contracting parties(2).

The last paragraph of this section is one of the exceptions to the said general rule and provides that the *benefit* of the contracts referred to in the section shall go with the mortgagee's interest It does not say anything as to the burden of such covenants Consequently while the *benefit* of a contract implied by this section can be claimed by the mortgagee and by persons to whom such mortgage interest may have been transferred, the general rule will apply in respect of the *burden* of the contract Consequently, the implied contract cannot be enforced except against the *mortgagor or his legal representatives* In *Renga Srinivasa Chari v Gnanaprakasa Mudaliar* (3) it was held by the High Court of Madras that a contract implied by this section could not be enforced against a *purchaser of the equity of redemption* at a revenue sale In *Punugu Subbiah v Ramireddi*(4) it was held by the same High Court that a person who has acquired the equity of redemption by adverse possession could not be said to derive any title through the mortgagor and could not be proceeded against on an implied contract by the mortgagor under this section Their Lordships did not decide whether the contract can be enforced against persons *deriving title* from the mortgagor but it was pointed out that according to the authorities in England, a covenant will not affect an assignee from the covenantor unless he is named in the contract (i e , unless he is a party to the contract) In *Syed Ibrahim v Arumugathavee* (5) where a covenant by the mortgagor *was not one under this section* it was held by the same High Court, that such covenant could not be enforced against a subsequent incumbrancer of the mortgaged property In the undermentioned case (6) however, it has been held by the Chief Court of Lower Burma that an implied contract under this section is enforceable against the purchaser of the mortgaged property from the mortgagor It is submitted that this view is not correct.

The question arises, however, whether S 59-A newly inserted in this Act by the amending Act of 1929 affects in any way the position as stated above If that section applies the word "mortgagor" would include persons deriving title from him, and so the contract can be enforced against a transferee of the equity of redemption It is submitted, however that, in view of the express provision in the last paragraph of the section that the benefit of the contract will run with the mortgagee's interest and the absence of a corresponding provision that the burden of the contracts will run with the mortgagor's interest, it must be held that there is an "express provision to the contrary" within the meaning of S 59-A, rendering it inapplicable to this section

In order that a person may be entitled to the benefit of contracts referred to in the section the contract, i.e., the mortgage, must be subsisting and alive(7).

Section 65 — Note 11

1. See Sections 40 and 42 of the Contract Act 1872 AIR 1937 Nag 225 (225) (Heirs of mortgagor are also bound by the implied terms as well as by the express terms of the mortgage-deed.)
2. AIR 1954 All 348 (349) (Pr 3, 6) (Transfer of equity of redemption — Money kept with vendee for payment of debt when sued — Mere retention of money does not create trust — Vendee held mere agent of vendor — No fresh suit lies against vendee for recovery of debt.) ** **(1912) 34 All 63 (64) : 39 Ind App 7 (PC).**
3. (1906) 30 Mad 67 (71) (DB).
   [See also AIR 1921 Mad 183 (189, 190) 44 Mad 301 (DB) (Per Seshagiri Aiyar J)]
4. AIR 1917 Mad 228 (232) : 39 Mad 959 (DB)
5. AIR 1916 Mad 859 (862) : 38 Mad 18 (DB).
6. (1912) 17 Ind Cas 878 (879) (Low Bur).
7. AIR 1964 Mad 122 (125) : ILR (1964) 1 Mad 85.

^[**65A. MORTGAGOR'S POWER TO LEASE**[B].— (1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2) (a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(c) No such lease shall contain a covenant for renewal.

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.]

[A] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 of 1929), S 30

[B] For restriction on mortgagor's power to lease see A P Act VII of 1964, S 110; Guj Act X of 1962, S 129 Maha Act XXIV of 1961 S 127· Punj Act XXVI of 1957, S 27 and Raj Act XIII of 1965, S. 100; M.P. Act XXVIII of 1966, S. 33.

Synopsis

1. **Scope of the section.**
2. **Retrospective operation of the section.**
3. **"While lawfully in possession."**
4. **Sub-section (2), clause (a) — "In the ordinary course of management."**
5. **Sub-section (2), clause (b) — "Shall reserve the best rent."**

5A. **Sub-section (2) — Clause (e).**

6. **Lease made after institution of suit on mortgage.** See Note 39 on Section 52.
7. **Sub-section (3) — Provisions of sub-sections (1) and (2) apply where there is no intention to the contrary expressed.**

1. Scope of the section.

This section makes it quite clear that a mortgagor in lawful possession has a right to lease the mortgaged property and lays down the conditions which are to be satisfied if the lease is to be binding on the mortgagee(1).

Prior to the enactment of this section by the Amending Act of 1929, the mortgagor's power to lease the mortgaged property was the subject-matter of conflicting judicial decisions. Three different views have been expressed by the Courts in India upon this question. Relying upon the rule of

Section 65-A — Note 1

1. See AIR 1967 Guj 193 (198) (DB).

English Common Law under which the mortgagor had no power to lease(2) it was held in some cases(3) that a mortgagor could not ordinarily, without the concurrence of the mortgagee express or implied, execute a lease which could be binding on the mortgagee In other cases (4) a distinction was drawn between English mortgages and other mortgages and it was considered that the mortgagor in India remained the owner and, when in possession, could *prima facie* exercise the rights of ownership inclusive of the power to grant leases of the mortgaged property The question was decided *with reference to S 66* and it was held that the mortgagor could grant leases which were not wasteful in their effect on the mortgagee's security This line of reasoning was not adopted in other cases(5) which laid down a different rule, viz that a mortgagor in possession might grant a lease conformable to usage in the ordinary course of management but was not competent to grant a lease in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage.

This question is now set at rest by the decision of the Supreme Court in *Kamakshya Narayan Singh Bahadur v Chohan Ram* (6) After considering the lines of reasoning of the conflicting views noted above, it approved the last view as the correct one, governing the question and disapproved of the other two views The true position, therefore according to the Supreme Court under the law as it stood prior to the enactment of this section, was that the question had to be determined with reference to the authority of the mortgagor as the bailiff or agent for the mortgagee to deal with the property in the usual course of management It had to be determined on general principles and not on the distinction between an English mortgage and a simple mortgage or on considerations germane to S 66 The view expressed in *Kamakshya Narayan Singh Bahadur's case* has been re-

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2. (1779) 99 ER 182 184) 1 Doug 279 Moss v Gallimore ** 1778 99 ER 27 (1 Doug 21 Keech v Hall ** (1884) 32 WR Eng 667 668 25 Ch D 678
3. **AIR 1930 PC 290 (291) . 128 Ind Cas 655 (PC)** (Case from East Africa) ** (1906) 30 Bom 250 (269) 6 Bom LR 995 ** AIR 1926 Bom 567 (569) 98 Ind Cas 436 ** (1915 2 All LJ 294 (296) (DB) ** (1912) 15 Oudh Cas 239 (242) 16 Ind Cas 4 6 477 (DB) ** (1864) 1 Suth WR 358 (359) (DB) (To a claim by the plaintiff as dur granted dar it was objected that the former zamindars could not execute a lease to the prejudice of a mortgagee — But as the *grantee* pottah was granted with the knowledge and consent of the mortgagee, it was held to be valid) ** AIR 1930 Cal 335 (338 57 Cal 82 (DB
4. AIR 1950 Bom 71 (72) ** AIR 1947 All 240 (242) ** AIR 1937 Oudh 146 (149) 12 Luck 161 (When its terms are so prejudicial to the interest of the mortgagor himself that it is impossible to consider it as given in the ordinary course of management) ** AIR 1933 Mad 876 (877 878) ** AIR 1935 All 511 (512) 154 Ind Cas 1009 (Mortgagee cannot complain of any act unless his security is likely to be diminished to the extent stated in S 66) ** AIR 1938 Pat 189 (191) 175 Ind Cas 279 (DB ** AIR 1931 Pat 210 (211) 10 Pat 332 (DB) ** AIR 1916 Low Bur 103 (103) 8 Low Bur Ru 413 (DB ** AIR 1923 Oudh 1 (3) ** AIR 1925 Oudh 542 (544) (DB) ** AIR 1927 Oudh 148 149 DB ** AIR 1931 Pat 193 (195) (DB) ** (1902) Pun Re No 85 p 348 (350) 1902 Pun LR No 124 (DB) ** (1891) 4 CPLR 193 (194) ** AIR 1915 Oudh 200 (202) 30 Ind Cas 289 (DB) ** **(1898) 1 Oudh Cas 18 (21) ** 1890 All WN 59 (59) (DB)**
   [See also AIR 1925 Oudh 542 (Grant of lease by mortgagor after passing of decree for enforcement of that mortgage is not an act destructive of or permanently injurious to the security within the meaning of S 66 because that section contemplates some substantial waste.) ** **(1868) 10 Suth WR 325 (325) (DB).]**
5. AIR 1933 Mad 876 (877 878) 148 IC 1115 ** AIR 1932 Rang 113 (114) 10 Rang 210 (DB) (AIR 1917 Cal 222, Foll.) ** AIR 1917 Cal 222 (225) 39 Ind Cas 182 (DB) ** AIR 1916 Pat 11 (14) 1 Pat LJ 563 38 Ind Cas 37 (DB) ** AIR 1925 Cal 251 (252 253) 85 Ind Cas 522 ** AIR 1938 Cal 823 (827) 180 Ind Cas 813 (DB) ** (1912) 16 Ind Cas 102 (103) (DB) (All) ** AIR 1928 Pat 372 (373) 7 Pat 349 110 Ind Cas 287 (DB) ** AIR **1917 Nag 133 (135) : 14 Nag LR 117 : 47 Ind Cas 99 (17 Ind Cas 1, Foll)**
6. **AIR 1952 SC 401 (403) : 1953 SCR 108.** (AIR 1917 Cal 222 Approved 10 Suth WR 325 (Cal), Expl , AIR 1916 Cal 870 and the cases following that line of reasoning noted under foot-note (4), **Overruled.)**

affirmed by the Supreme Court in *Mangru v. Thakur Taraknathji*(7)

In *Kamakshya Narayan Singh Bahadur v. Chohan Ram*,(8) the Supreme Court considered the old Calcutta case of *Banee Persad v. Reet Bhunjan Singh*.(9) The Calcutta case was considered by Jenkins, C J. in *Balmukund v. Motilal*(10) as an authority for the proposition that as long as nothing took place which impaired the value or impeded the operation of the mortgage, the mortgagor in creating a temporary lease acted within his powers This was the line of reasoning of the second view discussed above The Supreme Court found that the question of sufficiency or insufficiency of the security was not really gone into but the Calcutta High Court considered that the lease was granted in good faith, was for a limited term and stipulated a fair and reasonable rent and it was, therefore, operative against the mortgagee The case according to the Supreme Court, therefor was really no authority for the wide proposition for which it was claimed as an authority

It was this conflict of decisions which was sought to be resolved by the enactment of this section, and the Legislature too has, in substance, in enacting this section, given effect to the third view,(11) now approved by the Supreme Court.

The provisions of sub-sec (2) lay down the conditions subject to which the mortgagor in possession can make leases which will be binding on the mortgagee

As will be seen in Note 2, this section is not retrospective Where, therefore, the mortgage is executed before the introduction of this section, the question whether the lease granted by the mortgagor in lawful possession is binding on the mortgagee would be governed by the law laid down by the Supreme Court in *Kamakshya Narayan Singh Bahadur's case* and *Mangru Mahto's case*. But where the mortgage is executed after the introduction of this section, the binding character of the lease must be decided having regard to the provisions of this section.

Section 66 is a statutory enactment of the powers of the mortgagor in possession in regard to waste of mortgaged property This section, therefore, as seen already, has no application to the grant of a lease by the mortgagor in possession(12)

Where the lease granted by the mortgagor is not binding on the mortgagee, the right of the mortgagee is merely to cause the mortgaged property to be sold for the payment of his debt but he cannot eject the lessee (13) But if the property is sold or foreclosed by the mortgagee, the interest of the lessee which the mortgagor has created since the mortgage would be destroyed.(14) It does not, however, follow that a lessee from the mortgagor under a lease which is not binding on the mortgagee acquires no interest whatever in the property demised to him. A person taking a lease from a mortgagor after the mortgage acquires an interest in the equity of redemption and can claim to redeem on that footing.(15) (See S 91, Note 12) (See also Note 7)

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7. **AIR 1967 SC 1390 (1395) : (1967) 3 SCR 125.**
8. **AIR 1952 SC 401 (404) : 1953 SCR 108.**
9. (1868) 10 Suth WR 325 (325) (DB).
10. AIR 1916 Cal 870 : 20 Cal WN 350 (DB)
11. AIR 1932 Rang 113 (114) : 10 Rang 210 (DB).
12. **AIR 1952 SC 401 (404) : 1953 SCR 108 : 31 Pat 1020.**
13. AIR 1951 Assam 101 (103) ILR (1949) 1 Assam 198 (DB) ** AIR 1945 Pat 106 (108) : 23 Pat 648 (DB).
14. **AIR 1952 SC 401 (403) : 1953 SCR 108.** (Ghosh on Mortgages, Vol 1, p 212 quoted) [**See however** (1956) 3 All ER 373. (A mortgagee's right to treat as trespasser a tenant of the mortgagor under a lease not authorised by the mortgage is not lost on the mortgagee selling or foreclosing his mortgage.)]
15. **AIR 1967 SC 1390 (1394) : (1967) 3 SCR 125.** (If such a lease is created before the institution of a suit relating to the mortgage the lessee must be joined as a party to a suit under O. 34, R 1, Civil P C , otherwise he will not be bound by the decree passed in the suit and will continue to retain his right of redemption — But if the mortgagor grants such a lease during the pendency of a suit for sale by the mortgagee the lessee is bound by the result of the litigation If the property is sold in execution of the decree passed in the suit,

Where a compromise decree was passed in suit by mortgagees to enforce their rights and the property was put to auction sale, the auction-purchaser would be entitled to only symbolic possession when the property was in possession of persons claiming to be tenants as inducted by mortgagees prior to the date of confirmation of sale or date on which sale certificate was issued. Neither auction-purchasers were parties to mortgage nor the tenants. They were not in occupation as judgment-debtors or on behalf of judgment-debtors(16).

2. Retrospective operation of the section.

The section was inserted in the Act by S. 30 of the T.P. (Amendment) Act, 1929 which came into force on 1-4-1930. By S. 63 of the Amending Act of 1929 this section has been declared not to be retrospective in its operation. It will not, therefore, apply to cases where the mortgage was executed before the date of the introduction of this section,(1) and this would be so even if the lease itself has been executed subsequent to that date(2).

3. "While lawfully in possession."

A lease by a mortgagor who is not in possession of the mortgaged property at the time he grants the lease, is not binding on the mortgagee under this section (1). Suppose now that the mortgage is a possessory one, but the mortgagee not having taken possession, the mortgagor remains in possession and during such time he executes a lease. Is such a lease binding on the mortgagee? The possession of the mortgagor under the above circumstances cannot be said to be *ipso facto* unlawful(2) but it is submitted that the lease would nevertheless not be binding on the mortgagee for the reason that it cannot be said to have been made "in the course of management of the property." In a possessory mortgage, the mortgagor has no right to manage the property at all except as an agent of the mortgagee, and a lease made in the exercise of a non existent right of management cannot be said to be "in the course of management of the property" within the meaning of this section. In the English case of *Reynolds v. Ashby & Son*(3) (a case of an English mortgage), it was observed by Romer, L.J. :

> "It would be very dangerous if anything like a general authority to the mortgagor to deal with or affect the mortgaged property could be implied from the fact that the mortgagee has not taken possession of it."

In a case arising before the introduction of this section(4) Mr. Justice Ghose of the Calcutta High Court observed :

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the lessee cannot resist a claim for possession by the auction purchaser. AIR 1952 SC 401, Foll.) ** AIR 1952 SC 401 (403) : 1953 SCR 108.

16. AIR 2001 Delhi 175 (184) : 2000 (88) DLT 863.

Section 65-A — Note 2

1. AIR 1950 Bom 71 (72) ** AIR 1933 Mad 876 (876) : 148 Ind Cas 1115 ** AIR 1931 Pat 210 (211) : 10 Pat 332 : 133 Ind Cas 169 (DB) ** AIR 1937 Oudh 146 (149) : 12 Luck 161 : 142 Ind Cas 225.
2. AIR 1967 SC 1390 (1394) : (1967) 3 SCR 195 ** AIR 1940 Mad 669 (669) : 193 Ind Cas 366 ** AIR 1936 Mad 942 (942) : 165 Ind Cas 951. (Obiter.)

Section 65-A — Note 3

1. AIR 1933 Mad 876 (878) : 148 Ind Cas 1115.
2. (1887) 35 Ch D 125 (127) : 35 WR (Eng) 593 (593) : 56 LJ Ch 562 : 56 LT 399, Yorkshire Banking Company v. Mullan ** (1740) 26 ER 467 (467) : 2 Atk 107, Higgins v. York Building Co. (Case of trustee and creditor.)
   [See (1879) 12 Ch D 812 (813) : 28 WR (Eng) 242 (243) : 48 LJ Ch 695, Bagnall v. Villar (Possession of the mortgagor after the demand which was made on behalf of the mortgagees is wrongful.)]
3. (1903) 72 LJKB 51 (57) : (1903) 1 KB 87 (102) : 87 LT 640 : 51 WR (Eng) 405 : 19 TLR 70.
4. AIR 1930 Cal 335 (338) : 57 Cal 82 : 125 Ind Cas 661 (DB).

"Whatever may be the rights of a mortgagor under a simple mortgage to grant leases in the usual course of management, there is considerable difficulty on the part of a mortgagor, who has created an English mortgage, to grant such a lease as this. Such a mortgagor can only act as agent on behalf of the mortgage, and without the concurrence of the mortgagee such a lease cannot be binding on the mortgagee."

This section will not apply where the mortgagor is in possession as a *lessee* from the mortgagee and creates a sub-lease in that capacity **(5)** It is S. 108, cl. (g) that will govern such a transaction.

Sub-section (1) read as a whole can lead to no other interpretation except that the mortgaged property should have been leased by the mortgagor as such and not by some person holding the property as a tenant**(6)**.

4. Sub-section (2), clause (a) — "In the ordinary course of management."

As seen, prior to the enactment of this section, a mortgagor in possession could grant a lease conformable to usage in the ordinary course of management but was not competent to grant a lease on unusual terms or authorise the use of land in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage. Consequently if the mortgagor, after he had granted the mortgage, dealt with the property in the usual course of management the interest created by him was deemed operative against the mortgagee. But a lease granted by the mortgagor out of the ordinary course of management was not binding on the mortgagee.**(1)** Clause (a) of sub-section (2) of this section gives effect to this view **(2)**

The test to determine whether a lease granted by a mortgagor is a transaction in the ordinary course of management is, whether he would have granted the lease if he had known that he would continue indefinitely as a full owner of the property.**(3)** Whether a particular lease has been made in the ordinary course of management would depend upon the circumstances of the particular case. A mortgagor in possession may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. Such a lease would be conformable to the ordinary course of management **(4)** But the *duration* of the lease is not always the determining factor in deciding the question. A temporary lease of land would ordinarily be in the course of management**(5)** but not necessarily so. In the undermentioned case**(6)** a lease for three years was held, on the facts of the case, not to be in the ordinary course of management and not binding on the mortgagee. But, in another case,**(7)** having regard to the large extent of the land and the undertaking given by the lessees to bring the land under cultivation, a lease of seven years was held to be given in the ordinary course of management. Normally, a permanent lease with rent fixed in perpetuity is not sanctioned by the ordinary course of management.**(8)**

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5. 1959 MPC 317 (319) (Mortgagor taking mortgaged property on rent from mortgagee and creating sub-lease — S. 65-A will not apply to such sub-lease.)
6. 1969 All LJ 78 : 1969 Ren CR 277

Section 65-A — Note 4

1. **AIR 1967 SC 1390 (1395) : (1967) 3 SCR 125 ** AIR 1952 SC 401 (404) : 1953 SCR 108.**
2. **See AIR 1932 Rang 113 (114) : 10 Rang 210 (DB).**
3. AIR 1928 Nag 303 (304) : 109 Ind Cas 459 (AIR 1924 Nag 326 **Relied on.)**
4. **AIR 1967 SC 1390 (1394) : (1967) 3 SCR 125 **AIR 1952 SC 401 (403) : 1953 SCR 108 ** AIR 1917 Cal 222 (225).**
5. AIR 1916 Cal 870 (872) : 32 Ind Cas 195 (DB) (As long as nothing takes place which impairs the value or impedes the operation of the mortgage, the mortgagor, in creating a temporary lease acts within his powers.) ** (1868) 10 Suth WR 325 (325) (DB). (Do.).
6. **AIR 1932 Rang 113 (114) : 10 Rang 210 (DB).**
7. **AIR 1956 Mad 19 (27) : ILR (1955) Mad 744 (DB).**
8. **AIR 1967 SC 1390 (1394) : (1967) 3 SCR 125 **AIR 1952 SC 401 (405) : 1953 SCR 108** ** AIR 1947 Cal 73 (75) (DB)
   [**See also** AIR 1928 Nag 128 (130) : 106 Ind Cas 14 (Nazrana worth Rs. 1,000.)

In the undermentioned case(9) a lease of a *house site* by an unregistered document on condition of the lessee building a house thereon and living therein at a rent of Rs 50 per month as long as the house stands on the site, was held not to be one in the ordinary course of management

It is for the lessee, if he wants to resist the claim of the mortgagee, to establish that the lease in his favour was granted on usual terms in the course of management The burden of proof in this matter is upon him. If he fails to raise that plea and establish it, he would have no defence to an action at the instance of mortgagee.(10)

See also the undermentioned case.(11)

5. Sub-section (2), clause (b) — "Shall reserve the best rent."

The question whether the rent reserved by the lease was the best rent that could reasonably be obtained, must be considered with reference to the condition of the property *at the date of the lease* X mortgaged certain property to Y and thereafter granted a lease thereof to Z X thereafter voluntarily expended money in improving the property which, in consequence became capable of fetching a higher rent than that fixed in the lease The mortgagee brought a suit for a declaration that the lease was void on the ground that the mortgagor had not reserved the best rent In deciding the case in favour of the mortgagor Justice Luxmoore observed

> "As I have said, there was no obligation on the mortgagor to spend any money on the property and I do not think that the mortgagee is entitled to say that the rent is not the best rent reasonably obtainable for a particular property by reference to its condition as a result of voluntary expenditure at a date subsequent to the date of the lease in question' (1)

Section 65-A(2)(b) deals with covenants and terms of a lease executed by a mortgagor It does not deal with any subsequent arrangement entered into by the mortgagor with the tenant of the mortgaged property regarding repayment of any loan which is not charged upon the property or which has no connection with the leasehold interest in the property (2)

5A. Sub-section (2), clause (e).

Where the tenants inducted by mortgagee executed subsequent lease deeds during continuance of earlier leases, same amounted to implied surrender of earlier leases under S 111(f) Such leases would determine after expiry of three years under S 65-A(e) even though the period of lease stipulated in subsequent lease was 5 years.(1)

[See however AIR 1935 All 511 (513) 154 Ind Cas 1009 (Mortgagor in possession is entitled to lease property permanently irrespective of its effect on mortgage provided it is not injurious to property so as to render security insufficient) ** AIR 1943 Oudh 407 (408) 209 Ind Cas 23 (DB) ** AIR 1915 Oudh 165 (166) 30 Ind Cas 258 ** AIR 1931 Oudh 256 (259) 6 Luck 546 · 132 Ind Cas 532 (DB) ** AIR 1928 Pat 238 (240) 107 Ind Cas 156 (DB)]

9. AIR 1935 Rang 420 (422) : 159 Ind Cas 1038 (DB)
10. AIR 1952 SC 401 (405) : 1953 SCR 108
11. 1970 Ker LJ 754 (Where a mortgagor subsequent to the mortgage executed a "verumkozhu' lease and later changed it to "Kuzhikanom" least at a much reduced rent to the mortgagor shall be deemed to have recovered possession when the first lease was surrendered and as the rent was much reduced the mortgagee is entitled to avoid the lease) ** 1950 Bur LR (HC) 163 (177) (An executor's powers in the course of management of the estate of the deceased cannot be restricted by reference to the meaning of the word 'management' in this section or S. 76.)

Section 65A — Note 5

1. (1935) 104 LJ Ch 243 (246) 1935 Ch 438 153 LT 216 (218) (218) Coutts and Co v Somerville
2. AIR 1963 Mad 449 (450) : ILR (1963) Mad 681

Section 65-A — Note 5-A

1. 1993 (1) Andh LT 120 (129)

6. Lease made after institution of suit on mortgage.

See Note 39 on Section 52.

7. Sub-section (3) — Provisions of sub-sections (1) and (2) apply where there is no intention to the contrary expressed.

In two cases before the Act, it was held by the High Court of Allahabad that where there was a condition against alienation in a mortgage, a lease by the mortgagor would not be binding on the auction-purchaser in execution of the mortgage decree.(1) On the other hand, it was held by the Calcutta High Court that a covenant against alienation in a mortgage bond was personal one and that a lease by the mortgagor was not void against the auction-purchaser(2), though it was not binding on the mortgagee himself.(3)

The power of the mortgagor under sub-s. (1) does not exist if there is an intention to the contrary expressed in the mortgage document and the provisions of sub-s (2) themselves may be varied and extended by the terms of the mortgage deed.

Where there is a contrary intention expressed in the mortgage deed, and the mortgagor nevertheless grants a lease of the mortgaged property, the lease is, under the section, *not binding on the mortgagee* Thus, where, under the terms of the contract of mortgage, the mortgagee was entitled to take possession of the property on default of payment by the mortgagor, a lessee from the mortgagor cannot resist possession being taken by the mortgagee on default (4) The lease is not *ipso facto* void, but is good except in so far as it prejudices and is in defeasance of the mortgagee's rights (5) Though the lease may not be binding on the mortgagee, as between the lessor and the lessee, the lessee is not entitled to say that the lessor had no power to grant the lease on the ground that he had not obtained the consent of the mortgagee in granting the lease as provided in the mortgage (6) Where the mortgagee stipulated not to transfer the mortgaged property by mortgage, sale etc., it was held that the covenant did not prohibit a leasing of the propety (7)

See also the undermentioned case.(8)

(See also Note 1.)

Section 65-A — Note 7

1. (1877) 1 All 126 (129) (DB) ** (1877) 1 All 610 (610) (DB) (1 All 126, **Followed.**)
2. (1881) 6 Cal 317 (319) : 7 Cal LR 293 (DB).
   Also see S. 10, Note 18.
3. (1872) 17 Suth WR 560 (560) (DB).
5. AIR 1935 All 511 (512, 513) · 154 Ind Cas 1009 ** (1936) 164 Ind Cas 241 (243) (Cal) (As between mortgagor and lessee it is valid — The lessee is entitled to redeem) ** AIR 1915 Oudh 200 (202) : 30 Ind Cas 289 (DB).
   [**See also** ILR (1954) 2 All 531 (543) (DB) (Section 65A does not mean that a lease granted in contravention of its terms is a void lease as between the lessor and the lessee.) ** (1956) 3 All ER 373 (Lease granted by a mortgagor after a mortgage without statutory or express power is good by estoppel between mortgagor and lessee, but void as between mortgagee and lessee) ** (1882) 4 All 518 (524) , 1882 All WN 118 (DB).]
6. ILR (1954) 2 All 531 (543) (DB).
   See also Note 1.
7. AIR 1947 Nag 210 (213) : ILR (1947) Nag 740 (DB).
8. (1956) 2 All ER 378 (Case under (English) Transfer of Property Act, 1925 — Mortgage deed — Clause that mortgagor is not to lease premises without mortgagee's consent — Consent, according to mortgage deed not necessary to be expressed in lease — Lessee also, according to the deed · not required to see that consent was given — Lease — Validity — **Held,** that although there was no power in the mortgagors to grant a lease the lessee having been expressly absolved by the mortgagee from seeing that such a consent had been given was entitled to assume that it had and that operated by way of estoppel against the mortgagee.)

66. WASTE BY MORTGAGOR IN POSSESSION.— A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Explanation.— A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage

Synopsis

1. **Scope of the section.**
2. **Applicability of the principle of the section to the Punjab.**
3. **Act not prohibited unless it is destructive or permanently injurious to the property.**
4. **Mortgagor including items not belonging to him in mortgage.**
5. **Lease by mortgagor.** See Notes on S 65A
6. **Grant of easement by mortgagor.**
7. **Onus of proof.**
8. **Remedy of mortgagee if mortgagor commits waste.**
9. **Explanation.**

1. Scope of the section.

This section is a statutory enactment of the powers of the mortgagor in possession in regard to waste of mortgaged property (1) The mortgagor in possession is not liable for what in terms of the English Law of Real Property is known as permissive waste, i e , for omission to repair or to prevent natural deterioration He is, however, liable for destructive waste, i.e , acts which are destructive or permanently injurious to the mortgaged property if the security was insufficient or would be rendered insufficient by such acts (2) Subject to the duty not to do any act which renders the security insufficient, the mortgagor as owner of the property is entitled to use and enjoy the property in any way he likes (3)

Prior to the decision of the Supreme Court in *Kamakshya Narayan Singh v Chohan Ram* (4), as seen in S 65-A, Note 1, under the law as it stood prior to the enactment of S 65A, the question as to whether a mortgagor in possession had the power to grant a lease of the mortgaged property so as to bind the mortgagee was decided in some cases(5) with reference to this section and it was held that the mortgagor could grant leases which were not wasteful in their effect on the mortgagee's security The Supreme Court in *Kamakshya Narayan Singh's case*(6) disapproved of this line of reasoning and has held that this section has nothing to do with the mortgagor's power to lease the mortgaged property (See S 65A, Note 1)

Section 66 — Note 1

1. **AIR 1952 SC 401 (404) : 1953 SCR 108.**
2. **AIR 1952 SC 401 (404) : 1953 SCR 108.**
3. AIR 1935 All 511 (512) ** AIR 1917 Mad 880 (883) (DB) ** (1865) 34 LJ Ch 195 (200) 11 LT (NS) 497 (499), Collins v. Lamport ** 1896-9 CPLR 130 (131).
4. **AIR 1952 SC 401 (404) : 1953 SCR 108.**
5. AIR 1950 Bom 71 (74) ** (1912) 15 Oudh Cas 239 (241) (DB) (Mortgagor cannot by granting lease of the mortgaged property affect the mortgagee s right to possession on default of payment.) ** AIR 1917 Nag 116 (118) (A mortgagee cannot have his rights created on the date of mortgage, impaired by any subsequent act of the mortgagor to which he was not a party.)
   [**See also** (1905) 28 Mad 208 (209) (DB), Aiyappa Reddi v Kuppusami Reddi]
6. **AIR 1952 SC 401 (404) : 1953 SCR 108** (AIR 1917 Cal 222, Approved, 10 Suth WR 325 (Cal) Expl, AIR 1916 Cal 870 and the cases following that line of reasoning, **Disapproved.**)

2. Applicability of the principle of the section to the Punjab.

The principle of this section has been applied to cases arising in the Punjab as being in consonance with justice, equity and good conscience.(1)

3. Act not prohibited unless is destructive or permanently injurious to the property.

The section deals only with acts of 'waste' by the mortgagor in possession. It does not apply to other acts, though by reason of such acts, the security is rendered insufficient. As seen in Note 1, the mortgagor in possession is not liable for what in terms of the English Law of Real Property is known as permissive waste that is, for omission to repair or to prevent natural deterioration He is however, liable for destructive waste, that is, acts which are destructive or permanently injurious to the mortgaged property if the security was insufficient or would be rendered insufficient by such acts.(1) In a case arising before the Act, it was held that the act of annual cutting and felling of wood in the mortgaged property, a forest, not inconsistent with good management, was neither destructive not injurious to the property nor rendered the property insufficient in value (2) Under the present act standing timber is not included in the definition of "immovable property" and a mortgage of land is not, therefore, a mortgage of the timber standing thereon.(3) Where the mortgaged property is land which is used for periodically growing and cutting timber, the act of cutting the timber standing on the land *cannot be said to be destructive or injurious* to the mortgaged property A mortgagor does not, therefore, do any act prohibited by this section in cutting the timber But if the value of the mortgaged land is reduced to below the statutory minimum, the mortgagee has his remedy under S 68, clause (b). It has, however, been held in the undermentioned case(4) that though the mortgagor is *entitled* to cut and utilise standing timber, he will be liable *in tort* to the mortgagee if the value of the land is thereby reduced to below the statutory minimum. It is somewhat difficult to follow how a rightful act will give rise to an action in tort

A mortgagor is entitled to make a second mortgage or sell the equity of redemption and cannot be restrained from doing that but he cannot be allowed to remove a part of the mortgaged property and sell it in the shape of movable property so as to jeopardise the interest of the mortgagee in the property for payment of mortgage debt If a mortgagor declares his intention to remove the machinery which is part of the security and sell it he should be restrained from doing so But if they want to make a second mortgage or sell it, they cannot be restrained(5).

4. Mortgagor including items not belonging to him in mortgage.

It has been held that the section deals with waste by the mortgagor(1) and that it has nothing to do with regard to land which the mortgagee though he had got under the mortgage but which he is found to have really not got (2) Thus, where the mortgagor included in his mortgage certain items to which he had no title and the security was thus found to be insufficient, it was held that the case was not within the section.(3) The expression *'must not commit any act'* has reference obviously to

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Section 66 — Note 2

1. 1902 Pun Re No 85 p. 340 (350) 1902 Pun LR No. 124 p 518 (521) (DB)

Section 66 — Note 3

1. **AIR 1952 SC 401 (404) : 1953 SCR 108.**
2. (1883) 7 Bom 336 (339) (DB)
3. AIR 1926 Mad 343 (344) (But a house which is built on a site with foundation laid in it is immovable property.)
4. AIR 1917 Mad 880 (881) (DB).
5. AIR 1980 Raj 121 : 1980 Raj LAW 243.

Section 66 — Note 4

1. AIR 1926 Mad 343 (345).
2. AIR 1922 Bom 217 (218) (DB).
3. AIR 1922 Bom 217 (218) (DB).

acts committed *subsequent* to the mortgage and will not apply to a case like the one referred to above.

5. Lease by mortgagor.

See Notes on Section 65A.

6. Grant of easement by mortgagor.

Section 10 of the Easements Act, 1882, provides that a mortgagor may impose on the mortgaged property any easement that does not render the security insufficient and the explanation to that section is identical with the explanation to this section as to when a security is insufficient. It is not necessary under that Act that the grant of the easement should be destructive or permanently injurious to the mortgaged property. It is doubtful if S. 66 of this Act which deals with acts of *waste* can be applied to grants of easement rights by the mortgagor. But if such a grant can be considered to be, in particular circumstances, destructive or injurious to the property, as had been held in the cases of leases before the introduction of S. 65A, then the grant of easement will not be binding on the mortgagee under this section if the security is rendered insufficient thereby.

X mortgaged to *Y* a house together with a well. *X* afterwards granted an easement right in the well to his neighbour *Z*. The mortgagee *Y*, having purchased the mortgaged property in execution of the mortgage decree, objected to the use of the well by *Z*. It was held that the validity of the easement as against the mortgagee depended upon the question whether the grant of the easement rendered the security insufficient within the meaning of this section(1).

7. Onus of proof.

The *onus* of proof that a particular act of the mortgagor in possession was destructive or permanently injurious to the property and that thereby the value of the security has gone down below the statutory minimum is on the *mortgagee* (1). The contrary view which has been taken in the undermentioned cases(2) does not appear to be correct.

8. Remedy of mortgagee if mortgagor commits waste.

Where a mortgagor 'threatens' to commit acts which are destructive or permanently injurious to the property and which are likely to render the security insufficient under this section, the mortgagee may sue for an injunction restraining the mortgagor from committing such acts (1). He may, if such acts *have been committed*, maintain an action in tort for damages against the mortgagor for the depreciation of the mortgage security, if it can be shown that by reason of such acts the value of the mortgage security has been lowered below the statutory minimum (2). He may also sue for the recovery of the mortgage-money under S. 68, clause (c)(3). The mortgagee can also apply for

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Section 66 — Note 6

1. 1902 Pun Re No. 85 p. 348 (350); 1902 Pun LR No. 124 p. 518 (522) (DB).

Section 66 — Note 7

1. AIR 1917 Mad 880 (883) (DB) ** AIR 1914 Bom 312 (316) (DB) ** AIR 1938 Pat 189 (191) (DB). (Explaining AIR 1921 Pat 183 and AIR 1928 Pat 372.)
2. AIR 1916 Pat 11 (14); 1 Pat LJ 563 (DB). (Following 17 Ind Cas 1 which has been explained in AIR 1938 Pat 189.) ** 1902 Pun Re No. 85 p. 348 (350); 1902 Pun LR No. 124 p. 518 (522) (DB).

Section 66 — Note 8

1. (1750) 26 ER 1214 (1215); 3 Atk 723, Farrant v. Lovell. AIR 1986 Ker 149 (153); 1986 Ker LJ 83.
2. (1905) 28 Mad 208 (209, 210) (DB) ** AIR 1915 Mad 633 (634) (DB).
   [See also AIR 1917 Mad 880 (884) (DB). (Mortgagor cutting and removing standing timber thereby rendering the security insufficient — Mortgagor though entitled to standing timber is liable for damages.)]
3. See Section 68, Note 4 under sub-heading "Wrongful act."

appointment of receiver(4).

B was a mortgagee and also a lessee of a glass factory and its fixtures, fittings and tools belonging to *A*. *C*, in order to satisfy a decree for debt obtained against *A* attached the factory and removed and sold part of its roofing. It was held that *B's* rights as mortgagee and lessee were infringed by the removal and sale of roofing resulting in diminution of the value of the property and, therefore, he was entitled to damages against *C*, which were to be measured by the loss of value of the mortgaged property(5).

The seller of a private forest who has handed over possession to the purchaser on part payment being made, can raise objection before the Forest Authorities, against the permission sought by purchaser for clear felling of forest(6).

9. Explanation.

The rule that a security is insufficient unless in the case of a mortgage of buildings, the value thereof exceeds by one-half and in other cases, by one-third, the amount due on the mortgage has been recognised by the Legislature not only in this section but also in S. 20, clause (e) of the Trusts Act, 1882, and in S. 10 of the Easements Act, 1882.

Rights and Liabilities of Mortgagee

67. RIGHT TO FORECLOSURE OR SALE.— In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become [A][due] to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court [B][a decree] that the mortgagor shall be absolutely debarred of his right to redeem the property or [B][a decree] that the property be sold.

A suit to obtain [B][a decree] that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

[C][(a) to authorize any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclosure, to institute a suit for foreclosure or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or]

(b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(c) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property,

4. AIR 1987 Kant 40 (47, 48) : ILR (1986) Kant 1843.
5. AIR 1949 PC 68 (68, 69).
6. AIR 1986 Ker 149 (153) : 1986 Ker LJ 83

unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

[A] Substituted for the words "payable" by the Transfer of Property (Amendment) Act, 1929 (20 of 1929), S. 31, (1-4-1930).

[B] *Substituted* for the words "an order", *ibid*

[C] *Substituted* for the original clause, *ibid*.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Section applies to a charge.
4. "In the absence of a contract to the contrary."
4A. "Mortgagee."
5. "After the mortgage-money has become due."
6. Failure to pay interest.
7. Failure to pay instalments.
8. Right to sue under this section, if can arise apart from the terms of the contract.
9. "Before the mortgage-money has been paid or deposited as hereinafter provided."
10. Effect of foreclosure.
11. Effect of sale under mortgage decree.
12. Clause (a).
13. Remedy of a simple mortgagee.
14. Remedy of a mortgagee by conditional sale.
15. Remedy of a usufructuary mortgagee.
16. Remedy of an English mortgagee.
17. Remedy of a mortgagee by deposit of title deeds.
18. Remedy of an anomalous mortgagee.
19. Remedies of prior and puisne mortgagees against other.
20. Rights of persons deriving title from the mortgagee.
21. Sub-mortgagee.
22. Benamidar mortgagee.
22A. Mortgagee of limited interest in property.
23. Enforcement of a security bond.
24. Suit by Government to recover takkavi loan.
25. Clause (b).
26. Clause (c).
27. Clause (d).
28. Partial foreclosure or sale by a sole mortgagee.
29. Mortgagee's right against the property and the doctrine of substituted security.
30. Mortgagee, whether can enforce his mortgage against a trespasser in possession of the mortgaged property.
31. Mortgagee obtaining a money decree — Whether can sell the mortgaged property.
32. Bundelkhand Alienation of Land Act.

1. Legislative changes.

The following changes have been introduced in this section by S. 31 of the Transfer of Property (Amendment) Act of 1929 :

(1) The word "due" was substituted for the word "payable" in the first paragraph of the section in view of a similar change in S. 60.

(2) The words "a decree" were substituted for the words "an order" in the first and the second paragraphs of the section, in view of the use of the word "decree" instead of the word "order" in O. 34, Rr. 3 and 5 of the Code of Civil Procedure

(3) The present clause (a) was substituted for the old clause. See Note 12

2. Scope of the section.

This section deals with the *enforcement* of a mortgage. It defines the rights of a mortgagee as against the mortgagor, so far as the right to maintain a suit for foreclosure or sale is concerned.(1) The section being only *procedural* is retrospective in its operation(2) and a

Section 67 — Note 2

1. AIR 1937 Oudh 20 (23): 12 Luck 313 (A suit on the mortgage is a suit for a decree for sale or foreclosure brought under S. 67.) ** (1891 13 All 432 (455) (FB).
2. AIR 1955 Him Pra 46 (48) ** 1889 11 All 367 (371) (DB) ** AIR 1917 Mad 232 (233) (DB) ** 1884 All WN 183 (184) (DB)

mortgagee claiming under a mortgage executed before the Act can enforce his remedies according to the present section even though the procedure before the Act was different.(3) The rights of a mortgagee are, however, subject to the provisions of Ss. 20(2) and 28(3), Orissa Estates Abolition Act (1 of 1952) Those provisions prevail over any provisions of the Transfer of Property Act inconsistent with them, by virtue of Art. 254(2) of the Constitution.(4) Where the entire property under a mortgage or charge has, under the Land Reforms legislation vested in the State, not only the property under mortgage becomes non-available for sale but the very remedy by suit in a Court of law for the realization of money due under the hypothecation, either by the sale of property hypothecated or by enforcing the personal liability may be barred by the statute(5).

A decree for possession was passed in a suit for foreclosure without being subject to any condition which presupposes that the said decree, if executed, would amount to the last stage of a suit for foreclosure, namely possession. The decree had been passed without a preliminary decree, therefore it is not executable(6).

3. Section applies to a charge.

By virtue of S. 100, the provisions of the Act, which apply to a simple mortgage are also applicable to a charge. This section, being a provision applicable to all mortgages including a simple mortgage, applies also to a charge holder and he is entitled to obtain a decree for sale of the charged property.(1) As to whether this section applies to a charge created by operation of law, see S. 100, Note 17.

4. "In the absence of a contract to the contrary".

As seen in Note 5 on S 60, the right to redeem and the right to foreclosure are co-extensive and arise simultaneously and, consequently, if the mortgagee has no right to sue for the mortgage-money, the mortgagor cannot sue to redeem. It is however to be noted that the right of the mortgagee to obtain a decree for foreclosure or sale given by the first paragraph of this section is available only "in the absence of a contract to the contrary" while the right of the mortgagor to redeem given by S 60 is not made subject to any contract to the contrary. The reason is that a mortgagor who is a borrower, requires greater protection than a mortgagee who is always in a dominating position. The result will be that even when the mortgagor has an absolute right to redeem the mortgagee's right to foreclosure or to sue for sale may be subjected to restrictions and conditions. In the undermentioned case(1) the mortgage deed contained a covenant that if the mortgagee wanted payment he must give notice to be paid on the day after the beginning of the cultivation in any year and not at other times The first Court held that the mortgagor was not entitled to redeem until a demand for payment was made by the mortgagee It was held by the High Court that the covenant in the mortgage deed affected only the mortgagee and not the mortgagor's right to redeem at any time.

In the case noted below,(2) a mortgagee was entitled under the terms of the mortgage to enter into possession of the mortgaged property immediately on the execution of the mortgage deed. It was further provided in the deed that the mortgagee would have the right to recall the mortgage-money and to sue for foreclosure only in the event of the mortgagor's default in redeeming the

3. AIR 1955 Him Pra 46 (48).
4. AIR 1954 Orissa 186 (188) : ILR (1954) Cut 504.
5. AIR 1957 Pat 575 (582) 36 Pat 323 (DB) (Bihar Land Reforms Act (30 of 1950) – Entire mortgaged property vested in State — Remedy of mortgagee to suit for sale or for personal decree is lost.)
6. 1996 All WC 1444 (1449).

Section 67 — Note 3

1. AIR 1953 Mad 32 (38) (DB) ** (1852) 64 ER 1322 (1322) · 21 LJ Ch 741 Footner v Sturgis (A charge-holder is entitled only to sell and not foreclosure)

Section 67 — Note 4

1. AIR 1923 Mad 553 (556) (DB).
2. AIR 1932 Oudh 178 (179) (DB).

mortgage on the expiry of five years The mortgagee was not allowed to enter into possession by the mortgagor. The question was when the mortgage-money became payable It was argued that reading S 68 with S. 67, the mortgage-money became payable on the happening of the contigency of not getting the possession by the mortgagee But it was held that the right given by S 67 was controlled by a contract to the contrary and that, according to the stipulation in the mortgage-deed the mortgagee could not recall the mortgage-money and sue for foreclosure before the expiry of five years.

Where a mortgage combined with an unusual incidental arrangement under which the mortgagor, in selling off any parcel of the mortgaged property was entitled to retain one-fourth of the purchase money for his own purposes, it was held that the condition did not destroy the mortgagee's lien on the mortgaged property and in case of sale he could follow the mortgaged property if he was not paid three-fourths of the purchase money(3)

See also the undermentioned cases(4)

4A. "Mortgagee."

Any person who is named as mortgagee in the mortgage deed can sue on the mortgage whether he has any real interest in the mortgage or not Where a mortgage is executed in favour of A described as the son of B, it is not open to the mortgagor or persons claiming under him to question the validity of A's adoption(1).

5. "After the mortgage-money has become due."

The right to foreclosure or sale, under this section arises after the *mortgage-money* has 'become due'. The right to redeem under S 60, arises when the *principal money* has become due Although the expression "mortgage-money" is wider than the expression 'principal money '(1) the right to foreclosure or sale under this section will arise simultaneously with the right to redeem under S. 60 The reason is that the *mortgage-money* cannot be said to have *become due* unless the *principal money* has become due (2) This is consistent with the general principle that the right to redeem and the right to foreclosure are co-extensive(3)

Where the mortgage-deed provides for a period for payment of the mortgage-money the mortgagee's right to forclosure or sale arises *after* the expiry of the period and not before inasmuch as the right to redeem arises on the expiry of the period (4) Where no period is fixed for the payment of the mortgage-money it has been generally held that the mortgage-money becomes due on the date of the mortgage and the mortgagee is free to enforce his security at any time after the date

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3. AIR 1914 Lah 204 (206) : 1915 Pun Re No. 4 (DB)
4. (1958) 3 WLR 572 (Proviso for redemption in mortgage deed held not a 'contract to the contrary") ** AIR 1934 Lah 895 (897) (DB) (Mortgagor selling mortgaged property with knowledge of mortgagee — Mortgagee not estopped from enforcing his lien)

Section 67 — Note 4A

1. AIR 1949 Nag 81 (81, 82) : ILR (1948) Nag 290 (DB)

Section 67 — Note 5

1. See Note 17 on S 58
2. See AIR 1919 PC 150 (151) : 46 Ind App 151. (Mortgagee cannot sell mortgaged property for interest alone.)
   [See also (1894) 16 All 415 (417) (DB).]
3. (1922) 65 Ind Cas 273 (274 275) (DB) (Cal) ** (1907) 29 All 471 (473) (DB) (Reversed on construction of mortgagee deed in AIR 1914 PC 36.)
4. (1951) 29 Mys LJ 51 (53) (DB) (Principal payable 'within three years" from 6 10 1933 — Mortgagee cannot seek payment at any time within three years but only after expiry of three years from 6-10-33) ** (1922) 65 Ind Cas 273 (274) (DB) (Cal) ** (1910) 8 Ind Cas 576 (577) (DB) (Lah) (When the mortgage-money is to be paid *within* certain period mortgage-money becomes due after the expiry of the period) ** (1907) 29 All 47. (474) (DB) (Reversed on question of construction of mortgage deed in AIR 19.4 PC 36) ** AIR 1933 Oudh 81 (83) (DB) ** AIR 1933 Oudh 237 (239) 8 Luck 488

Also see S. 60, Note 5

of the mortgage.(5) In the undermentioned case(6) where no specific time was fixed for payment of the debt their Lordships of the Privy Council held that "on the facts of the case" the money did not become due until a demand was made by the mortgagee and refused by the mortgagor. Where no period for redemption was fixed but interest was to accrue only after expiry of the year, it was held that the mortgage-money became due not immediately on the date of the mortgage but after expiry of one year(7).

After the decision of the Privy Council in *Lasa Din v Mt Gulab Kunwar*(8) it is now settled law that where a mortgage fixing a term for payment contains also a default clause for payment before the due date, the mortgage-money does not become due as soon as the default occurs. In such cases, the mortgagee has an option either to enforce his security at once, or to stand by for the full term of the mortgage. The money, therefore, becomes due either when he exercises his option(9) or, where he does not exercise his option, on the expiry of the period (10) The cases which have held that it became due on first default or that the right would be waived and the mortgagee could sue on the basis of next default are no longer good law(11)

Where the mortgage-money is payable under the deed "on demand," the question in each case is whether the parties intended to make the demand a term of the contract. Where the demand is an integral part of the contract, the money will not become due until a demand is made (12) But the words "on demand" do not by themselves make a demand a term of the contract(13) The same principles will apply where the words used are "when you require(14)"

In England, it has been held that the mortgagor must have a reasonable notice for payment

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5. AIR 1955 Cal 194 (200) (DB) (Stipulation that mortgagor can pay money whenever it is convenient to him — He can pay, even before demand is made — It cannot be said that it becomes due only when demand is made— Where no date is fixed, money becomes due on date of mortgage) ** (1893) 20 Cal 269 (272) (DB) (In such a case a suit for foreclosure is barred if brought more than twelve years after the date of the mortgage deed) ** (1912) 39 Cal 828 (831) (DB) ** (1907) 17 Mad LJ 177 (178) (DB) (No demand is necessary before the institution of a suit for sale or foreclosure) ** AIR 1926 Lah 225 (226) (DB).
   [**See also** AIR 1933 Lah 84 (85) (Period of limitation commences from the date of mortgage)]
6. **AIR 1930 PC 188 (192) : 57 Ind App 194.**
7. AIR 1963 Punj 25 (28) ILR (1962) 1 Punj 464 (**Reversing** AIR 1959 Punj 249)
8. **AIR 1932 PC 207 (211) : 7 Luck 442 : 59 Ind App 376.**
9. AIR 1962 Mys 5 (8) ** (1921) 62 Ind Cas 762 (763) (DB) (Mad) ** AIR 1928 Mad 637 (638, 639) (DB) (AIR 1926 PC 85, referred to) ** AIR 1933 Oudh 237 (239) . 8 Luck 488. (Affirmed on appeal in AIR 1934 Oudh 473.)
10. **(1895) 23 Cal 228 (246, 247) : 22 Ind App 183 (PC) ** (1900) 27 Cal 938 (942) · 27 Ind App 98 (PC) ** AIR 1933 Oudh 66 (67) : 8 Luck 242 (FB) ** ILR (1956) 6 Raj 1023 (1024) ** AIR 193 Mad 884 (885) ** AIR 1934 Mad 227 (228) (DB) (Reversed on another point in AIR 1936 Mad 171 (FB)) ** AIR 1917 Oudh 177 (178) 20 Oudh Cas 132 ** AIR 1931 Pat 285 (290) : 11 Pat 112 (DB).**
    [**See also** (1906) 16 Mad LJ 364 (365) (DB) ** AIR 1936 Sind 14 (15) · 29 Sind LR 361 (DB)]
11. For a fuller discussion, see Note 24 on Art 62 of the AIR Commentaries on the Limitation Act, 5th (1976) Edn
12. See the AIR Commentaries on the Limitation Act, 7th (1997), Edition, Article 21, Note 6 and Art 62 Note 23
    [**See also** (1879) 4 Cal 283 (294) (DB) (Per Garth C J) ** (1906) 16 Mad LJ 364 (365) (DB)]
13. AIR 1919 All 56 (59) · 42 All 70 (DB) See the AIR Commentaries on the Limitation Act 7th (1997), Edition, Art 21, Note 6 and Art 62, Note 23
    [**See also** (1893) 2 Ch 300 (305) 62 LJ Ch 695 41 WR (Eng) 440 69 LT 12 3 R 463, *In Re Browns Estate Brown v Brown* ** (1979) 4 Cal 283 (294) (DB) (Per Garth,C J)]
14. (1899) 22 Mad 20 (22) (DB) (On construction the words "when you require" held to imply a condition and not a mere technical expression)

after a demand is made before the mortgagee can enforce his remedy(**15**)

A failure on the part of the mortgagor to perform what was incumbent upon him to do during the term of the mortgage, may give rise to a right of foreclosure or sale before the expiry of the term fixed in the mortgage-deed (**16**) This can be supported on the ground that by reason of the mortgagor's default the mortgagee is entitled to rescind, under Sections 39 and 54 of the Contract Act, the contract on his part to wait till the expiry of the period fixed In *Seaton v Twyford* (**17**) the above principle was applied even where the mortgagor merely failed to carry out the terms of the contract as regards the payment of interest In India, the view of *Seaton v. Twyford*(**18**) namely that the failure on the part of the mortgagor to pay the stipulated interest, would release the mortgagee from the necessity of waiting for the expiry of the term, before exercising his right as a mortgagee has been approved in the undermentioned cases(**19**).

A, a trustee, executed a mortgage in favour of *B* the trust temple The mortgage-debt was not to be paid for 20 years. In a suit instituted under S 92, Civil Procedure Code the mortgage was declared to be a breach of trust and the money was ordered to be paid immediately to *B*. *B* brought a suit forclosure before the expiry of the period It was held that the mortgage-money became due within the meaning of S 67 and the suit was maintainable(**20**)

Illustrative cases

(1) In a mortgage bond dated 14th June, 1876 the stipulation was that the mortgage-money advanced should be repaid "in the month of *Jeth 1289 Fasli* being a period of six years The last day of *Jeth 1289* fell on the 1st June, 1882 and the period of six years from the date of the bond ended on the 14th of June, 1882 It was held that the mortgage money became due on the 14th June 1882(**21**)

(2) A mortgage-deed provided for the repayment of the principal and interest by the month of *Chaitra* 1305 If the mortgagor failed to pay the amount he was to give to the mortgagee the produce of the security for three was succeeding (1306 1307 and 1308) there was also a provision that the mortgagor would not thrash the produce without the permission of the mortgagee and that if he did so he would realize the principal and interest in *Magh* 1308 It was held that the mortgage-money did not become due before 1308(**22**)

(3) A mortgage-deed provided that the mortgagee could not sue unless (i) the entire demand for two instalments for two consecutive years and interest on the principal for two consecutive years remain unpaid, and (ii) nothing was paid on account of principal or interest for two consecutive years It was held that the right to sue did not arise unless nothing had been paid on account of principal or interest(**23**).

(4) A mortgage-deed for a period of nine years provided that the mortgagor was not entitled to redeem the property before the said period There was also a condition that the mortgagee could not bring

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15. (1862) 7 LT 422 (423) 32 LJQB 38 11 WR (Eng) 167 9 Jur (NS) 495 3 B & S 305 129 RR 337, *Brightey v Norton*, (Half an hour's notice is not a reasonable one) ** (1883) 8 App Cas 285 (293) : 48 LT 918 : 52 LJ PC 35, *More v Shelley*

16. (1902) 26 Bom 241 (245) (DB) (Some part of the mortgaged property not belonging to mortgagor — Further security demanded but refused— Mortgagee was held entitled to sell the property) ** (1870) 11 Eq 591 (598) 19 WR (Eng) 200 40 LJ Ch 122 23 LT 648 *Seaton v. Twyford.*

17. (1870) 11 EQ 591 (598) 19 WR (Eng) 200 40 LJ Ch 122 23 LT 648

18. (1870) 11 EQ 591 (598) 19 WR (Eng) 200 40 LJ Ch 122 23 LT 648

19. (1902) 26 Bom 241 (245) (DB) (Case not governed by the Transfer of Property Act) ** AIR 1921 Mad 229 (230) (DB) (Per Wallis C J Sadashiva Aiyar J contra) ** AIR 1915 Nag 133 (135) 11 Nag LR 153 (Where, however there is a covenant not to call in the money for a certain period, no default in payment of interest will enable the mortgagee to sue.)

20. AIR 1921 Mad 229 (230) (DB)

21. (1897) 24 Cal 382 (384) (DB).

22. AIR 1919 Cal 520 (521) (DB).

23. AIR 1915 Oudh 31 (54) (DB).

the property to sale before the expiry of that period There was this further peculiar condition that the mortgagee may recover at his wish either by mutual settlement or through suit in Court the entire principal and interest before the expiry of the period It was held by a Full Bench of the Chief Court of Oudh that the mortgage-money became due only on the expiry of the period(**24**).

(5) A mortgage-deed contained an agreement that the principal money should not be required by the mortgagee until the expiration of five years from the date of the deed "if the half yearly interest should be punctually paid" Interest was not paid on the day fixed The mortgagee sued before the expiry of five years It was held that "punctually" meant payment on the day fixed Payment nine days after the due date, was not good payment The mortgagee, therefore, was held entitled to sue before the expiry of the period(**25**).

The mortgagee can bring a suit after lapse of 30 years that mortgage having extinguished by lapse of time having not been redeemed, they had become full owners(**26**)

6. Failure to pay interest.

Under this section, the right to sue for foreclosure or sale arises, when the *mortgage-money* has become due Under the second paragraph of S 58, the *principal and interest* of which payment is secured is "mortgage-money." But the general principal is that interest is accessory to the principal and cannot be recovered apart from the principal to which it is accessory (**1**) Where, therefore, the principal money has not become due the mortgagee has under this section no right to demand a sale of the mortgaged lands for the payment of interest alone (**2**) The view expressed by Wallis, C.J. in *Arunachellam Chettiar v. Raja of Kalahast*,(**3**) namely that the mortgagee is entitled under this section to realise the interest in arrear, by sale of a portion of the security, even where the principal money has not become due, as interest is included in the term mortgage-money, is, it is submitted, not correct There may, however, be a special stiulation to that effect in the mortgage-deed, in which case the mortgagee's right will be governed by the express terms of the contract and the mortgagee will be entitled to sell the mortgaged security for the arrears of interest alone(**4**)

7. Failure to pay instalments.

Where the mortgage-money is agreed to be paid by instalments and the mortgagor commits default, it is doubtful if the mortgagee can sue for sale or for foreclosure under this section for part of the mortgage-money, though he can obtain a money-decree for the amount due Where, however, the parties agree to allow a foreclosure or sale for part of the mortgage-money, the mortgagee is free to enforce a portion of mortgage security as each instalment falls due.(**1**) In *Ramayya v. Venkataramu Gurraju*,(**2**) the express covenant to pay as each instalment fell due was held to carry with it the right to sale and the mortgagee was held entitled to recover the same by sale of a portion of the mortgage security It is also established that if under the deed the mortgagee is restrained from enforcing his security until all the instalments have become due, the mortgagee has no right to sue

24. AIR 1928 Oudh 289 (290) : 3 Luck 439 (FB).

25. (1898) 1 Ch 343 (349) 46 WR (Eng) 230 67 LJ Ch 135 77 LT 665 14 TLR 157 *Leeds and Hanley Theatre of Varieties v. Broadbent*

26. AIR 1991 Punj and Har 85 (86 88) ** 1992 Bank J 370 (Punj & Har) ** 1991 Pun LJ 650

Section 67 — Note 6

1. See the AIR Commentaries on the Limitation Act 7th (1997), Edition, Art 25 Note 1

2. AIR 1919 PC 150 (151) : 46 Ind App 151.
[But see AIR 1917 Mad 743 (743) (DB)]

3. AIR 1921 Mad 229 (230) (DB).

4. AIR 1919 PC 150 (151) : 42 Mad 813 (819) : 46 Ind App 151 (1904) 31 Cal 922 (927) (DB). (Mortgage bond providing that if interest was not paid for three consecutive years, creditors to institute a suit for interest only and recover it by sale of mortgaged property — Mortgagee held could realize arrears of interest by sale.)

Section 67 — Note 7

1. AIR 1915 Nag 133 (135) : 11 Nag LR 153

2. (1903) 13 Mad LJ 2 (3) (DB) (And also personally from the mortgagor)

for sale or foreclosure on default of one instalment(3)

In a suit for foreclosure of mortgage where a preliminary decree is passed ex parte and at the time of final decree mortgagor appears and requests for instalments and the same is granted subject to condition that on failure to pay two instalments right of redemption would be lost, the foreclosure would become final on failure of the mortgagor to comply with the condition and he will have no right to claim redemption(4).

8. Right to sue under the section, if can arise apart from the terms of the contract.

The mortgage-money may also become due for the purpose of this section apart from the terms of the mortgage-deed. Clauses (b), (c) and (d) of S 68 describe the circumstances under which the mortgagee can sue for the mortgage-money, although it has not become due under the terms of the mortgage contract As to whether in such cases the mortgagee has a right to *sue for sale* of the mortgaged property, see Note 17 on S. 68.

9. "Before the mortgage-money has been paid or deposited as hereinafter provided."

A mortgagee has a right to obtain a decree for foreclosure or sale only before the mortgage-money has been paid or deposited Where the mortgage-money is paid, the mortgage is extinguished and no question of foreclosure or sale will arise (1) As long as the mortgage-money is not paid or deposited, the mortgagee's suit for sale is not barred under S 11 of the Civil P C by reason of a decree for sale passed on the same mortgage in a prior suit, provided of course the second suit is not barred by limitation(2)

As regards the deposit of mortgage-money by the mortgagor a provision has been made by S 83 and the words "as hereinafter provided" refer to that provision Where a deposit complies with the requirements of that section the mortgagee will not be entitled to a decree for foreclosure or sale whether he accepts or refuses the deposit For example, where the mortgagee accepts the deposit, the mortgage is discharged and no question of foreclosure or sale will arise Where the mortgagee refuses to accept the deposit which still lies in a Court, and sues on his mortgage and it is found on taking accounts that nothing is due on the mortgage, no decree for foreclosure or sale will be necessary Where, however, the deposit is held invalid, it will amount to no deposit and there will be no bar to the passing of the decree for foreclosure or sale according to this section(3)

In the undermentioned case(4) the mortgagee after receiving a notice of deposit went to withdraw it but finding that it had been withdrawn by a pleader purporting to act under his authority filed a suit for foreclosure. It was held that the words "as hereinafter provided" make it perfectly clear that a deposit under S. 83, in so far as it is contemplated here, must a deposit which has been accepted and acted on by the mortgagee in terms of that section It was also held that where facts showed that the Court could not place the money in the hands of the mortgagee, the deposit for all practical purposes would be an illusory transaction and would not be legal deposit under S 83 such as might be supposed to affect the rights of the parties one way or the other and consequently, the mortgagee would be entitled to obtain a decree for foreclosure

3. (1902) 15 CPLR 78 (80) ** AIR 1915 Nag 133 (135) . 11 Nag LR 153.
4. 1992 Bom Civ J 898 (904).

Section 67 — Note 9

1. 1969 Cur LJ 294 (Punj) (Where the mortgagor pleaded that he had sold the mortgaged property for Rs 3,000/- out of which Rs 1,000/- were left with the purchaser for payment to the mortgagee and the purchaser deposited the amount in Court within time though the deposit was short by very small amount both the mortgagor and the purchaser held entitled to redeem the property.) ** AIR 1933 Mad 879 (882) 57 Mad 195 (DB) ** (1911) 11 Ind Cas 410 (412) (DB) (Lah) (Admission of redemption in mutation proceedings bars him from enforcing the mortgage.)
2. AIR 1966 Ker 273 (276) ** AIR 1953 Mad 32 (38) (DB)
3. See Notes 17 and 20 on Section 83.
4. AIR 1941 Cal 18 (19, 20). (AIR 1924 All 26, Relied on.)

This section debars the the mortgagee from obtaining a decree for foreclosure or sale after a deposit by mortgagor. It does not preclude him from *instituting a suit* on his mortgage. In *Sitaramayya v. Venkatramana*(5) the mortgagee was held entitled to sue on his mortgage after a deposit was made by mortgagor but before the notice of it was served on him.

10. Effect of foreclosure.

A suit for foreclosure is a suit to obtain a decree that the mortgagor shall be absolutely debarred of his right to redeem the property.(1) Foreclosure is not a thing which can be effected by the act of parties. It can be effected only by the order of Court, in a suit properly constituted for that purpose (2) The effect of passing such a decree is that it extinguishes the mortgagor's right to redeem and makes the mortgagee an absolute owner of the property from the date of the decree.(3) It has virtually the effect of an out and out transfer in favour of the mortgagee(4).

In the undermentioned case(5) a Hindu widow entitled to a life estate purported to mortgage the whole of the proprietary interest in the property A decree for foreclosure was passed on the mortgage in respect of the whole interest A reversioner of the widow claimed to redeem the property It was held that the decree for foreclosure passed in the above circumstances could not bind the reversioner and that he could redeem the property in spite of the foreclosure decree

Where a suit at the instance of the two of the heirs of a deceased mortgagor was decreed without other heir being impleaded but the plaintiffs failed to deposit the amount under the decree within time and a final decree for foreclosure was passed it will not debar the other heirs from redeeming the property but in absence of any evidence showing that he has more than half share in

5. (1888) 11 Mad 371 (372) (DB).

Section 67 — Note 10

1. **See also** AIR 1953 All 242 (243) (Right or foreclosure is nothing but a method prescribed by law for the recovery of the loan advanced by him by seeing the relief of foreclosure against the mortgagor's property.)
2. AIR 1951 Nag 171 (174). ILR (1950) Nag 618 (Foreclosure is effected by Court — When possession is eventually taken, it is in pursuance of decree of Court and not in pursuance of a contract which is superseded) ** (1951) 1 Ch 22 (24) 84 LJ Ch 129 112 LT 151 21 Manson 395. *In re Farnol, Eades, Irvine and Co Ltd. Carpenter v Farnol Eades Irvine & Co. Ltd*
   [**See also** AIR 1955 Him Pra 46 (48) (In the case of a mortgage by conditional sale the mortgage does not automatically mature into a sale — When the mortgage money becomes due, and the right of redemption is not yet barred, the mortgagee has to obtain a decree from the Court to the effect that the mortgagor is absolutely debarred to redeem the mortgaged property) ** AIR 1916 Nag 120 (123) · 13 Nag LR 69 (Mortgage by conditional sale — Ownership not to vest in mortgagee until decree absolute for foreclosure is passed.)]
3. AIR 1953 All 242 (243) ** (1881) 6 QBD 345 (360) 29 WR (Eng) 904 44 LT 327 50 LJQB 473. *Heath v. Pugh* ** (1916) 1 Ch 452 (461) 85 LJ Ch 360 114 LT 914 60 SJ 32. *Wakefield and Barnsley Union Bank Ltd. v Yates* ** AIR 1931 Sind 107 (109) 25 Sind LR 405 (Arbitrator duly appointed by parties can pass an award to the same effect) ** AIR 1914 All 63 (64) 36 All 327 (DB) ** (1877) 3 Cal 508 (510) (DB) (Obiter)
   [**See also** (1883) 7 Bom 532 (535) ** (1881) 7 App Cas 235 (238) 30 WR 553 51 LJQB 367 : 46 LT 321, *Pugh v. Heath.*]
4. AIR 1924 All 818 (821) : 46 All 864.
   [See AIR 1942 Cal 452 (454) (DB). (A executing a kabuliat in favour of B — Kabuliat containing a covenant that if A makes a gift of or sells or otherwise transfers the land then he and the vendee or transferee would be bound to pay B ¼th of the price of the land — A mortgaging property by conditional sale — **Held,** mortgage by conditional sale followed by decree for foreclosure and taking of possession thereunder constituted a "transfer" contemplated by the kabuliat)]
5. AIR 1931 Oudh 358 (362) 6 Luck 715 (DB). (32 Cal 296 (PC). followed.)

the mortgage property he is entitled to redeem to the extent of his share(6).

11. Effect of sale under mortgage-decree.

The mere passing of a final decree for sale or the actual sale of the mortgaged property under it, does not put an end to the mortgage security. It is only on the *confirmation* of the sale that the mortgage security is extinguished(1) and the effect of it is to pass to the purchaser the interest both of the mortgagor and the mortgagee (2). Hence, if a lease by the mortgagor in possession does not bind the mortgagee, it does not equally bind the auction purchaser(3).

12. Clause (a).

Clause (a) of the section before amendment was as follows:

"(a) to authorise a simple mortgagee as such to institute a suit for foreclosure, or an usufructuary mortgagee as such to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale; or."

It will be noticed that only a simple mortgagee and an usufructuary mortgagee were expressly debarred from obtaining a decree for foreclosure. Other mortgagees such as a mortgagee by deposit of title deeds and an English mortgagee could get a decree for foreclosure. The object of the Legislature in introducing the amendment was to restrict the remedy of foreclosure only to certain classes of mortgages. In their Report the Special Committee observe as follows:

"Under the present law (i.e., before amendment) the remedy by way of foreclosure is open to a mortgagee in the case of a mortgage by conditional sale and in an English mortgage, as also in anomalous mortgages, by the terms of which the mortgagee is entitled to foreclose. By Rule 4(2) of O. 34 of the Code of Civil Procedure, 1908, the Courts in India have been empowered, when a suit is brought for foreclosure, to direct a sale in lieu of foreclosure. The discretion conferred by that rule on the Courts has been exercised in different ways, some Courts refusing foreclosure while others have granted it. We understand that in Allahabad foreclosure decrees are more frequent. As to equitable mortgages by deposit of title deeds also, a different practice prevails in different Courts. In Calcutta and Allahabad the Courts have invariably refused foreclosure in such cases (24 Cal. 348; 14 All 238), while in Bombay foreclosure decrees are sometimes passed (14 Bom 269)."

The question is discussed by the late Sir Rash Behari Ghose in the 5th Edition of his "Law of Mortgage" at page 32 where he says :

"But although sales take place more frequently now, foreclosure is still a common method of working out the rights of mortgagees in England. I may, however, be permitted to observe that in complicated cases, the rights of the parties can be adequately protected only by a decree for sale, foreclosure being both cumbrous and dilatory method of procedure. When the Transfer of Property Act was under consideration, it was proposed in this country to do away with foreclosure altogether, and to give the mortgagee only the right to realise his security by a sale of the pledge. But it was thought by the then Law Member of the Governor-General's Council that the amount of simplicity which would be thus gained would not justify the amount of disturbance which would be created by such a change in the law. I, however, venture to doubt whether the sight disturbance which would have been created by such a law would have been too dear a price to pay for the elegance and simplicity which such a measure would have given us. At any rate the gain to the community would have been sufficient compensation for any possible disturbance. The right of a mortgagee to foreclose, we should remember, naturally grew in England out of the form of an English mortgage, which consists of a transfer of ownership, accompanied by a condition for re-transfer upon due payment of

6. 1975 Raj LW 273.

Section 67 — Note 11

1. See the Code of Civil Procedure, O. 34, R. 5, Note 13 ** AIR 1925 All 818 (821) : 46 All 864.
2. **(1876) 1 All 236 (238) (FB).** (Sale in execution of a simple money decree obtained on a simple mortgage.) ** **(1876) 1 All 240 (245) (FB)** ** AIR 1930 Bom 221 (222) (DB) ** (1880) 5 Bom 8 (12, 13) (DB) ** (1892) 16 Bom 486 (491) (DB) ** (1886) 10 Bom 224 (226) (DB) ** (1870) 7 Bom HCR (AC) 146 (148) ** (1908) 7 Cal LJ 1 (30) (DB).
3. **AIR 1967 SC 1390 (1394) : 46 Pat 870.**

the debt, probably the crudest method, as Professor Holland points out, in which security can be given for the fulfilment of an engagement In many of the States of America, as well as in Ireland, sale is regarded as the most appropriate remedy on a mortgage The same practice is followed in countries which have adopted the Roman law as the basis of their jurisprudence In English law however, the more cumbrous mode of proceeding has stood its ground down to the present day, but it may be affirmed without much temerity that foreclosure with its successive periods of redemption, its liability to be re-opened, and the manifest inadequacy of the remedy in complicated cases is doomed even in England."

In Wiltsie on "Mortgage Foreclosure", Vol. 1, p 5, 3rd Edn. (an American work), it is observed :

"Strict foreclosure or foreclosure without a sale was a procedure greatly used in England at one time and its purpose was to perfect in the mortgagee an absolute title, instead of to obtain a decree for sale, the Courts in most States recognise this method, but allow its use only in exceptional cases, owing to its severity upon the rights of the owner of the equity of redemption

We, therefore, consider it desirable to confine the remedy of foreclosure to the case of a mortgage by conditional sale or an anomalous mortgage where, by the express terms of the deed, the parties have stipulated for foreclosure; and to disallow it in all other cases"

13. Remedy of a simple mortgagee.

Under this section a simple mortgagee has the right to obtain only a decree for sale (1) He cannot obtain a decree for foreclosure.(2) But where a simple mortgage-deed expressly stipulates that the mortgagee is entitled to foreclose the property on default in payment of the mortgage-money a suit for foreclosure is maintainable.(3) The provision in a deed of simple mortgage entitling the mortgagee to enter into possession in case of default of payment on the specified date does not take away the right of sale given to the mortgagee(4)

In the undermentioned case(5) a simple mortgagee sued to enforce his mortgage and the Court, instead of granting him a decree for sale ordered that in case of default in payment of the amount, the mortgagee should be put in possession of the property. In appeal the Judicial Committee held that this was wrong, and that the only decree that could be passed on a simple mortgage was a decree for sale.

Even before this Act a simple mortgagee had the right to enforce the mortgage by sale.(6) The usual practice was to sue for the mortgage-money, praying that the lien might be declared on the property. Then having obtained a decree the mortgagee asked for execution by sale of the mortgaged property. This prayer is not now necessary and the mortgagee can directly ask for sale of the property under this section(7).

In the Punjab the Transfer of Property Act does not apply but a simple mortgagee has a right of sale as the hypothecation itself implies such a right(8).

Section 67 — Note 13

1. **AIR 1918 PC 34 (34) : 45 Ind App 130 ** (1896) 19 Mad 249 (251) : 23 Ind App 32 (PC) ** (1911) 10 Ind Cas 272 (272) (PC)** ** AIR 1958 Pun 309 (310) ** (1903) 6 Oudh Cas 151 (152) ** (1912) 34 All 640 (645) (DB) ** (1978) 1 All 611 (613) (DB)
2. AIR 1931 Mad 626 (628, 629) · 34 Mad 565 (Though he is not entitled to possession, he can ask for the appointment of a Receiver) ** AIR 1931 Mad 542 (547) (DB)
3. AIR 1953 Hyd 137 (137) : ILR (1951) Hyd 91 (93).
4. **(1911) 10 Ind Cas 272 (272) (PC)** ** (1903) 13 Mad LJ 2 (3) (DB) ** (1862-63) 1 Mad HCR 114 (115) (DB).
5. **(1896) 19 Mad 249 (253) : 23 Ind App 32 (PC).**

Also see S. 58, Note 30 and S. 76, Note 4

6. (1897) 21 Bom 267 (272) (DB) ** (1899) 23 Bom 781 (785) 1 Bom LR 461 (DB) ** (1889) 2 CPLR 57 (58).
7. (1889) 2 CPLR 57 (58).
8. AIR 1929 Lah 289 (290)

14. Remedy of a mortgagee by conditional sale.

A mortgagee by conditional sale enjoyed the right of foreclosure before the Transfer of Property Act. This section does not make any change in the rights and liabilities of the mortgagor and the mortgagee as they existed before. It only provides for a different procedure for the enforcement of those rights (1). By the former part of clause (a), a mortgagee by conditional sale is entitled to bring a suit for foreclosure, by the latter part he is forbidden from suing for a sale of the property. The result is that the only remedy of a mortgagee by conditional sale is to institute a suit for foreclosure(2).

As to the procedure adopted for foreclosure before the Act, see Notes on S. 58 and the under mentioned cases(3).

In the Punjab also mortgagee by conditional sale has a right of foreclosure. But this Act being inapplicable to that Province, the procedure to be followed for foreclosing is that which is laid down in the Bengal Regulation 17 of 1806 (4). See also Notes on S. 58.

A mortgagee by conditional sale of an intangible property also has got a right of foreclosure(5).

It has been held by the High Court of Nagpur that even a remedy by way of foreclosure may be available to a mortgagee of *movable* property if the mortgage-deed so provides(6).

A suit for foreclosure has been held to be a suit for recovery of money within the meaning of Section 4 of the Bihar Money Lenders Act, 3 of 1938(7).

15. Remedy of a usufructuary mortgagee.

Before the Act was passed it was held in some cases that a usufructuary mortgagee could not sue for foreclosure or for sale.(1) in the undermentioned case(2) a decree for sale was passed.

Under this section a usufructuary mortgagee, as such, is not entitled to sue for a decree for foreclosure or for sale of the mortgaged property(3).

Section 67 — Note 14

1. **(1886) 12 Cal 583 (589) (FB)** ** AIR 1988 Guj 110 (119) ** (1887) 14 Cal 451 (455) (DB).
2. AIR 1963 Guj 112 (115) (Mortgage by conditional sale — Mortgagee can realise his security only by suit for foreclosure.) ** AIR 1991 Guj 85 (90, 91, 93) ** AIR 1950 Nag 83 (85) : ILR (1950) Nag 211 (DB) (Mortgage by conditional sale — Decree must be for foreclosure — There is no option.) ** AIR 1942 Nag 88 (90) : ILR (1942) Nag 357 (DB) (In a case of foreclosure, the right conferred on the mortgagee is not to sue for money but to take steps to perfect his title to the property.) ** AIR 1926 All 493 (493) : 48 All 302 (DB) ** AIR 1929 All 421 (428) : 51 All 780 (DB) ** (1893) 16 Mad 64 (66) (DB) ** (1893) 20 Cal 269 (272) (DB)
   [See also (1900) 23 All 1 (4) (DB).]
3. **(1878) 3 Cal 397 (404, 405) : 5 Ind App 18 (PC) ** (1906) 28 All 496 (507) : 33 Ind App 107 (PC)** (1887) 14 Cal 451 (453) (DB) ** (1888) 15 Cal 357 (360) (DB) ** (1886) 8 All 388 (392) (DB).**
4. AIR 1933 Lah 174 (175) ** AIR 1920 Lah 345 (346) : 1 Lah 292 (DB)
5. AIR 1915 Cal 161 (167, 168) : 42 Cal 455 (DB) (Mortgage of a turn of worship of Kalighat shrine which is transferable according to the custom.)
6. AIR 1949 Nag 368 (369) : ILR (1949) Nag 243.
7. 1959 Pat LR 7 (8)

Section 67 — Note 15

1. (1881) All WN 71 (71) (DB) ** (1870) 13 Suth WR 445 (446) (DB) ** (1875) 24 Suth WR 426 (426) (DB) ** (1882) 4 All 281 (282) (DB) ** (1882) 4 All 245 (247) (DB)
2. AIR 1914 All 350 (350) (DB).
3. AIR 1982 Pat 180 (181) : 1982 Pat LJR 441 (Usufructuary mortgagee is entitled to a decree for money under S. 68(1)(a) of the Act.) ** (1940) 188 Ind Cas 669 (670) (DB) ** (1904) 1 All LJ 20 (25) (DB) (And if he does not get possession, he can sue for the money

Right to foreclose or sell the property is not available to usufructuary mortgagee whose only right is to enjoy the security until the mortgage-money is paid off But in the case of "Otti" which is a wellknown tenure in Travancore State there is an implied personal covenant to pay in addition to the usual incidents of a usufructuary mortgage In such a case mortgagee can sue for the recovery of mortgage-money within a period of six years from the expiry of the term and if no term is fixed, from the date of the mortgage(4).

Having came into possession of the whole property as a mortgagee from the plaintiff/mortgagor treating the plaintiff as a full owner, it was not opened to the defendant/mortgagee to question the title of the plaintiff/mortgagor either wholly or partly A usufructuary mortgagee cannot deny the title of his mortgagor Nor can he set up adverse possession unless he actually leaves the holding and re-enters under a different status(5).

A mortgagee cannot question the title of the mortgagor Once the valid execution and attestation of mortgage is established, the mortgagee is estopped from disputing the title of the mortgagors and it is not incumbent upon them to positively establish their title. They are entitled to redemption(6).

Before the year 1929, a mortgagee under a mortgage which was a combination of a simple and a usufructuary mortgage, could bring the property to sale by virtue of the covenant for sale (7) The same will even now be the case, though such mortgages are now classed as anomalous mortgages (8) Where there is no stipulation for sale but only a personal covenant to pay, there is a difference of opinion as to whether the mortgagee will be entitled to ask for sale of the property on the strength of the covenant to repay One view is that the mortgagee can sue for sale of the

paid) ** (1909) 31 All 318 (322) (DB) ** 1892 All WN 66 (67) ** (1889) 11 All 367 (371) (DB) ** AIR 1933 Lah 151 (152) (DB) (**Overruled** upon construction of mortgage in AIR 1947 Lah 40 (FB) in which it was held that the mortgage was a combination of usufructuary and simple mortgage) ** (1889) 12 Mad 109 (112) (DB) ** (1891) 15 Mad 174 (178) (DB) (**Overruled** in AIR 1919 Mad 1164 (FB) on another point) ** (1899) 22 Mad 350 (351) (DB) (A "kanmon," in the mortgage aspect of it is a usufructuary mortgage and hence mortgagee cannot sue for sale) ** (1892) 16 Bom 172 (177) (DB) ** (1898) 20 All 401 (407) (The mortgagee is entitled to remain in possession not only for principal but also for the arrears of interest) ** (1903) 26 All 14 (17) (DB) **** AIR 1916 PC 169 (172)** ** AIR 1929 Cal 304 (305) (DB) (But he can sue for sale if the terms of the deed allow him to do so) ** AIR 1937 Pat 94 (96) ** (1905) 2 Cal LJ 493 (495) (DB) ** (1897) 24 Cal 677 (680) (DB). (Unless there is anything in the contract which would imply the right) ** AIR 1933 Mad 613 (615) 57 Mad 892 (DB) ** (1902) 5 Oudh Cas 286 (292) (DB) ** AIR 1915 Cal 376 (377) (DB) ** AIR 1936 Pesh 48 (51) (DB) ** (1911) 35 Bom 288 (292) (DB) ** AIR 1918 Cal 797 (797) (DB) ** AIR 1927 All 341 (342) ** AIR 1940 Cal 437 (438) (DB) ** AIR 1941 Mad 885 (886) (DB)

[**See** (1901) 23 All 432 (433) (DB) (Position of a Mahomedan widow in possession of her husband's estate in lieu of dower debt explained) ** (1898) 21 All 4 (10) (DB) (Mortgage deed of a mixed character — Partly simple and partly usufructuary — **Held,** that the mortgagee was entitled to a decree for sale) ** AIR 1957 Mys 86 (86) ILR (1957) Mys 9 (Suit on usufructuary mortgage was simple mortgage)]

[**See also** AIR 1952 Mad 856 (858) (If under the mortgage deed the mortgagor expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee the transaction is a usufructuary mortgage notwithstanding that actual possession has not been delivered and the mortgagee cannot institute a suit for sale — Section 68 also does not confer right to sell property)]

4. 1971 Ker LJ 51.
5. **AIR 2000 SC 426 (433) : 1999 AIR SCW 4573 (4582) : 2000 (1) SCC 434.**
6. 1998 (1) CTC 79 (84) (Mad).
7. AIR 1943 Sind 59 (61) ILR (1942) Kant 452 (DB) (AIR 1929 PC 139, followed.) **** AIR 1929 PC 139 (141) : 4 Luck 363 : 56 Ind App 299.**
8. See Notes on S. 58. **AIR 1947 Lah 40 (45, 46) (FB).**

property on the strength of the covenant,(9) while according to the other view(10) the mortgagee cannot sell the property. See also S. 58, Note 35.

As to the question whether a usufructuary mortgagee who is not given possession by the mortgagor, can sue for sale of the mortgaged property, see Notes 5 and 17 on Section 68.

In the Presidency of Bombay, before the Act was made applicable there, the rights of a mortgagee with possession were governed by the Bombay Regulation V of 1827, S. 15, clause (3). For the law under that Regulation, see the undermentioned cases(11).

In the Punjab though Act does not apply, a usufructuary mortgagee has got no right to ask for sale of the property(12).

16. Remedy of an English mortgagee.

The remedy of an English mortgagee was not restricted either to sale or foreclosure before the amendment in clause (a) in 1929. It was, therefore, held before 1929 that both the remedies, i.e. the remedy of sale and also of foreclosure, were open to him. (1) In the case of an English mortgage executed prior to 1st April, 1930, this right to file a suit for foreclosure or sale is not affected by the Amending Act (20 of 1929). (2) Under the present clause (a) the remedy of foreclosure being available to a mortgagee by conditional sale only, the remedy open to an English mortgagee is only by way of sale(3).

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9. **(1903) 27 Mad 526 (527) (FB)** (The mortgage was a combination of simple and usufructuary mortgage.) ** **(1893) 17 Mad 131 (133) (FB)** ** (1968) 1 Mad LJ (139) (144) (1962) 86 Mad LW 631 ** AIR 1964 Madh Pra 305 (306) (Usufructuary mortgage — Mortgagors also binding themselves personally to pay — Mortgage being a simple mortgage usufructuary mortgagee has a right to bring mortgaged property to sale.) ** AIR 1962 Mad 308 (308) ** AIR 1954 Mys 177 (178) (ILR (1955) Mys 15 (DB)) (Simple mortgage usufructuary — Personal covenant to pay — Mortgagee has a right to institute suit for sale.) ** AIR 1952 Mys 125 (126, 127) (ILR (1953) Mys 1) (Usufructuary mortgage containing personal covenant to pay mortgage money — Such a transaction is a composite mortgage styled simple mortgage usufructuary — Mortgagee could bring a suit for recovery of money after expiry of stipulated period and put mortgaged property to sale.) ** AIR 1933 Mad 613 (615) (56 Mad 892 (DB)) (On facts held there was no personal covenant.) ** AIR 1943 Sind 59 (61) (ILR (1932) Kant 452 (DB)) ** (1890) 14 Mad 252 (254) (DB) ** (1896) 19 Mad 411 (413) (DB) ** (1903) 5 Bom LR 119 (121) (DB) ** (1893) 17 Bom 425 (428) (DB) ** (1916) 6 Nag LR 20 (25) ** (1910) 34 Bom 462 (466) (DB) ** (1866) 6 Suth WR 283 (284) (DB) ** (1910) 6 Ind Cas 153 (153) (DB) (Cal) ** AIR (1935) Lah 103 (104) : 16 Lah 616 (DB)
Also see S. 68, Note 17 and S. 98, Note 5.

10. AIR 1942 All 326 (327) (ILR (1942) All 368 (DB)) (Following AIR 1938 All 4, 8 (FB)) ** **AIR 1938 All 418 (421) : ILR (1938) All 714 (FB)** ** (1906) 28 All 157 (160) (DB) ** AIR 1933 Lah 151 (152) (DB) ** (1908) 10 Bom LR 615 (617) (DB)
Also see S. 58, Note 35 and S. 68, Note 17.

11. (1910) 34 Bom 462 (466) (DB) (Mortgagee had right to sell.) ** **(1889) 13 Bom 90 (100) (FB)** (Do.) ** (1892) 16 Bom 303 (306) (DB) (Right to sale under the Regulation could be exercised only when there was no agreement to the contrary.) ** (1892) 20 Bom 296 (298) (DB) (Do.) ** AIR 1924 Bom 387 (388) (DB) (Do.) ** (1901) 3 Bom LR 156 (157) (DB) (**Held**, that the clause did not authorise mortgagee to sell property.) ** (1910) 34 Bom 128 (134) (DB). (Mortgagee could sell property.)

12. AIR 1933 Lah 151 (152) (DB) ** 1873 Pun re No. 57, p. 83 (83) (DB) (Case before Transfer of Property Act.) ** 1870 Pun re No. 81, page 208 (209) (DB) (Do.)

Section 67 — Note 16

1. AIR 1924 Mad 736 (737) (DB) ** AIR 1922 Cal 52 (52) (DB).
[**See also** (1887) 14 Cal 464 (481, 482) (DB).]
2. AIR 1946 Bom 499 (508) (Art. 147 Lim. Act continues to be applicable to such suits.)
3. AIR 1942 Cal 153 (158) (ILR (1942) 1 Cal 326 (DB)) (Suit for enforce such mortgage falls under Art. 132 and not under Art. 147, Limitation Act.)

If the mortgagor binds himself, whether expressly or impliedly, to pay the money personally, the mortgagee will be entitled to get a personal decree also against the mortgagor under O 34, R 6 of the Civil Procedure Code(4).

Where under the deed property was granted, transferred conveyed, assigned and assumed to the use of the purchaser absolutely and for ever and it was stated that purchaser thereafter peaceably and quietly enjoy and possess the property, it was a deed of English mortgage(5)

It may also be noted that if both or any of the parties to an English mortgage are neither Hindus, nor Muhammadans, nor Buddhists, nor member of any race, sect, tribe or class from time to time specified in this behalf by the State Government in the Official Gazette, the mortgagee will also have a right of sale of the mortgaged property '*without the intervention of Court*' under S 69, clause (a) besides the right of sale under this section which can be exercised only through the intervention of a Court.

In the States to which this Act does not apply, an English mortgagee will be entitled to bring a suit for sale as well as for foreclosure as is the case under the English law.

17. Remedy of a mortgagee by deposit of title deeds.

Clause (a) of this section as it stood before the amendment in 1929 did not restrict the mortgagee by deposit of title deeds to any particular kind of suit It was, therefore, held by the High Court of Bombay, following the English law, that he could bring a suit for sale of the property as well as for foreclosure.(1) The High Court of Rangoon was also of the same view though it usually granted a decree only for sale.(2) The practice of the High Court of Calcutta was to give a decree for sale.(3) Under the present amended clause, a decree for forclosure is restricted to a case of a mortgage by conditional sale and under certain circumstances to the case of an anomalous mortgage Consequently, the remedy open to a mortgagee by deposit of title deeds under the present law is only by way of sale (4) In a mortgage by deposit of title deeds, a decree as may be passed in a suit of a simple mortgage can only be passed A decree for foreclosure cannot be passed in a suit of mortgage by deposit of title deeds (5) See also Notes on Section 96

18. Remedy of an anomalous mortgagee.

Under S 98, the rights and liabilities of the parties to an anomalous mortgage are to be determined according to the terms of the mortgage. Clause (a) of this section allows an anomalous mortgagee to institute a suit for foreclosure if the right of foreclosure is given to him by the contract and does not debar him from instituting a suit for sale It, therefore, follows that an anomalous

4. AIR 1922 Cal 52 (53) (DB) (Personal decree against the mortgagor can be made even in appeal)
5. AIR 1988 Cal 247 (250 to 252) : (1987) 1 Cal HN 402.

Section 67 — Note 17

1. (1890) 14 Bom 269 (273) (DB). (Parsons, J.)
   [**See also** (1898) 22 Bom 164 (169) (DB) (What rights the equitable mortgagee has against the mortgagor depends upon the agreement between them — In the absence of agreement English law gave mortgagee a right to call for the legal estate and right to foreclosure — The Transfer of Property Act is silent upon the subject)]
2. (1811) 11 Ind Cas 783 (784) (DB) (Low Bur) ** AIR 1916 Low Bur 20 (21) 8 Low Bur Rul 450
   [**See also** AIR 1928 Rang 16 (17) 5 Rang 558 (DB) (Equitable mortgage — Decree for sale — Mortgagee applying for personal decree in respect of balance due — **Held**, as there was no evidence to show that the mortgagor bound himself personally to pay, such decree could not be obtained.)]
3. (1897) 24 Cal 348 (350) ** (1856) 13 Cal 322 (326) (DB).
4. AIR 1936 Rang 400 (401) (DB) (This kind of mortgage has all the incidents of simple mortgage) ** AIR 1936 Rang 290 (292) 14 Rang 292 (DB)
5. AIR 1992 All 111 (115) : 1991 All WC 886

mortgagee can institute a suit for sale,(1) as well as for foreclosure(2) if the right of sale or foreclosure is given to him by the contract of mortgage. Even where such a right is not given by the contract, but the contract does not also contain a stipulation barring such a right, the mortgagee is entitled to exercise his right under this section.(3) There is no conflict between Section 67 and S. 98(4).

Where in an anomalous mortgage such as a *lahan gahan* mortgage in Nagpur(5) the mortgagee is given a right of foreclosure and also of sale, and the mortgagee institutes a suit for foreclosure, the Court has a discretion under O. 34, R. 4, sub-r. (3), Civil Procedure Code, to pass a decree for sale instead of for foreclosure. Such a discretion can be used in the case of anomalous mortgages only.(6) Although the anomalous mortgage gives the mortgagee right to ask for decree for foreclosure or sell it does not follow that he has a right to direct the Court which relief to grant him. The matter is covered by Order 34, Rule 4. (Case prior to the amendment in (1929) (7).

Before 1929 the mortgagee under a simple mortgage usufructuary was allowed to institute a suit for sale there being a hypothecation of the property.(8) Such mortgages will now be included in the category of an anomalous mortgage and rights of the parties will be determined according to the terms of the contract of mortgage.

The question whether a mortgagee under an anomalous mortgage has a right to sell or to foreclose, depends upon the intention of the parties as evidenced by the terms of the contract. Thus where, in an anomalous mortgage the mortgagee was put in possession, the mortgage was for a fixed term, and it was provided that if the mortgagor did not pay on the stipulated date, the mortgagee should continue to be in possession, it was held that there was no right to bring the property to sale.(9) Where under the mortgage without possession a period was fixed for payment of the mort-

Section 67 — Note 18

1. AIR 1968 Pat 222. (In absence of covenant for sale in an anomalous mortgage provisions of S. 67 will not be applicable.) ** (1990) 3 Cur Civ C 84 (Gauhati) ** AIR 1954 Mys. 77 (178). ILR (1955) Mys 15 (DB). (Simple mortgage usufructuary. — Personal covenant to pay. — Mortgagee has a right to institute suit for sale.) ** AIR 1953 Mad 13 (15). ILR (1952) Mad 993 (DB). (Mortgagee to enjoy property in lieu of interest. — Personal covenant to pay. — Possession not given to mortgagee. — Mortgagee held anomalous and hence mortgagee held entitled to decree for sale. — Even otherwise the existence of personal covenant gave mortgagee right to sue for sale.) ** AIR 1952 Mad 856 (858). (Mortgage deed was held a combination of a simple mortgage and usufructuary mortgage because of the personal covenant contained therein and that because of that personal covenant a decree for sale could be made under S. 67.) ** AIR 1936 Pat 221 (222). 14 Pat 560 (DB).
2. AIR 1953 Hyd 137 (137). ILR (1951) Hyd 91 (93). (Simple mortgage without possession expressly stipulating that mortgagee is entitled to foreclose on default in payment of mortgagee money. — Suit for foreclosure is maintainable.) ** AIR 1941 All 169 (170). ILR (1941) All 240 ** (1813) 21 Ind Cas 457 (458) (DB) (All).
3. AIR 1968 Pat 222 (225). ILR 46 Pat 1202 (DB). (Provisions of Ss. 67 and 98 are not conflicting.)
4. **AIR 1973 Raj 173 : 1972 Raj LW 310 (FB).**
5. AIR 1940 Nag 156 (157). ILR (1941) Nag 607 (DB). (AIR 1929 Nag 254 (FB). **Followed.**) ** **AIR 1938 Nag 112 (113) : ILR (1938) Nag 91 (DB).**
6. AIR 1935 All 778 (781) (DB).
7. AIR 1929 Oudh 282 (282) (DB).
8. AIR 1938 Lah 145 (147) (DB) ** (1810) 6 Nag LR 20 (25) ** AIR 1933 Oudh 35 (36). 8 Luck 190 (DB). (Deed of mortgage was executed in 1918. — **Held** that the relief must be determined with reference to law as it stood before 1929.) ** (1908) 30 All 162 (162) (DB) ** (1910) 6 Ind Cas 795 (796) (DB) (All) ** (1913) 16 Oudh Cas 92 (92, 93) ** AIR 1922 Pat 167 (169). 1 Pat 350 (DB) ** (1910) 6 Ind Cas 153 (153) (DB) (Cal).
   [See also AIR 1924 All 928 (929).]
   Also see S. 68, Note 17.
9. AIR 1928 Mad 226 (226) (DB).

gage-debt, and in the event of default the mortgagee was entitled to enter into possession of the land, such a mortgage is an anomalous mortgage under S. 58, and under S. 67(a) a decree of foreclosure can be passed to enforce it.(10)

In a suit for foreclosure on anomalous mortgage the mortgagor cannot compel the mortgagee to accept a decree for sale unless it is proved that the remedy sought by the mortgagee is injurious to his interest and some advantage would accrue to him if the discretion is exercised in his favour.(11)

In the undermentioned case,(12) not governed by the Act, certain property was mortgaged with possession for a period of three years with the stipulation that it would be redeemed after the expiry of that period. The mortgagee sued for sale on his mortgage after the expiry of the period. It was held that the mortgage was an anomalous one and that a decree for sale should be granted on principles of justice, equity and good conscience. The reason was stated by their Lordships as under :

> "The words with regard to redemption after the period of three years has elapsed clearly indicate that the redemption was considered to be *de rigueur* at the end of the stipulated period and that it was not intended that the mortgagee should continue to occupy the land afterwards. In the circumstances it will be inequitable to refuse the relief asked for and to make the mortgagee wait till the mortgagor decides to redeem his property."

Anomalous mortgage combining usufructuary and simple mortgage allowing mortgagee to enjoy the property in lieu of interest for five years and mortgagor to repay the amount whenever he wanted in any year on close of the agriculture year it would be said that the money became due under the personal covenant only after the demand was made by the mortgagee. In such a case money became due both for redeeming and for suit for sale on the expiry of the five year period.(13)

Under an anomalous mortgage a decree for the sale of property can be passed.(14)

See also the undermentioned cases.(15)

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10. AIR 1956 Hyd 107 (110) : ILR (1956) Hyd 339.
11. (1913) 18 Ind Cas 24 (25, 26) (DB).
12. AIR 1936 Pesh 43 (45) (DB).
13. (1968) 81 Mad LW 166 : (1968) 2 Mad LJ 445
14. AIR 1972 Pat 432 (DB)
15. **AIR 1919 PC 121 (123) : 15 Nag LR 134.** (Mortgagor to repay by instalments with interest or to redeem at any time — Mortgagee to remain in possession — **Held,** mortgage was anomalous one and the conclusion to be drawn from its terms was that the parties never contemplated sale.) ** (1967) 1 MLJ 139 (144) ** AIR 1962 Mad 308 (308) (Usufructuary mortgage prescribing specific period for redemption — Recital to pay principal after expiry of period amounts to personal covenant to pay — Right of mortgagee to bring property to sale.) ** 1961 Jab LJ 1207 (1208). (Mortgage with possession with further stipulation that mortgagee could realise the debt by sale of the property — Lease back to mortgagor — Suit by mortgagee as landlord for eviction and arrears of rent on the basis of rent note — Suit resisted on ground that previous suit filed by plaintiff as mortgagee for sale of mortgaged property was dismissed for default and consquently mortgage had become extinguished and that mortgagee was now entitled to the possession of the mortgaged property — Defence plea accepted by trial Court — Dismissal of suit affirmed by first appellate Court — In second appeal — **Held,** that mortgage was anomalous mortgage — **Held** further, dismissal of previous suit for sale only barred action for sale — It did not and could not extinguish security — Right of mortgagee to possess the property does not become extinguished, merely because another remedy provided for the sale of the property cannot be availed of — AIR 1960 MP 44 and AIR 1958 MP 319, **Rel. on.**) ** AIR 1960 Madh Pra 44 (45, 46) (Usufructuary mortgage — Failure to deliver possession — Decree for sale in favour of mortgagee — Execution barred by time — Mortgage not extinguished and mortga-

19. Remedies of prior and puisne mortgagees against each other.

This section is not limited to the first mortgagee The word "mortgagee" used in it refers to all mortgagees, whether prior or subsequent The section does not qualify the right of subsequent mortgagee so as to defer the enforcement of his rights under his mortgage until the prior mortgage is due or redeemed.(1) The prior mortgagee also is entitled to enforce his mortgage irrespective of whatever other claims there may be subsequent to his mortgage (2) Where, however, the prior mortgagee sues to enforce his mortgage, the puisne mortgagee is a necessary party to the suit under O 34, R 1 of the Code of Civil Procedure Where a puisne mortgagee is a party to such a suit and a decree for sale or foreclosure is passed in favour of the prior mortgagee the effect is to extinguish the puisne mortgagee's security if the puisne mortgagee does not exercise his right of redemption or if his security is not expressly saved.(3) Where property is sold in execution of a decree obtained in such a suit, the subsequent mortgagee is entitled to claim the surplus sale proceeds (4) But if the prior mortgage is satisfied before the sale in execution, the subsequent mortgagee cannot ask for the sale of the property in the same suit to satisfy his claim For this he must file a separate suit under this section on his own mortgage.(5)

Puisne mortgagee in respect of whose mortgage decree has already been made in a prior mortgagee's suit to which he is made a party is entitled to institute a separate suit in respect of his mortgage and ask for a decree in the form 5 A of Appendix in the First Schedule of C P Code when the claim of the prior mortgagee made in the prior mortgagee's suit has been satisfied by the payments made by the mortgagor as a result of which no sale takes place in that suit (6)

Where a puisne mortgagee is not made a party to the prior mortgagee's suit the rights of the puisne mortgagee remain unaffected by the decree passed in the suit (7) Rights of Puisne mortgagee are unaffected if he is not impleaded in prior mortgagee's suit Auction purchaser cannot in such a

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gee's right to continue in possession not lost Mortgagor does not acquire unfettered right to property and its possession) ** AIR 1914 Mad 317 (318) (DB) (A kanom is a usufructuary mortgage apart from the reservation of the purapaid and it is well understood in Malabar that it does not confer a right to bring the property to sale) ** [illegible] (DB) Mortgage held anomalous and upon personal covenant to pay Mortgagee held entitled to sale 27 Mad 526, Rel on)

Section 67 — Note 19

1. (1894) 22 Cal 33 (37) (DB) ** AIR 1927 Oudh 527 (527) (DB)
2. AIR 1914 Low Bur 178 (180) (DB)
3. AIR 1953 All 147 (148) (DB) ** AIR 1930 All 826 (827) ** (1910) 6 Ind Cas 331 (All) ** (1904) 7 Oudh Cas 243 (247) (DB) ** (1906) All W N 112 (113) ** AIR 1932 Cal 126 (131 132) : 59 Cal 117 (DB) ** AIR 1928 Lah 505 (507) ** AIR 1922 Mad 507 (508) (DB) ** AIR 1916 Pat 64 (65) : 1 Pat LJ 261.
   [See however AIR 1915 All 297 (298) (Right of puisne mortgagee are not affected where a money decree only is obtained on the prior mortgage)]
4. AIR 1968 Andh Pra 336 (340) (DB) (Suit by prior mortgagee for sale impleading puisne mortgagee — Decree therein not providing for payment of balance of sale amount to puisne mortgagee — Right of puisne mortgagee for sale of mortgaged property or for a decree against balance of sale proceeds held not in any way affected Second suit by puisne mortgagee held not barred by principles of constructive *res judicata*)
5. ILR (1954) 2 Cal 204 (207) (Suit by prior mortgagee on his mortgage for sale — Puisne mortgagee is entitled to redeem prior mortgage or participate in surplus sale proceeds after satisfaction of claim on prior mortgage — Prior mortgagee obtaining final decree for sale but not proceeding with sale — Puisne mortgagee cannot have the sale proceeded with for his benefit, either by transferring himself to the category of plaintiff or in any other manner.) ** AIR 1935 Rang 26 (29) (DB).
6. AIR 1960 PC 600 (602, 603) : (1968) 2 SCJ 93.
7. AIR 1918 PC 34 (34, 35) : 40 All 407 : 45 Ind App 130. (Prior mortgagee obtaining decree for sale without impleading subsequent mortgagee — Decree not executed within the period of limitation — Subsequent mortgagee suing for sale on his mortgage **Held,**

case use the plea of being a bona fide purchaser for value without notice.(8)

He can either redeem the prior mortgage or bring a suit on his mortgage for sale of the property subject to the prior mortgage (9) The prior mortgagee also can file a fresh suit on his mortgage against the puisne mortgagee.(10) if such a suit is within time Where, however, the priro mortga-

subsequent mortgagee was not bound by decree in prior mortgagee's suit) ** AIR 1981 Cal 404 (412) (DB) ** AIR 1967 Mad 418 (421) ILR (1967) 1 Mad 378 ** ILR (1954) Madh B 37 (41) (The offer made by the puisne mortgagee to redeem the property or an agreement to purchase the decree of the prior mortgagee held did not extinguish his right to redeem the prior mortgage) ** AIR 1953 Bom 405 (407) ILR (1954) Bom 10 (DB) ** AIR 1925 Mad 150 (150) ** AIR 1916 Oudh 100 (102) 19 Oudh Cas 39 (Decree for sale obtained by prior mortgagee without impleading puisne mortgagee — Puisne mortgagee is not bound by accounts embodied in decree — In his suit for redemption he is entitled to have accounts adjusted on basis of original mortgage) ** AIR 1924 Nag 346 (347) ** AIR 1926 Rang 183 (184) 4 Rang 96 (DB) ** AIR 1916 Lah 219 (220) 1916 Pun Re No 86 (DB) (26 Mad 537 28 Bom 153. **Followed.**) ** AIR 1928 Lah 593 (595) (He can bring the property to sale or claim the surplus proceeds if it is sold by prior mortgagee)

[**See also** AIR 1950 Bom 136 (142, 144) ILR (1949) Bom 851 (DB) (Subsequent usufructuary mortgagee in possession not made party in suit on prior simple mortgage — Prior mortgagee acquires only limited rights which he acquires as result of his purchase in execution of his own decree, those rights being subject to the puisne mortgage already effected before suit — Prior mortgagee in execution of his decree purchasing property himself — He cannot get possession of property if it is in possession of subsequent mortgagee.)]

See also the Code of Civil Procedure, O 34, R 1, Note 19 in the Appendix

8. (1979) 5 All LR 6.
9. **(1903) 30 Cal 599 (604) (FB).** (A puisne mortgagee is entitled to a sale of the property secured by his mortgage, subject to the rights of the first mortgagee, even after the property has been sold in execution of a decree obtained by the first mortgagee in a suit to which the puisne mortgagee was not a party. **Overruling** (1900) 4 Cal WN 541) ** AIR 1931 Oudh 157 (159) (DB) ** AIR 1953 Bom 405 (407) ILR (1954) Bom 10 (DB) ** AIR 1928 Pat 589 (592) ** AIR 1925 Mad 150 (150) ** AIR 1916 Oudh 179 (180) ** AIR 1926 Pat 94 (100) (DB) (Puisne mortgagee not impleaded in suit by prior mortgagee — Puisne mortgagee cannot redeem property merely by paying amount for which property is purchased in auction — In order to determine rights of the parties they must be placed in the position which they occupied before property was put up for sale) ** AIR 1921 Nag 69 (69, 70) 17 Nag LR 33 (Suit for foreclosure by prior mortgagee without impleading subsequent mortgagee — Subsequent mortgagee has a right to redeem) ** AIR 1914 Sind 170 (171) 8 Sind LR 257 (DB) ** (1909) 2 Ind Cas 495 (496) (All) ** (1912) 34 All 323 (328) (DB) ** (1912) 14 Ind Cas 537 (539) (DB) (All).

[**See also** AIR 1943 Cal 577 (586). (Simple mortgage to A and then to B — A and B suing to enforce mortgage without impleading each other — Property sold first under A's decree and then under B's decree — Purchaser under A's decree in possession can set up A's prior mortgage against purchaser under B's decree) ** AIR 1924 Nag 346 (347) (Where a prior mortgagee sues his mortgagor for the sale of mortgaged property without making the puisne mortgagee a party to the suit, the latter is in no way affected by the suit or its results The puisne mortgagee has as against the auction purchaser, whether he is a prior mortgagee or a stranger, precisely the same rights as he did collectively against his mortgagor and the prior mortgagee, that is to say, he may sue to redeem the purchaser as mortgageeor thereafter as mortgagor to foreclose, or suffer himself to be redeemed by him.) ** AIR 1923 All 271 (272) ILR 45 All 268 (DB) (Prior and puisne mortgagees — Decree on prior mortgage without impleading puisne mortgagee — Decree on puisne mortgage without impleading prior mortgagee — Sales in execution of both decrees — Purchaser in execution of puisne mortgage decree can redeem the other.)]

10. AIR 1935 Rang 139 (141).

gee has foreclosed the mortgaged property under his mortgage and the subsequent mortgagee also is entitled to claim foreclosure only, under his mortgage, the latter cannot sue for foreclosure(**11**) as it is not possible to obtain foreclosure *subject to* the rights of the prior mortgagee The proper remedy available to the puisne mortgagee, in such a case, is only to redeem the prior mortgage (**12**)

Where a prior mortgagee obtains a final decree for foreclosure on his mortgage without impleading the puisne mortgagee, all the rights of the mortgagor in the property, *including his right of redeeming the puisne mortgagee* are transferred to and become vested in the prior mortgagee Where the puisne mortgagee redeems the prior mortgage afterwards the mortgagor's right of redemption of either mortgage is not revived (**13**) The same principle will apply to cases where the prior mortgagee has brought the property to sale without impleading the puisne mortgagee and subsequently the puisne mortgagee redeems the property from the purchaser (**14**)

Where a puisne mortgagee sues on his mortgage and the prior mortgagee is not a necessary party to it, a sale or foreclosure under the decree obtained in the suit without impleading the prior mortgagee will always be subject to the rights of the prior mortgagee Where a prior mortgagee is made a party to the suit, the subsequent mortgagee can ask for sale subject to the rights of the prior mortgagee (**15**) He can also ask, in the same suit, a prayer to redeem the prior mortgage and to foreclosure (where he has got such right) his own mortgage (**16**)

See also S 94 and Notes thereunder, and the Code of Civil Procedure, O 34, Rule 1 Note 9 in the Appendix.

20. Rights of persons deriving title from the mortgagee.

Section 59 A enacts that "unless otherwise expressly provided, reference in this chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively" Therefore, persons deriving title from the mortgagee are also governed by this section Section 101 enacts that there is no merger of interest when the mortgagee purchases mortgaged property, against subsequent mortgagees and this section defines the mortgagee's rights as against them.

A purchaser in a mortgagee's suit, when all the later mortgagees and the mortgagor are added as parties, gets all the interest in the property including the later mortgagees' interest in the mortgaged property But cases arise where a prior mortgagee, for some reason or other, omits to enforce his rights against puisne mortgagees and sues only the mortgagor and the property is sold in execution of that decree. The auction-purchaser, no doubt, acquires the mortgagee's interest and also becomes the representative of the *ultimate* owner of the equity of redemption (**1**) A third party

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[See also (1894) 21 Cal 366 (373) : 21 Ind App 1 (PC) (Prior mortgagee obtaining decree for sale without impleading subsequent mortgagee and purchasing the property himself — Subsequently prior mortgagee's heir filing a suit against subsequent mortgagee for declaration of his rights — **Held**, decree for principal and compound interest as agreed in mortgage deed must be passed)]

11. AIR 1930 Oudh 129 (131) (DB).

12. AIR 1935 Oudh 411 (413) 11 Luck 270 (DB) ** (1897) 11 CPLR 75 (79)

13. (1902) 15 CPLR 188 (189) ** AIR 1920 Nag 176 (176) 16 Nag LR 180

14. AIR 1959 Ker 56 (58) ILR (1958) Ker 1133 (DB) (AIR 1930 Pat 570 and AIR 1950 Assam 59, Criticised.)

15. See the Code of Civil Procedure, O. 34, R. 1, Note 10 in the Appendix

16. (1900) 14 CPLR 177 (181).

Section 67 — Note 20

1. (1874) 22 Suth WR 360 (360) (DB) ** AIR 1929 Pat 94 (96) (DB) ** (1873) 5 Bom 2 (5) (DB) ** AIR 1914 Bom 268 (270) 38 Bom 24 (DB) ** (1873) 5 Bom 5 (7) (DB) ** (1895) 20 Bom 390 (392, 393) (DB) ** (1897) 22 Bom 945 (948) (DB) (At a sale in execution of a mortgage decree the interests of both the mortgagor and the mortgagee pass to the purchaser) ** AIR 1926 Rang 183 (183) 4 Rang 96 (DB) (Do) ** AIR 1926 Nag 135 (136) ** AIR 1928 Nag 98 (100).
[See AIR 1937 Oudh 33 (33, 34) : 12 Luck 690 (DB).]

auction purchaser of the hypotheca in execution of decree on the foot of first mortgage can use the first mortgage as a shield in his defence, when the puisne mortgagee files a suit for redemption of the mortgage in his favour, only to the extent of money for which he purchased the property.(2) The rights of the puisne mortgagee are, however, not affected by the proceedings in the prior mortgagee's suit, for a person who is not a party to a suit cannot be prejudiced by the decision in that suit which affects his right, the puisne mortgagee may enforce his rights under his mortgage, making the purchaser in the prior mortgagee's suit a party in his capacity as the *ultimate* owner of the equity of redemption.(3) Such purchaser can, in that suit require the puisne mortgagee-plaintiff to redeem him and in default be foreclosed without having to sell the property again(4); the prior mortgagee's omission to foreclose the right of redemption of a subsequent mortgagee by adding him as a party does not disentitle the purchaser to insist on his being redeemed in a subsequent mortgagee's suit for sale.(5) If the prior mortgagee were to be himself the purchaser, he can require the puisne mortgagee-plaintiff whose mortgage is only on a part of the property comprised in the first mortgage to redeem him by paying a proportionate amount based on the value of the properties mortgaged to him as the mortgage becomes split up under the provisions of S 60 by reason of his purchase (6) Or he may require the mortgaged property to be sold free of encumbrance and have the sale proceeds first applied in satisfaction of his prior mortgage leaving the subsequent mortgagee to take the balance, if any (7) He may also redeem the puisne mortgagee-plaintiff in preference

2. (1979) 92 Mad LW 435 (444) : ILR (1979) 3 Mad 269 (DB).
3. **(1871) 14 Moo Ind App 144 (148, 149) : 8 Beng LR 104 (PC) ** (1893) 21 Cal 78 (79) : 20 Ind App 165 (PC) ** (1909) 37 Cal 239 (248, 250) : 37 Ind App 19 (PC) ** (1911) 9 Ind Cas 513 (517, 518) (FB) (Mad) **** AIR 1926 All 480 (482) (DB) **** (1882) 6 Bom 404 (411) (FB) **** (1882) 5 Mad 184 (187) (DB) ** AIR 1928 Rang 127 (127) : 6 Rang 122 ** AIR 1929 Nag 246 (250) 25 Nag LR 19 ** AIR 1917 Mad 751 (753) 40 Mad 77 (DB)

   [**See also** AIR 1967 Mad 418 (421) ILR (1967) 1 Mad 378 (Suit by prior mortgagee and suit by puisne mortgagee — Puisne mortgagee not impleaded in former suit — Prior mortgagee not impleaded in latter suit — Sale in former suit cannot prevail over sale in latter suit — Auction-purchaser in latter suit has right to redeem property from purchaser in earlier sale) ** AIR 1931 Rang 105 (107) 9 Rang 1 (The same result will follow if the suit is dismissed against him.)]

   [**But see AIR 1933 Mad 583 (584, 593) : 56 Mad 846 (FB).**]
4. AIR 1917 Mad 359 (362, 363) (DB) ** AIR 1935 Mad 12 (14, 15, 16) 58 Mad 825 (DB) ** (1875) 23 Suth WR 338 (339) (DB) ** AIR 1934 Pat 215 (215) ** AIR 1921 Pat 150 (151) 5 Pat LJ 715 (DB) ** AIR 1921 Cal 157 (158) (DB) ** (1909) 12 Oudh Cas 133 (138) (DB) **** AIR 1937 Oudh 478 (480) (DB).**

   [**See** AIR 1942 Cal 138 (140) (DB) (Prior mortgagee not aware of subsequent mortgagee obtaining decree without impleading puisne mortgagee — Purchaser in execution acquires title subject to puisne mortgagee's right of redemption)]
5. (1911) 10 Ind Cas 83 (86) (DB) (Mad) ** AIR 1922 All 104 (105) 44 All 418 (DB) **** AIR 1921 All 339 (341) : 43 All 204 (FB) **** 1885 All WN 155 (155) (DB) ** AIR 1914 Cal 669 (669) (DB) ** AIR 1933 All 412 (413) (DB) ** (1874) 22 Suth WR 322 (323) (DB) ** AIR 1930 Bom 221 (222, 223) (DB) ** AIR 1923 Rang 107 (108) (DB)
6. AIR 1925 Cal 59 (61) (DB) ** AIR 1915 Oudh 211 (215) (DB) ** AIR 1935 Pesh 161 (163) (DB) ** AIR 1931 Pat 434 (435) 12 Pat 769 ** AIR 1934 Pat 648 (650) 13 Pat 364 (DB)

   [**See also** (1909) 1 Ind Cas 505 (506) (All) (Prior mortgagee suing on his mortgage without impleading puisne mortgagee and obtaining decree — Property purchased in execution by A — Puisne mortgagee whose mortgage was on a part of property mortgaged to prior mortgagee suing A for redemption of the part mortgaged to him on payment of proportionate amount due under prior mortgage — A contending that puisne mortgagee must redeem entire property — **Held,** there was force in this contention but on puisne mortgagee expressing his willingness to do this, the plea was abandoned by A)]
7. (1874) 22 Suth WR 360 (360) (DB) ** AIR 1917 Mad 751 (758) : 40 Mad 77 (DB)

t his redeeming him by virtue of his being also the representative of the ultimate owner of the equity of redemption **(8)** If he fails to claim any of the rights mentioned above, he has thereafter only to **file a suit on the mortgage.(9)**

But the prior mortgagee *as such* or a purchaser as *his* representative cannot redeem the subsequent mortgagee **(10)** Where the prior and subsequent mortgagees have sued and obtained decrees and purchased the mortgaged properties in Court-auction, without impleading each other in their respective suits, and the prior mortgagee obtains possession the remedy of the puisne mortgagee who is a later purchaser is to file a suit to redeem the prior mortgagee The prior mortgagee auction purchaser,however, will have the right to redeem the subsequent mortgagee auction-purchaser, retaining possession of the hypothecated property **(11)** In a contest between an auction-purchaser in execution of the decree on the prior mortgage to which the subsequent mortgagee was not a party and an auction-purchaser in the execution of the decree on the subsequent mortgage to which the prior mortgagee is not made a party, the first purchaser is entitled to retain possession **(12)**

Where a prior mortgagee gets into possession of the mortgaged properties in satisfaction of his own mortgage, it has been held that in calculating interest as against the puisne mortgagee the prior mortgagee purchaser is accountable for the income received by him subsequent to the date of the purchase **(13)** But where a mortgagee pays price for the equity of redemption and enters into possession as a vendee, he is not liable to account for the income for the purpose of calculating **interest as against the puisne mortgagee.(14)**

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8. AIR 1957 Ker 48 (50) 51, ILR (1957) Ker 35 (DB) (Where successive mortgagees sued for sale of mortgaged property without impleading each other in their respective suits the prior mortgagee B who sued earlier and also purchased in execution earlier had the right to redeem the later mortgage) ** AIR 1957 Ker 45 (47) ILR (1957) Ker 55 (DB) Prior and subsequent mortgages Property sold in execution of decree on prior mortgage Right of auction purchaser to redeem subsequent mortgage) ** AIR 1922 All 135 (138) 44 All 462 (DB) ** AIR 1924 Pat 452 (453) 3 Pat 114 (DB) ** AIR 1924 Pat 484 (485 486) 3 Pat 435 (DB) ** (1896) 16 Mad 121 (125 126) (DB) ** AIR 1926 Nag 135 (136) ** AIR 1921 Mad 648 (649) (DB) ** AIR 1925 All 804 (806) 47 All 751 (DB) ** (1906) 5 Cal WN 232 (233) (DB) ** (1908) 31 Mad 425 (428) (DB) ** (1904) 28 Bom 153 (170) (DB) ** (1881) 8 Bom 168 (173) (DB) ** (1901) 3 Bom LR 92 (94) (DB) ** (1896) 20 Mad 120 (123) (DB) ** (1903) 26 Mad 484 (485) (DB) **Held**, that the prior mortgagee who had purchased the mortgaged property in execution of a decree on his mortgage to which the subsequent mortgagee was not made a party was not entitled to possession without paying off the subsequent mortgagee) ** (1910) 6 Ind Cas 670 (671) (Cal) ** (1910) 37 Cal 282 (284) (DB)

[**But see** (1908) 8 Cal LJ 173 (176) (DB) ** AIR 1924 Nag 198 (199) ** (1890) 3 CPLR 82 (84, 85) ** (1898) 8 Mad LJ 298 (300) (DB) ** (1902) 26 Mad 537 (539 540) (DB)]

9. AIR 1934 All 73 (75) (DB) (Provided that the limitation has not expired

10. AIR 1926 Nag 21 (23) 23 Nag LR 86 ** AIR 1917 Mad 751 (752) 40 Mad 77 (DB)

11. AIR 1951 Trav-Co 36 (37) (DB)

[**See also** AIR 1950 Orissa 210 (212, 213) ILR (1950) Cut 486 (DB) (Puisne usufructuary mortgagee not party to prior mortgage suit - Rights of puisne mortgagee are unaffected by auction sale in execution of decree in prior mortgage suit — Rights of puisne mortgagee is determined by date of institution of suit on prior mortgage and not by date of the sale Puisne mortgagee losing right to possession by being dispossessed by mortgagor and for having sued for sale only — He has only a right to redeem prior mortgage, which right remains unaffected — Puisne mortgagee not impleading prior mortgagee in his suit and himself purchasing at auction sale in execution of his decree the property — Priority of right to redeem between two auction purchasers vests in the prior mortgagee.)]

12. AIR 1960 Ker 52 (57) (Competition for possession between prior and puisne mortgagees — Both purchasing same property in execution — Prior purchaser gets possession) ** AIR 1954 Mad 266 (266).

13. 1937 Mad WN 910 (911).

14. 1937 Mad WN 910 (911).

In a competition to redeem between auction purchaser at a Court sale held for recovery of tax which are first charge on the mortgage property who had obtained possession and the auction purchaser in a suit on one of the mortgagees whose application for delivery of possession was resisted by the first auction purchaser held that the earlier auction purchaser had a superior right to redeem the mortgages as against the subsequent mortgagee purchaser as he failed to take any action to redeem the mortgages by suit.(15)

A purchaser does not lose his right to insist on his being redeemed by reason of the prior mortgage being barred by limitation.(16) provided the sale was in pursuance of a mortgage decree for sale.(17)

If some of the heirs of the mortgage are not joined in a suit for recovery on mortgage debt within limitation the defect is not curable.(18)

As to the efffect of non-joinder of parties who are interested in the suit on mortgage, see the Code of Civil Procedure, O. 34, R 1, Note 19 in the Appendix.

Where in a suit on a mortgage against the agriculturist mortgagor and non-agriculturist puisne mortgagee a decree for the scaled down amount is passed against the agriculturist mortgagor and a decree for the unscaled amount is passsed against the non-agriculturist puisne mortgagee, the decree-holder is entitled to execute the decree for the unscaled amount against the non-agriculturist mortgagee, and even if the latter should become entitled to the entire property in his absolute right, he is still liable to pay the full unscaled decree amount before he can claim that the entire decree has been satisfied.(19)

In the instant case, in a Court auction, purchasers purchased the one third share of the mortgagor in the mortgaged items of properties, in spite of being made aware of the creation and subsistence of the mortgage Later on, when a partition suit was instituted by some of purchasers, they as well as the other Court auction purchaser were put on notice of the subsistence of the mortgage and warned of the consequence of any collusive arrangement being entered into. In spite of the notices litigants purchasers had brought about a compromise between partition decree, and in the said decree, the mortgaged items of properties, which, according to the mortgagee are worthless, were allotted to the mortgagor.

Those materials clearly establish the practice of fraud by the mortgagors and repurchasers

Held, in such circumstances the normal rights available to co-sharers for asking for a partition of the mortgaged items of properties free of the mortgage cannot be claimed by such purchasers.

The resultant position would be that the mortgagee will be entitled to ignore the partition decree and enforce the mortgage against the one-third share of the mortgagor (20)

21. Sub-mortgagee.

A sub-mortgage of an interest in immovable property is entitled to sue for a decree for sale of

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15. AIR 1980 Andh Pra 305 : (1980) 2 APLJ (HC) 152 (DB).
16. AIR 1940 Mad 646 (649) (Suit by prior mortgagee without impleading subsequent mortgagee — Prior mortgagee himself purchasing mortgaged property at sale in execution of his decree Suit by subsequent mortgagee against mortgagor and prior mortgagee for enforcing his mortgage — Prior mortgagee can set his mortgage in defence though the right to enforce it may be time-barred at the date of puisne mortgagee's suit) ** AIR 1922 Nag 89 (92, 94) (FB) ** AIR 1931 Oudh 157 (159) (DB) ** AIR 1922 Mad 249 (252) (DB)
17. (1867) 7 Suth WR 232 (233) (DB) ** (1870) 14 Suth WR 238 (239) (DB)
18. AIR 1971 Andh Pra 363 (FB).
19. AIR 1959 Mad 433 (435) ILR (1959) Mad 740 (DB) (AIR 1951 SC 189, **Reversing;** AIR 1949 Mad 238, **Foll;** AIR 1947 Mad 255 **Held impliedly Overruled** and not followed.)
20. AIR 1981 Mad 338 (346) : (1981) 1 Mad LJ 232 (DB).

the mortgagee rights of his mortgagor (1) Two alternative remedies are open to a sub-mortgagee He may realise the amount due to him by enforcing his security by bringing to sell the mortgagee's rights which was sub-mortgaged to him or he may as an assignee of the mortgagee sue for the sale of the property and incidentally realise his dues (2) The original mortgagor need not be joined as a party to the suit (3) A subsequent mortgage between the original mortgagor and mortgagee which may operate as a merger of the earlier mortgage does not prejudice the sub-mortgagee's rights or affect his right to bring the mortgagee's rights under the original mortgage to sale (4)

A sub-mortgagee can also sue for a decree for sale of the original mortgagor's interest in cases, and under the circumstances, which would have entitled the original mortgagee, on the date of the sub-mortgage, to claim such relief on his own mortgage (5) So also it is open to a sub-mortgagee in an action to enforce his mortgage to obtain a decree foreclosing the right of not merely his mortgagor but also of the main mortgagor to redeem and a final decree passed in such an action would operate to extinguish the right of redemption (6) The mortgagor as well as the sub-mortgagee must be impleaded in such a suit, so that the former may have the opportunity to redeem and the latter may be able to safeguard his interest as regards the claim put forward by the sub-mortgagee (7) Where, however, the original mortgagor sells away the property and has no interest at all on the date of sub mortgagee's suit for sale of property, he is not a necessary party to the suit (8) The fact that the original mortgagee has obtained a decree for sale against the mortgagor which is not however executed within limitation does not operate as a bar to the sub-mortgagee's right of suit

Section 67 — Note 21

1. AIR 1943 Mad 498 (499) : ILR (1944) Mad 104 (DB) ** (1907) 29 All 385 (405, 408) (FB). (20 Mad 35 Referred 27 All 511 **Overruled**) ** (1909) 4 Ind Cas 433 (434) (DB) (Cal). (Do.) ** (1910) 7 Ind Cas 166 (170) (DB) (Cal) ** (1906) 9 Oudh Cas 233 (234) (20 Mad 35. Followed.)
   Also see S. 60, Note 19
2. ILR (1966) 1 Ker 398
3. (1909) 4 Ind Cas 433 (434) (DB) (Cal)
4. (1908) 18 Mad LJ 462 (463) (DB) ** AIR 1919 Mad 1082 (1083) (DB)
5. AIR 1953 All 296 (299) : ILR (1951) 1 All 515 (DB) (When sub-mortgagee sues to put property to sale he does so to enforce his own sub-mortgage by enforcing the mortgage of his own mortgagor — Putting mortgagee rights of his mortgagor to sale means putting property to sale — His suit is for sale in enforcement of his mortgage.) ** AIR 1943 Mad 498 (499) : ILR (1944) Mad 104 (DB) (In such a case the relief to which he is entitled is to be gathered from Form No XI in Appendix D to Civil Procedure Code.) ** (1897) 20 Mad 35 (39, 40) ** AIR 1919 Mad 1082 (1083) (DB) ** (1909) 3 Ind Cas 511 (514) (DB) (Cal) (Whether it is a simple debt or mortgage debt.) ** (1909) 2 Ind Cas 645 (646) (DB) (Cal) ** (1906) 9 Oudh Cas 233 (234) ** (1913) 18 Ind Cas 389 (390) (DB) ** AIR (1946) Pesh 25 (26)
   The following cases holding to the contrary are no longer good law
   1902 All WN 216 (216) (DB) ** (1896) 18 All 113 (114) (DB).
   [See (1905) 27 All 511 (512).]
6. AIR 1954 Mad 650 (653) : ILR (1954) Mad 654 (DB) (Decree made it clear that original mortgagor was only a *pro forma* party to the action by the sub mortgagee Decree mentioned in the amount due to the sub-mortgagee from his mortgagor and directed that in default of payment the "hypothecated property" should be sold and that any balance remaining after payment of the amount due to the plaintiff should be paid to the mortgagee — No adjudication of the rights of parties under the original mortgage — Amount due by the original mortgagor to the mortgagee not declared and no provision for any payment of surplus sale proceeds to him — Period fixed for redemption not expired — It was held that the decree could not be read as declaring the right of redemption in respect of original mortgage.)
7. (1908) 5 All LJ 402 (403) (DB).
8. AIR 1953 All 296 (300) : ILR (1951) 1 All 515 (DB).

against the original mortgagor.(9) Where, however, the mortgagor without notice of the sub-mortgage pays the mortgage-money to the original mortgagee, the sub-mortgagee loses his right against the mortgaged property and has the only remedy of proceeding against his transferor personally.(10)

The two remedies, viz., suit for relief on basis of sub-mortgage and on basis of original mortgage, available to a sub-mortgagee are based on different rights and can only be alternative ones. If he has elected one of the two remedies and obtained a decree, the cause of action on the sub-mortgage would be merged in the judgment and it would not be open to him to revive it for relief on the basis of alternative remedy.(11)

See also the undermentioned cases.(12)

22. Benamidar-mortgagee.

A *benamidar* can sue to enforce the mortgage in his own name without making the real owner a party to the suit.(1) In the absence of any evidence to the contrary, it will be presumed that a suit by the *benamidar* has been instituted by the full authority of the real owner and the decision made in the suit will be binding upon the latter as if the suit has been brought by him.(2) The real owner also can bring a suit to enforce the mortgage executed in the name of a *benamidar*, making the latter a party to it.(3)

See also the Code of Civil Procedure, O. 34, R. 1, Note 8 in the Appendix.

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9. (1913) 18 Ind Cas 389 (391) (Oudh).
10. AIR 1932 Mad 115 (116, 117) : 55 Mad 320 (DB) ** AIR 1938 Pesh 73 (76) (DB) ** AIR 1940 Pesh 25 (26) ** (1908) 18 Mad LJ 462 (463) (DB) ** (1913) 18 Ind Cas 389 (390) (Oudh).
11. **AIR 1959 Mad 246 (249) : ILR (1959) Mad 369 (FB).**
12. AIR 1951 Trav-Co 92 (93) (Mortgage decree providing for satisfying claim under sub-mortgage — Sub-mortgagee and his assignee acquiescing in that decree and seeking to enforce provision — Separate suit by assignee to enforce claim under decree held not maintainable.) ** AIR 1937 Mad 799 (800) (DB) (Suit by sub-mortgagee for amount less than original amount of mortgage and sale of hypothecated properties — Decree in such suit not making provision for realisation of amount due on original mortgage — Suit subsequently on original mortgage — Such suit held maintainable — Decree in suit of sub-mortgagee held did not preclude original mortgagee from asserting his rights under mortgage in subsequent suit.) ** AIR 1938 Lah 145 (148) (DB) (Original mortgagee can also sue to enforce his mortgage making sub-mortgagee a party to the suit — Giving of a sub-mortgage which does not amount to complete assignment is not a bar to such a suit.)

Section 67 — Note 22

1. **AIR 1918 PC 140 (143) : 46 Cal 566 : 46 Ind App 1** (Though it is open to the real owner to apply to be joined in the action.) ** **AIR 1919 Mad 524 (525, 526) : 42 Mad 348 (FB)** ** AIR 1918 Mad 407 (407) : 41 Mad 435 (DB) ** (1897) 24 Cal 644 (645) (DB) ** (1890) 1 Ind Cas 522 (523) (DB) (Cal) ** (1910) 7 Ind Cas 167 (170) (DB) (Cal) ** AIR 1914 Cal 323 (324) (DB) **AIR 1915 All 10 (10) : 37 All 113 (DB) ** AIR 1937 Rang 508 (510) : 1937 Rang LR 432 (DB) ** **AIR 1932 Oudh 285 (286, 287) : 7 Luck 41 (FB).** (Per Wazir Hassan, C.J.) ** AIR 1915 Low Bur 134 (135) : 8 Low Bur Rul 205 (18 Suth WR 454, **Followed.**) ** AIR 1926 Bom 115 (115) : 49 Bom 832 (DB) (This applies even to cases governed by Dekkhan Agriculturists' Relief Act.) ** (1899) 21 All 380 (384) (DB) ** AIR 1919 Cal 314 (315) (DB) ** AIR 1916 Oudh 228 (228) : 18 Oudh Cas 363.

   [**See also** (1908) 30 All 30 (32) (A decision passed in a suit brought by a benamidar binds the beneficial owner.) ** AIR 1921 Cal 653 (656) (DB).

   [**But see** (1908) 12 Cal WN 409 (411) (DB) (Submitted not correct.)]
2. AIR 1914 Cal 323 (324) (DB) ** AIR 1926 Bom 115 (115) : 49 Bom 832 (DB).
3. **AIR 1965 SC 1738 (1740) : (1966) 1 SCR 153** ** AIR 1921 Cal 653 (656) (DB).

22-A. Mortgagee of limited interest in property.

Where the mortgagor has got only a limited interest in the property, the mortgagee cannot proceed against the property after the limited interest of the mortgagor has ceased to exist. Thus, where a mortgagor mortgaged his right to collect *melvaram* from certain land which was granted to him as a service *inam* and the mortgagee wanted to recover the mortgage-money by sale of the property after the death of the mortgagor, it was held "that the remedy against the property mortgaged ceased with the termination of the mortgagor's right to emoluments by his death and cannot be forced against the property in the hands of his successor, even though that successor is his son and inherits the office as such."(1)

23. Enforcement of a security bond.

See Notes on S. 145 of the AIR Commentaries on the Code of Civil Procedure, 10th (1985) Edition.

24. Suit by Government to recover takkavi loan.

Where immovable property is mortgaged to the Government to secure the advance of *takkavi* the Government have two remedies to recover the same. The one is under the Public Demands Recovery Act (Bengal Act 7 of 1880)(1) and the other is by a suit under this section, as there is nothing in the above-mentioned Act which debars the Government from instituting a suit upon the mortgage in their favour under this section.(2)

25. Clause (b).

The clause contemplates a case where the right of sale as well as of foreclosure is available to the mortgagee. Otherwise the question of sale *instead* of foreclosure cannot arise. The clause provides that if the mortgagor holds the interest of the mortgagee as a trustee or as a legal representative and the mortgagee has got both the rights, there can be a suit for sale only and not for foreclosure. The reason is that a trustee is in a position in which it is impossible for him, if foreclosure is granted, to make the performance of his duty coincide with his interest (1). The principle will apply even where the mortgagee holds the interest of the mortgagor in the capacity of a trustee and in such cases also the mortgagee will not be entitled to sue for foreclosure (2).

26. Clause (c).

This clause negatives the right of sale or foreclosure where the mortgaged property is a railway or canal or other work in the maintenance of which the public are interested. Under the English law also the right of sale or foreclosure does not extend to a property which has been acquired under statutory powers for public purposes, if those purposes will be defeated, or at all events seriously affected by a sale or foreclosure (1). The reason why the holder of a mortgage over a

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Section 67 — Note 22A

1. (1905) 15 Mad LJ 10 (11) (DB).

Section 67 — Note 24

1. Now see the Bengal Public Demands Recovery Act (Bengal Act III of 1913).
2. (1902) 29 Cal 537 (542) (DB). (Where property is sold under the Public Demands Recovery Act only the right, title and interest of the mortgagor pass to the purchaser.)

Section 67 — Note 25

1. (1869) 4 Ch 537 (544); 38 LJ Ch 169; 20 LT 856, Tenant v. Trenchard.
2. (1869) 4 Ch 537 (544); 38 LJ Ch 169; 20 LT 856, Tenant v. Trenchard.

Section 67 — Note 26

1. (1895) 2 Ch 36 (50); 43 WR (Eng) 469 (470), Marshal v. South Staffordshire Tramways Co. (No sale.) ** (1878) 10 Ch D 42 (46); 48 LJ Ch 69; 39 LT 324, In re Herne Bay Waterworks Co. (Only right to them under the Act of Parliament was the appointment of a Receiver.) ** (1885) 53 ER 771 (773); 24 Beav 614, Furness v. Caterham Railway Co.

railway company is not entitled to have the railway sold for the payment of his debt has been stated by Lord Cairns in *Gardner v. London, Chatham, and Dover Railway Co.*,(2) as follows :

> "When Parliament, acting for the public interest, authorises the construction and maintenance of a railway both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons These powers must be executed, and these duties discharged, by the company They cannot be delegated or transferred"

The remedy in such cases is the appointment of a Receiver (3) The present section does not provide any remedy specifically. But it may be assumed that in India also the remedy will be the same as under the English law.

27. Clause (d).

This clause does not lay down any new rule of law but merely gives statutory recognition to the law in force before the passing of this Act (1) It is an established principle that the whole of the mortgaged property is liable for any and every portion of the mortgage age debt however small (2) The principle of this clause is the same as that of the last paragraph of S 60, namely, the indivisibility of the mortgage (3) The last paragraph of S 60 however, deals with the question of the indivisibility of the mortgage from the point of view of *redemption*, while this clause deals with the question from the point of the *enforcement* of the mortgage. The clause is intended to protect the mortgagor from harassment by multiplicity of suits in respect of the different interests which the mortgagees may, as between themselves, possess (4) Thus, under this clause, one of several mortgagees cannot institute a suit for foreclosure or sale of only a portion of the mortgaged property corre-

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[See also A(1867) 2 Ch 201 (212) : 15 WR (Eng) 325, Gardner v London, Chathan and Dover Railway Co (The Court cannot appoint a manager of a railway company)]

2. (1867) 2 Ch App 201 (212) : 15 WR (Eng) 325 (328).

[See 1905 App Cas 576 (581) : 74 LJPC 116, Central Ontario Railway v Trusts and Guarantee Co. Ltd]

3. (1878) 10 Ch D 42 (46) : 48 LJ 69, In re Herne Bay Waterworks Co

[See also (1901) 2 Ch 8 (17) : 49 WR (Eng) 469, In re Knott End Rly (Receiver ought not to be appointed when there is not and probably will not, until the line is opened for traffic, be any money to receive.)]

Section 67 — Note 27

1. AIR 1939 Nag 136 (139) (Severance of interest as provided by S 67(d), is nothing but a special application of the ordinary law of novation and requires as a pre-requisite the consent of all the parties concerned and unless a co-mortgagee consents to such servance or does some act which, under the law, effects a severance, the usual rule about the integrity of the mortgage must be observed) ** (1894) 7 CPLR 147 (149) **** (1887) 9 All 68 (73) (FB)** ** (1868) 10 Suth WR 476 (476) (DB) (Any one of the several parties interested in a mortgage is not at liberty to foreclose in respect of his fractional share)

[See also (1870) 14 Suth WR 216 (216) (DB) ** (1876) 1 All 297 (300) (DB)]

2. AIR 1928 Mad 933 (935) (DB). (Section 67(d) is not mandatory — Per Phillips, J) ** AIR 1935 All 391 (393) (DB).

3. AIR 1959 Punj 372 (374) : ILR (1958) Punj 1929 ** AIR 1958 Mad 621 : ILR (1958) Mad 1066

4. AIR 1955 Trav-Co 17 (17) ** AIR 1935 All 263 (263) (DB) ** 1864 Suth WR Gap No 285 (286) (DB) ** AIR 1931 Cal 806 (807) ** AIR 1915 Mad 344 (344) (DB) (Mortgage debt can be severed with the consent of mortgagor) ** (1894) 7 CPLR 147 (148, 149).

[See also AIR 1936 Oudh 242 (244) : 12 Luck 82 (DB).]

sponding to his share in the mortgage-money (5) In the undermentioned cases,(6) governed by the law in force before the passing of the Act, it was held that the rule that one of the mortgagees cannot institute a suit for foreclosure or sale of a portion of the mortgaged property corresponding to his share in the mortgagee money, would not apply to a case where the rights of all the parties under the mortgage might be fully and finally dealt with in the suit brought by one of the mortgagees in respect of a portion of the property and the mortgagor cannot be further vexed in respect of the mortgage. The reason of the rule, i.e., avoidance of multiplicity of suits, having ceased to exist, the rule itself had no application It is, however, doubtful whether this would be correct in cases governed by the clause in view of the express language of the clause

The clause prohibits separate suits by different mortgagees in respect of the same mortgage The law does not require that the one suit to be brought on the mortgage must be by all the mortgagees as *plaintiffs* What is required is that all of them must be *parties* to the suit Thus, if some of them cannot be joined as plaintiffs they may be joined as defendants (7) If this were not so it would have been the easiest thing for a mortgagor to arrange matters with one of the mortgagees whose share may be very small and induce him not to join other mortgagees as plaintiffs in the suit and thereby defeat the interests of the remaining mortgagees (8) If the defendants mortgagees want to

5. AIR 1951 Pepsu 18 (21) 3 Pepsu LR 373 (DB) (Under Hidayat (Patiala) (1922) C 2 an application for foreclosure of part of property is not maintainable.) ** **AIR 1950 All 598 (603) : ILR (1951) 2 All 475 (FB).** (Suit by one of co-mortgagees is not maintainable either for whole or for a part of the share in the mortgaged property The principle of indivisibility of the mortgage and the principle that all the joint promisees must combine to enforce the claim against the promisors applies It is not possible to split up the mortgage and permit one of the co-mortgagees to enforce his claim either for the whole or for a part nor is it possible for him as one of the joint promisees to enforce the claim without impleading his co promisees either as plaintiffs or in the case of their refusal as defendants.) ** 1887 All WN 233 (233) (DB) ** AIR 1935 All 391 (394) (DB)

6. (1894) 7 CPLR 147 (149) ** 1864 Suth WR Gap No 285 (286) (DB) ** (1894) 17 Mad 12 (13) (DB)

7. AIR 1968 All 201 (202) (Suit by one mortgagee only for part of share in mortgaged property — Non joinder of other mortgagees as parties within limitation period — Amendment of plaint to include other co-mortgagees as parties cannot be allowed after expiry of period of limitation since suit itself is time barred — AIR 1950 All 598 Rel on) ** AIR 1968 Raj 123 (129) ** AIR 1958 Mad 621 (622) ILR (1958) Mad 1066 (Omission to implead all mortgagees either as plaintiffs or as defendants is different from a case where all persons interested in equity of redemption are not impleaded as parties) ** **AIR 1950 All 598 (603) : ILR (1951) 2 All 475 (FB).** (Suit by one of co mortgagees is not maintainable either for whole or for a part of the share in the mortgaged property — The principle of indivisibility of the mortgage and the principle that all the joint promisees must combine to enforce the claim against the promisor applies — It is not possible to split up the mortgage and permit one of the co-mortgagees to enforce his claim either for the whole or for a part nor is it possible for him as one of the joint promisees to enforce the claim without impleading his co-promisees, either as plaintiffs or in the case of their refusal as defendants) ** AIR 1936 Pat 439 (441) ** (1870) 14 Suth WR 216 (216) (DB) ** (19, 3) 20 Ind Cas 329 (330) (DB) (Cal) Halsbury Laws of England, Vol 21 p 278 ** (1879) 1 Ch D 121 (126, 128) 48 LJ Ch 361, Luke v South Kensington Hotel Co ** AIR 1932 Cal 34 (35) ** AIR 1931 Cal 806 (807) ** **AIR 1919 PC 24 (26) : 47 Cal 175 . 46 Ind App 272.** (But the rights between the co defendant mortgagee and the mortgagor cannot be decided in that suit) ** (1847) 82 RR 98 (99) 68 ER 102 Davenport v James

[**See also (1887) 9 All 68 (73) (FB).** (A plaintiff is not entitled, in respect of his own share, to maintain a suit for sale against the whole property, the other parties interested not having been joined.) ** AIR 1927 Cal 880 (881) (DB).]

8. AIR 1936 Pat 439 (441).

protect their interests they may do so by joining as plaintiffs. In the undermentioned case(9) one of the mortgagees sued for his share of the mortgage-money alleging that the other mortgagees who were defendants in the suit, had received from the mortgagor their shares of the mortgage-money He further stated in the plaint, that if any sum was due to the defendants-mortgagees he was prepared to increase the amount of the claim It was held that the suit as framed could not be defeated when all the mortgagees were parties to it, and that if anything was due to the defendants-mortgagees it was open to them to have themselves transferred from the category of defendants to that of plaintiffs In another case(10) A mortgaged his property to B and C jointly B wanted to get the mortgage-money, but C was not willing to join as plaintiff B, therefore, brought a suit for the recovery of his share of the mortgage-money by sale of the entire property, making C a defendant in the suit, obtained a decree, and in execution got the entire property sold C then brought a suit for the recovery of his share of the mortgage-money by sale of the whole property again. It was held that the suit was not maintainable The same mortgage could not be enforced by sale of the property twice, C was a party to B's suit and could have protected his interest by joining as a plaintiff, this he did not do and it was due to his own fault that he could not recover his share.

In the undermentioned case,(11) however, it held that where in a suit for sale by two out of three mortgagees impleading the third as defendant the Court passed a preliminary decree for sale for two-thirds of the mortgage amount which was deposited in Court and subsequently the defendant co-mortgagee brought a suit for recovery of his share by sale of the hypotheca, the suit was not barred by virtue of the decree in the previous suit as the Court did not deal with the right of the defendant co-mortgagee to recover his one-third share.

(A) Suit by one co-mortgagee, if should be for whole amount.

The question, however, arises whether, when one of the mortgagees sues as plaintiff, making others parties as defendants, he should sue for the recovery of the entire mortgage-money by foreclosure or sale of the entire mortgaged property, or whether he should limit his claim to his share of the mortgage money by praying for foreclosure or sale of the entire property. It has been held that a suit by one of the mortgagees for the recovery of the whole of the mortgage-money is always maintainable when the other mortgagees consent to the institution of such a suit but do not join as plaintiffs for certain reasons.(12) When, however, the consent of the other co-mortgagees could not be obtained, there was before the year 1919, a conflict of opinion as to how the suit should be framed, one set of cases(13) holding that the suit must be for the whole amount of the mortgage and another set of cases(14) holding that it may be for his share of the money. In the year 1919 the matter came up before the Privy Council in *Sunitabala Debi v. Dhara Sundar* (15) In that case a mortgage was executed in favour of A and B for the consideration of Rs. 1,60,000 (Rs. 80,000 by each). A brought a suit for the recovery of his Rs 80,000 by sale of half of the mortgaged property

9. AIR 1914 Cal 788 (789) (DB).

10. 1896 All WN 153 (153) (DB).

11. AIR 1948 Mad 17 (23) ILR (1948) Mad 190 (DB). (The right of the defendant co-mortgagee is not extinguished automatically on the passing of the decree in favour of the plaintiff irrespective of the nature of the judgment given and the language of the decree passed in it and irrespective of whether or not the right of the co-mortgagee defendant was the subject of adjudication.)

12. AIR 1930 Mad 985 (985) ** (1913) 20 Ind Cas 329 (330) (DB) (Cal) ** (1879) 11 Ch D 121 (127) . 48 LJ Ch 361 40 LT 638 · 27 WR (Eng) 514, Luke v. South Kensington Hotel Co

13. 1892 All WN 246 (246) (DB) ** (1913) 20 Ind Cas 151 (151) (DB) (All) ** (1909) 1 Ind Cas 117 (118) (DB) (All).

14. (1905) 15 Mad LJ 496 (496) (DB) ** (1913) 20 Ind Cas 329 (330) (DB) (Cal)

15. **AIR 1919 PC 24 (26) : 47 Cal 175 : 46 Ind App 272.** (Facts taken from 24 Cal WN 297 at p. 299)

It was contended that the proceedings were wrong in form since by S 67 the plaintiff could not seek for sale of part only of mortgaged property. The first Court disallowing the contention, granted the relief as claimed by the plaintiff. On appeal the High Court reversed the decree on the ground that the suit should have been brought to recover the entire mortgage-money However, it made an order directing the plaintiff to amend the plaint as follows

> "If in the opinion of the Court the plaintiff is held to be not entitled to a decree on the footing of a mortgage for the principal sum of Rs 80,000 then a usual mortgage-decree may be passed in favour of the plaintiff and the defendant No 3 (the other co-mortgagee B) for the amount found due up to the period of grace to be fixed by the Court upon the basis of the entire mortgage-money, that is Rs 1,60,000."

On appeal to the Privy Council their Lordships of the Judicial Committee held that the High Court was right in its conclusion and observed as follows

> "This mortgage clearly effects the conveyance of the real estate to the mortgagees as tenants-in-common, and no redemption could be effected of part of the property by paying to one of the mortgagees her separate debt It is not a mortgage to each of a divided half but a conveyance to them of the whole property Where a mortgage is made by one mortgagor to two tenants-in-common, the right of either mortgagee who desires to realise the mortgaged property and obtain payment of the debt, if the consent of the co-mortgagee cannot be obtained, is to add the co-mortgagee as a defendant to the suit and to ask for the proper mortgage-decree, which would provide for all the necessary accounts and payments, excepting that there could be no judgment for a sum of money entered as between the mortgagee defendant and the mortgagor"

Even after the decision in *Sunitabala Devi's case*(**16**) there has been a conflict of opinion on the point, both the conflicting views being rested on the said decision of the Privy Council According to one class of cases,(**17**) when the consent of the other co-mortgagees cannot be obtained one of the mortgagees need not institute a suit for the recovery of the whole of the mortgage-money but may sue only for the recovery of his share by proceeding against the whole property and making other co-mortgagees as defendants It has also been held that such a suit does not contravene the provisions of clause (d) as it is a suit by a person interested in part only of the mortgage money *relating to the whole of the mortgaged property* and not to a corresponding part of it.(**18**) According to the contrary view(**19**) one of several mortgagees cannot sue for his share of the mortgage money but must sue for the whole amount In both the classes of cases, however, the amount which the

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16. AIR 1919 PC 24 (26) : 47 Cal 175 : 46 Ind App 272.

17. AIR 1943 Cal 455 (457, 458) ILR (1943) 1 Cal 59 (DB) (Whether the co-mortgagee-defendant would be able to withdraw his share in the surplus sale proceeds by application in the suit on payment of proper Court fee or will have to institute a suit for the purpose is a point on which there is a divergence of opinion) ** AIR 1935 All 391 (396) (DB) ** AIR 1928 Mad 933 (935, 938) (DB) ** AIR 1930 Mad 985 (985) ** AIR 1942 Mad 205 (207 208) ILR (1942) Mad 438 (DB) (But Court-fee must be paid on full amount of mortgage and not on plaintiff's share alone.)

[**See also** AIR 1932 Cal 34 (35).]

18. AIR 1930 Mad 985 (985).

[**See also** AIR 1928 Mad 933 (939) (DB).]

19. AIR 1947 Cal 211 (217) (DB) (Though the mortgage debt is apportioned between the mortgagees, under Bengal Agricultural Debtors Act the security cannot be split up in law and the mortgagees would be entitled to proceed against the entire mortgaged property for realisation of the total decretal amount That would be sufficient compliance with the law of integrity of mortgage debts) ** **AIR 1950 All 598 (603) : ILR (1951) 2 All 475 (FB).** (Obiter — Even if other co-mortgagees are impleaded, one co-mortgagor cannot file suit for his share only) ** AIR 1927 Cal 425 (426) (DB) ** AIR 1931 Cal 806 (807) ** AIR 1937 Nag 262 (263) ILR (1937) Nag 503 ** AIR 1936 Oudh 242 (244) 12 Luck 82 (DB) ** AIR 1935 All 263 (263) (DB) ** AIR 1936 Mad 895 (897).

plaintiff will get out of the sale proceeds of the entire property will be not the whole amount realised, but only the amount proportionate to his share in the mortgage-money.(20)

The interests of the mortgagees under the mortgage can, however, be severed with the consent of the mortgagor(21) and in such a case one of the mortgagees can institute a suit relating to a portion of the mortgaged property corresponding to his interest in the mortgage-money(22) and further, can institute a suit for the recovery of his share in the mortgage-money, *not by foreclosure or sale of the entire property, but only by foreclosure or sale of the portion corresponding to his interest in the* mortgage-money (23) The rule in the clause, having been enacted for the benefit of the mortgage has no application when the mortgagor himself consents to the severance of interests of the different mortgagees under the mortgage and thus allows the integrity of the mortgage to be broken.(24) But where the severance of interest between the mortgagees has been effected without the consent, express or implied, of the mortgagor and the severance is not binding on the mortgagor, it has been held that the remedy of one of the mortgagees is to sue for the whole of the mortgage amount with the consent of the co-mortgagee, and if such consent cannot be obtained, his remedy is to add in that suit the co-mortgagee as a defendant and to seek for the proper mortgage decree which would provide for all the accounts and payments (25) It should, however, be noted that one of the mortgagees cannot sever his interest under the mortgage behind the back of the other co-mortgagees, by obtaining the consent of the mortgagor. The other mortgagees must also be parties to such an arrangement (26) Where they are not parties to such an arrangement the integrity of the mortgage is not broken and they can proceed against the whole property in enforcing their claim.(27) This is similar to the last paragraph of S. 60 under which if there are more mortgagees than one, all of them must acquire the share of a mortgagor in the mortgaged property in order to break the integrity of the mortgage, and acquisition by one or some of them is not sufficient (28) In the undermentioned case(29) A mortgaged his property jointly to B and C Subsequently, A mortgaged the same property to C alone and the consideration for this subsequent mortgage was the amount of the prior mortgage in favour of B and C It was held that a discharge by C of the whole of the prior mortgage operated in respect only of his half share in the mortgage and in law the act of A and C amounted to severance of the interest of the mortgagees with the consent of the mortgagor within the meaning of this clause It is submitted that the decision does not seem to be correct B was not a party to the arrangement between A and C and there could be no valid severance of interests of the mortgagees, within the meaning of the clause So also in the undermen-

20. (1909) 1 Ind Cas 117 (118) (DB) (All) ** AIR 1935 All 391 (396) (DB)

21. AIR 1935 All 391 (394) (DB) ** AIR 1933 Cal 154 (162) · 59 Cal 1372 (DB)

22. 1967 All WR (HC) 450 ** AIR 1937 Nag 262 (264) ILR (1937) Nag 503 ** 1887 All WN 233 (233) (DB). (Assumed — **Held,** there was no severance of interest)

23. AIR 1937 Nag 262 (264) : ILR (1937) Nag 503.

24. AIR 1919 All 275 (276) : 41 All 631 (DB).

25. AIR 1955 Trav-Co 17 (17).

26. AIR 1939 Nag 136 (139) (DB) ** AIR 1928 Mad 933 (938, 940) (DB).

27. AIR 1945 Bom 351 (351, 352) ILR (1945) Bom 390 (It is not open to one of two mortgagees by purchasing the equity of redemption in the mortgaged property to reduce his co-mortgagee's security from the whole of the property to only a half The mortgaged security being ordinarily indivisible, if one of two mortgagees purchases the equity of redemption in the mortgaged property without the consent of the other mortgagee the latter is entitled to bring the whole of the property to sale for recovery of his half share of the mortgage debt.) ** AIR 1939 Nag 136 (140) (DB).

[**See also** 1896 All WN 171 (171) (DB).]

28. See S. 60, Note 44.

29. AIR 1919 All 275 (276) : 41 All 631 (DB).

tioned case.(30) Where one of the co-mortgagees purchases the equity of redemption without the consent of his other mortgagee such mortgagee can bring the whole of the mortgaged property to sale to recover his share of the mortgage debt and the mortgage in favour of the co-mortgagee is not discharged or extinguished by merger.(31)

A mortgaged his property to B and C who had each a half share in the mortgage-money B purchased the equity of redemption in execution of a simple money decree C then sued to recover his share in the mortgage-money *by sale of the entire mortgaged property* It was held that C could not do so, he, in suing only for his share in the mortgage-money, had practically admitted that something had happened which had the effect of satisfying half the mortgage amount and he could not, therefore, throw the burden of his share on the whole of the mortgaged property It is submitted that the decision is not correct inasmuch as it allows one of the mortgagees to break the integrity of the mortgage by acquiring the mortgaged property from the mortgagor without the consent of the other It was not followed in the undermentioned case (32)

The language of the clause cannot, however, be taken to mean that severance of interests of the mortgagees can be effected only with the consent of the mortgagor and not in any other way The Legislature could not possibly have intended to enact that if severance of the interests of the mortgagees took place in any other lawful mode legally binding on the mortgagor, the mortgagor could resist a suit for sale for recovery of a portion of the mortgage-money on the basis of such severance.(33) Thus, where in a suit brought by one of the mortgagees against the mortgagor there is a decree declaring that there has been a severance of the mortgage, the decree though obtained without the consent of the mortgagor and the other mortgagee is effective legally to create the severance of interests of the mortgagees and a suit by the other mortgagee for the recovery of his share of the mortgage-money on the basis of such severance cannot be resisted by the mortgagor.(34)

28. Partial foreclosure or sale by a sole mortgagee.

As seen in Note 27, one of several mortgagees cannot institute a suit for foreclosure or sale of a part of the mortgaged property for a proportionate part of the mortgage money which he claims to be his share. This, however, does not affect the right of a sole mortgagee to sue on the mortgage as a whole by proceeding against the whole(1) or any part only of the mortgaged property abandoning the rest of the security This is on the principle that as between the mortgagor and the mortgagee every part of the mortgaged property is liable for the whole debt and the mortgagee has the right to recover the debt from any part of the property, there being no obligation on his to proceed against the whole of it.(2)

The last paragraph of S 60 lays down that a person entitled to a share only of the mortgaged property may redeem his share only in a case where the mortgagee acquires in whole or in part the share of a mortgagor. The paragraph deals only with the mortgagor s right to redeem, but the same principle will apply to the mortgagee's right to foreclose or sell the property and hence a sole mortgagee who has acquired either in whole or in part a share of the mortgaged property can sue for

30. AIR 1924 All 11 (12) : 45 All 46 (DB)

31. ILR (1967) Andh Pra 325.

32. AIR 1928 Mad 933 (940) (DB).

33. AIR 1915 Mad 344 (344) : 39 Mad 17 (DB)

[See also AIR 1933 Cal 154 (161) : 59 Cal 1372 (DB).]

34. AIR 1915 Mad 344 (344) : 39 Mad 17 (DB).

Section 67 — Note 28

1. AIR 1923 Pat 242 (246) 2 Pat 335 (DB) (Mortgagee is entitled to bring a suit for sale of the entire mortgaged property for the balance due upon his mortgage, although he received half the mortgage debt from one in whom one-half of the equity of redemption became vested subsequent to the mortgage.)

2. AIR 1954 Mad 540 (541) ** AIR 1950 Orissa 6(9) ILR (1949) 1 Cut 351 (DB) ** AIR

foreclosure or sale of a part of the mortgaged security.(3) But he can only realise from the share not acquired by him a proportionate part of the mortgage-money.(4)

For further discussion of the topic, see Notes 41 to 44 on section 60.

29. Mortgagee's right against the property and the doctrine of substituted security.

See Notes on S. 73 generally.

It will be seen from the Notes on S. 73 that where a coparcener in a joint Hindu family mortgages his undivided share, and subsequently, on partition the mortgaged property goes to the share of another co-parcener, the mortgagee can proceed only against the property that has come to the share of the mortgagor co-parcener on the doctrine of substituted security and that he cannot

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1930 Mad 371 (372) (Subsequent purchaser without notice cannot affect either mortgagee's right to relinquish part of security or legal effect of such relinquishment) ** AIR 1948 Nag 44 (47) ILR (1947) Nag 381 (DB) (Where there is a decree charging a number of properties, the charge-holder can proceed to enforce his charge against any item of property he pleases whether the charge be divisible or indivisible) ** **(1906) 28 All 174 (178) (FB)** ** AIR 1922 All 352 (354) · 44 All 146 (DB) ** AIR 1929 All 380 (381) (DB) ** (1896) 18 All 189 (193) (DB) ** AIR 1938 Nag 79 (79) ILR (1940) Nag 385. (Portion of mortgage security excluded by operation of law — Mortgagee can enforce his whole charge against rest.) ** AIR 1930 Mad 371 (372) ** (1913) 35 All 441 (444) (DB) (Where the mortgaged property is divided among the mortgagor's heirs without mortgagee's consent there is nothing to preclude the mortgagee from proceeding against the share of one only for the whole debt) ** (1902) 25 All 79 (82) (DB) (Semble) ** 1898 All WN 120 (120) ** **AIR 1930 Mad 371 (372) (DB).**

[**See also** AIR 1947 Oudh 122 (126) 22 Luck 37 (Where a portion of the property charged with maintenance allowance has been relieved of the charge by reason of the action of the onus of the property, the charge-holder can realize the entire maintenance allowance from the remaining portion of the property) ** (1895) 17 All 434 (435) (DB) (The right of mortgagee to bring any portion of the mortgaged property to sale is not curtailed by the mortgagor, subsequently to the mortgage, selling a portion of the mortgaged property to a third person.)]

3. AIR 1951 Trav-Co 101 (102) · 1950 Trav-Co LR 683 (DB) (Purchase by hypothecatee of all items of property — Purchase in respect of some items if it proves infructuous breaks the integrity of mortgage — Hypothecatee becoming owner by purchase of items, purchase of which is good — Charge over the items the purchase of which has become infructuous continues and can be enforced against them) ** (1906) 3 Cal LJ 377 (378) (DB) · (1883) 5 All 257 (258) (DB) ** (1903) 26 All 72 (76) ** AIR 1920 All 129 (130) 42 All 544 (DB) (There is no difference in principle in the case where it is after the decree for sale and not before it that the mortgagee acquires a part of the mortgaged property) ** (1889) 2 CPLR 90 (92, 93) ** AIR 1932 Cal 319 (320) 59 Cal 76 (DB) ** AIR 1938 Cal 618 (622) : ILR (1938) 2 Cal 590 (DB) ** (1908) 8 Cal LJ 92 (93) (DB) ** (1897) 19 All 196 (198) ** **(1897) 20 All 23 (26, 27) (FB)** ** 1895 All WN 1 (1) (DB) ** AIR 1932 Mad 18 (19) ** **(1912) 34 All 474 (478) (FB)** ** (1911) 10 Ind Cas 235 (235) (All) ** 1898 All WN 120 (120) ** **(1900) 22 All 284 (290) (FB)** ** (1903) 25 All 446 (456) (DB).

4. See AIR 1942 All 104 (107) (DB). (Security bond for Rs. 10,000 by A on hypothecation of properties X and Y in B's favour and personal liability for any loss — Execution under S. 386, Criminal P.C., against A — Property X sold subject to B's charge — Balance, after deducting find, representing proportionate share of B's charge over property X returned to B — B obtaining decree in suit against A on security bond and for recovery of amount embezzled by A — Pending appeal by A, B executing decree against property Y and purchasing same — **Held,** B himself having broken integrity of mortgage by sale of property Y, B held not entitled to enforce his charge any further against property X and could not proceed against it on basis of A's personal liability since sale of X was a valid sale)

proceed against the mortgaged property which has gone to the share of the other coparcener (1) But if the latter coparcener, at the time of partition, and as a part of the partition, undertakes to pay off the mortgage-debt, what he really takes on partition is only an equity of redemption in the property and the mortgagee can proceed against the property in his hands (2)

It will also be seen from the Notes on S 73 that where a foreteiture is incurred fraudulently by the mortgagor by making a default in payment of Government revenue and the property again comes to the hands of the mortgagor, the mortgagee can proceed against such property But if the forefiture is incurred in spite of the mortgagor's attempt to avoid it and the property again comes to his hands the mortgagee has got no legal right to proceed against the property in the hands of the mortgagor : he has got only equitable right against it and if he wants to enforce his lien against the property he is bound to establish that the destruction of the original security took place under such circumstances as to raise an equity in his favour so as to fasten his mortgage on the property Thus, where a village was forfeited by Government for non-payment of revenue and then certain fields were settled upon the mortgagor and the mortgagee wanted to proceed against those fields, it was held that forfeiture was not incurred fraudulently and that the mortgagee by not attempting to avoid the forefeiture, had lost his equity of proceeding against the property (3)

A mortgagee is entitrled to foreclosure the cultivating rights in plots which were sir at the time the mortgage was executed but which ceased to be sir by reason of the mortgagor losing the right to occupy these plots as a proprietor.(4)

Property held by junior member of a Marumakkathayam family is not alienable though he enjoys certain rights If he mortgages the property the other members can invalidate the same but until so avoided, the mortgage remains valid and binding. But the avoidance of the mortgage will not deprive the mortgagee of his equity If upon subsequent partition in the family the mortgage property is allotted to the mortgagor as his share the mortgagee will be free to enforce his right against the property notwithstanding invalidation of the mortgage by other members This is because such a mortgage is not void but voidable.(5)

30. Mortgagee, whether can enforce his mortgage against a trespasser in possession of the mortgaged property.

A mortgagee who not entitled to possession under the terms of his mortgage is not affected by the adverse possession against his mortgagor which commences after the creation of his mortgage (1) A mortgagee can, therefore, enforce his mortgage against such a trespasser even if he has perfected his title by prescription as against the mortgagor (2)

The position is, however, different when the mortgage is created after the trespasser's entry upon the property The extinguishment of the mortgagor's title by adverse possession will in such a

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Section 67 — Note 29

1. AIR 1945 Pat 400 (403) : 24 Pat 268 (DB)
2. AIR 1940 Nag 149 (154) : ILR (1941) Nag 677 (DB)
3. (1911) 7 Nag LR 2 (7).
4. AIR 1946 Nag 419 (421).
5. AIR 1979 Ker 224 : ILR (1979) 2 Ker 427.

Section 67 — Note 30

1. AIR 1914 All 95 (96) : 36 All 567 (FB) ** AIR 1918 Cal 933 (938) 44 Cal 425 (DB) (1909) 12 Oudh Cas 45 (51, 57) (DB) ** AIR 1919 Cal 716 (718) (DB) ** AIR 1923 Pat 305 (306) ** (1913) 9 Nag LR 191 (192).

   [See AIR 1922 Cal 32 (35) (DB) (Case under Bengal Tenancy Act)]
2. AIR 1916 Mad 990 (996, 997) : 39 Mad 811 (FB) ** AIR 1914 All 95 (96) · 36 All 567 (FB) ** AIR 1918 Cal 933 (938) 44 Cal 425 (DB) ** AIR 1923 Mad 160 (161) (DB) ** AIR 1929 Pat 577 (579) ** (1912) 34 All 640 (644) (DB)

case extinguish the mortgage also.(3)

See also Notes 84 and 85 on Articles 64 and 65 of the AIR Commentaries on the Limitation Act, 7th (1997) Edition.

31. Mortgagee obtaining a money-decree — Whether can sell the mortgaged property.

A question may arise as to whether a mortgagee obtaining a simple money-decree on the mortgage can proceed against the mortgaged property. Rule 14 of Order 34, Civil Procedure Code, disallows a sale of the mortgaged property in execution of a money-decree obtained by a mortgagee on a claim arising out of the mortgage, otherwise than by instituting a suit for sale in enforcement of the mortgage. A mortgagee, therefore, cannot sell the mortgaged property in execution of his money-decree except by the insitution of a suit for sale under this section (1)

The decisions(2) under section 99 of this Act (now repealed and re-enacted as O. 34, R. 14 of the Civil Procedure Code), which disallowed the sale of the mortgaged property in execution of a money-decree even in respect of a claim *not connected* with the mortgage, are no longer good law. no such restriction exists under the present Rule. Where, therefore, a decree-holder holds a money-decree as well as a decree absolute for sale of the mortgaged properties against the same judgment-debtor, there is nothing irregular in selling the properties for the amounts of both the decrees.(3)

See also Notes on R. 14 of O. 34 of the Code of Civil Procedure in the Appendix.

32. Bundelkhand Alienation of Land Act.

Though under this section a mortgagee has got a right to obtain a decree for sale or for foreclosure as the case may be, where the mortgagor is a member of an agricultural tribe and the Bundelkhand Alienation of Land Act, II of 1903, applies, the Civil Court cannot pass a decree either for sale or for foreclosure. It has to refer the matter to the Collector who can take action under S. 9 of that Act.(1)

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^[67A. MORTGAGE WHEN BOUND TO BRING ONE SUIT ON SEVERAL MORTGAGES.— A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same

3. (1911) 9 Ind Cas 990 (991) (All) ** (1912) 34 All 640 (645) (DB) ** (1895) 18 Mad 342 (347) (DB).

[But see AIR 1917 Mad 228 (230) : 39 Mad 959 (DB)]

Section 67 — Note 31

1. (1921) 63 Ind Cas 303 (307, 308) (DB) (Pat) ** (1898) 2 Cal WN 320 (321) (DB) ** (1906) 28 All 58 (59) (A mortgagee brought a suit for sale on his mortgage — The suit was compromised and the mortgagee took a money decree in which, however, the property originally hypothecated to him was set out as being charged — **Held** that the mortgagee decree-holder could not bring the mortgaged property to sale in execution of this decree but if he wished to do so he would have to institute a suit under S. 67, on the decree.) ** (1909) 2 Ind Cas 980 (980) (DB) (Mad)

[See also (1875) Pun Re No. 89, p. 196 (197) (DB).]

2. (1906) 33 Cal 113 (115) (DB) ** (1903) 30 Cal 463 (465) (DB) ** (1904) 7 Oudh Cas 314 (315) (DB) ** (1896) 1 Cal WN 80 (81) (DB) ** (1901) 4 Oudh Cas 231 (232) ** (1890) 3 CPLR 15 (15).

[See also 1894 All WN 205 (207) (DB).]

3. (1909) 31 All 114 (145)

Section 67 — Note 32

1. AIR 1932 All 614 (615) : 54 All 482 (DB)

kind of decree under Section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due]

[A] Inserted by the Transfer of Property (Amendment) Act 1929 (20 of 1929) S 32 (1-4-1930)

Synopsis

1. **Scope of the section.**
2. **Retrospective operation of the section.**
3. **Section, if applicable to charges created by operation of law.**
4. **Mortgages must have been executed by the same mortgagor.**
5. **"Same kind of decree."**
6. **Property mortgaged, if need be the same.**
7. **"In the absence of a contract to the contrary."**
8. **Money must have been due on all the mortgages.**
9. **Court-fee** — See A I R Commentaries on the Court-fees Act, S 17 Note 9

1. Scope of the section.

Section 61 of the Act, as it stood before the amending Act of 1929, provided that a mortgagor who has executed several mortgages on *different* properties was entitled to redeem each of the mortgages separately And the old S 85 of the Act (now repealed and re-enacted as O 34, R 1 of the Code of Civil Procedure, 1908), provided that "all persons having an interest in the property comprised in the mortgage must be joined as parties to any suit relating to such mortgage provided that the plaintiff has notice of such interest."

Before the enactment of the Civil Procedure Code 1908 the question whether a mortgagee having several mortgages over the same property was bound to sue on all the mortgages at the same time and what would be the effect of suing on only one of them, had to be decided by reference to the principles underlying sections 61 and 85 referred to above, and there was a conflict of opinions

According to one view a suit was not maintainable on one mortgage only subject to another mortgage.(1) The reason for this view was, *firstly* that S 85 of the Act which required all persons interested in the mortgaged property to be made parties to the mortgaged suit, necessitated where the same mortgagee had two or more mortgages over the same property the inclusion of all the mortgages in the same suit; *secondly*, that S 61 abolished consolidation for purposes of redemption, where the several mortgages were of *different* properties that where the properties were the *same*, the mortgagor was not at liberty to redeem only one of them, and that on the same principle though conversely, a mortgagee having several mortgages on the same property was bound to sue on all of them As a consequence of this view it was held in some cases(2) that if the mortgagee sued only on *one* of such mortgages, he was barred from later on suing on the other mortgages by reason of the doctrine of *res judicata* enacted in S 13 of the Code of Civil Procedure of 1882 Explanation IV (now S. 11 of the Code of 1908) It was also held in the undermentioned cases(3) that the second suit would be barred under S. 43 of the said Code (now O 2 R 2 of the Code of Civil Procedure 1908).

According to another view, Ss 61 and 85 did not compel the inclusion of all the mortgages in one suit, that neither the principle of S 13, Explanation IV nor of S 43 of the Code of Civil Procedure, 1882, applied to such cases and that the mortgagee was at liberty to sue on each of the mort-

Section 67-A — Note 1

1. (1901) 25 Mad 108 (115) (DB) ** (1907) 30 Mad 353 (355) (DB) ** (1911) 11 Ind Cas 629 (730) (DB) (Mad) ** (1903) 26 All 14 (19) (DB) ** (1907) 4 All LJ 253 (253) (DB) ** (1887) 11 Bom 112 (113, 114) (DB).
2. See the cases cited in foot-note 1.
3. (1906) 30 Bom 156 (163) (DB) ** (1910) 37 Cal 589 (595, 597) (DB) (Puisne mortgagee paying off prior mortgages — Suit on puisne mortgage only — Amounts paid on prior mortgages not claimed — Subsequent suit therefor barred by S 43, Civil P C , 1882)

gages separately and obtain decree, but that he could not sell the same property in execution more than once.(4)

Order 34, Rule 1 of the Code of Civil Procedure, 1908, introduced an explanation which was not found in the repealed section (S 85 of this Act), namely, that a puisne mortgagee may sue for sale or foreclosure without making the prior mortgage a party to the suit In view of this provision, it was decided in some cases(5) that a suit on the *earlier* of two mortgages would bar a subsequent suit on the later mortgage by virtue of the provisions of O 34, R 1 and S 11, Explanation IV of the Code, but that a suit on the *later* mortgage would not bar a subsequent suit on the earlier one In another class of cases(6) it was held that suits could be filed on the mortgages separately but the property could not be sold twice. A third view was that notwithstanding the explanation to O 34, R 1, even a suit on the *later* mortgage would bar a subsequent suit on the earlier one.(7) A fourth view was that where the several mortgages arise out of the same transaction, a suit on the earlier mortgage would bar a subsequent suit on the later mortgage, by the provisions of O. 2, R 2.(8) In the undermentioned cases(9) it was held that a suit could be maintained on a subsequent mortgage for sale subject to a prior mortgage.

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4. **(1898) 20 All 322 (324, 325) (FB).** (Section 43 of the old Code does not apply) ** (1890) 4 CPLR 164 (165) (Do.) ** (1889) 13 Bom 45 (48) (DB) (Neither S 13 nor S 43 applies.) ** (1909) 3 Ind Cas 175 (176, 177) (Cal) ** (1907) 29 All 233 (234 235) (DB) (Same property mortgaged twice to same mortgagee — Part purchased by himself under his decree on prior mortgage — Remainder is liable for full amount of the subsequent mortgage.)

   [**See also** (1911) 38 Cal 60 (65) (DB) (A suit on a prior mortgage only is maintainable, but property must be sold in execution free from subsequent mortgage.)]

   [**See however** (1906) 3 All LJ 238 (240) (First mortgage to M — Second mortgage to M and N — M suing on first mortgage and purchasing property — M and N again suing and obtaining decree on second mortgage — They can sell the property again)

5. AIR 1920 Mad 1026 (1033) (DB) (Several mortgages on same property to same person — Decree on later mortgages — Property unsold — Suit on first mortgage is maintainable.) ** AIR 1919 Oudh 352 (354, 355) (First suit on first mortgage — Second suit on later mortgage does not lie — **Dissented from** in AIR 1925 Oudh 379.) ** (1910) 4 Sind LR 82 (86) (DB) (First suit on first mortgage — Second suit on later mortgage does not lie.) ** ** AIR 1920 Low Bur 160 (162 163) 10 Low Bur Rul 360 (Suit on the later mortgage will not bar a subsequent suit on the earlier) ** AIR 1931 All 549 (549) 53 All 631 (DB) (It is not necessary for the subsequent mortgagee to declare prior encumbrances in favour of third persons or himself) ** AIR 1928 All 378 (380) 50 All 742 (DB). (Suit on later mortgage reserving rights on first mortgage does not bar subsequent suit on first mortgage) ** AIR 1936 Lah 1020 (1020) (DB). (Suit on second mortgage mentioning first mortgage — Mortgagee not estopped from suing on first mortgage) ** AIR 1914 Cal 646 (648) (DB).

6. AIR 1921 Cal 321 (327) (DB) ** AIR 1924 Pat 77 (80) 2 Pat 874 (DB) ** AIR 1927 Pat 117 (122) (DB) ** AIR 1925 Oudh 379 (380) (DB) (In a suit on prior mortgage, subsequent mortgage held by the same mortgagee need not be disclosed and the mortgagee can obtain a decree for sale on each of them in a separate suit) ** **AIR 1935 Nag 226 (229) ; 31 Nag LR Supp 1 (FB).** (Case to which S 67-A did not apply. 8 Nag LR 123 and AIR 1933 Nag 171, **Overruled.**) ** AIR 1936 Cal 698 (700) (DB). (Case to which S. 67-A did not apply.)

   [**See also** AIR 1924 Mad 366 (367) : 47 Mad 688 (DB) (Mortgagee is not bound to sue on all mortgages simultaneously.)]

7. **AIR 1915 Bom 54 (54, 55) : 39 Bom 138 (DB).**

8. AIR 1921 Bom 282 (283) 45 Bom 55 (DB). (Case under Dekkhan Agriculturists' Relief Act Ss 12 and 13)

9. **AIR 1916 Mad 934 (936, 937) : 38 Mad 927 (FB)** ** AIR 1915 Mad 288 (290) (DB).

This section has been enacted with a view to set the conflict at rest. The Legisalture, in S 61 abolished the rule of consolidation so far as redemption was concerned, on the ground that it was inequitable to enforce such rule to the *prejudice of the mortgagor* But where a mortgagor has executed several mortgages over the same property to the same mortgagee it will be *advantageous* to the mortgagor to compel the mortgagee to consolidate his mortgages and sue on all of them at the same time. The Legislature has, therefore, in this section given effect to the rule of consolidation by compelling the mortgagee to sue, at the same time on all his mortgages **(10)** Its policy is that the question between the mortgagor and the mortgagee about all the mortgages held by the latter be tried once for all in one and the same suit **(11)** In their Report the Special Committee observe with reference to this section, as follows :

> "While dealing with S 61, we pointed out that it is inequitable to enforce the principle of the consolidation of securities to the prejudice of a mortgagor When however a mortgagee holds several mortgages in respect of the same or different properties it will be prejudicial to the mortgagor if the mortgagee is allowed to enforce one mortgage and keep the other mortgages alive In the case of a number of mortgages in which the only remedy open is foreclosure the disadvantage of the mortgagor will be very marked as he may lose the whole property in satisfaction of one debt which may be less than the real value of the property and will be liable to haave a personal decree passed against him in satisfaction of the debts under the mortgages In the case of mortgages too where the only remedy is sale, the property will never realise its fair and proper value if it be sold subject to another mortgage."

In order that the section may apply, however, the following conditions must be satisfied—

(i) the mortgages must have been executed by the *same mortgagor* **(12)**

(ii) in respect of each of such mortgages the mortgagee must have the right to obtain the *same kind of decree;*

(iii) the mortgage money *must have become due* at the time of the suit on all the mortgages and

(iv) there mst have been 'no contract' between the parties against consolidation

Cases outside the section would still have to be decided with reference to the law as laid down in decisions prior to the enactment of this section **(13)**

(Failure or omission to bring in all mortgages in suit held not illegality) ** AIR 1916 Pad 113 (114, 115) (DB) ** AIR 1919 Pat 129 (129 130) (DB) ** AIR 1927 All 341 (342)

[See AIR 1921 Mad 624 (626) (DB) (Mortgagee is entitled to sell property in execution of mortgage decree in his favour subject to his prior usufructuary mortgage)]

10. AIR 1965 Mad 537 (539) ILR (1966) 1 Mad 620 (DB) ** AIR 1956 Mad 467 (468) ** AIR 1956 Mad 434 (438) ILR (1956) Mad 983 (DB) ** AIR 1934 Cal 325 (326) 60 Cal 1470 ** AIR 1936 Lah 1020 (1021) (DB).

[See AIR 1935 Mad 262 (262) (Principle of consolidation applied by S 67 A has no bearing upon interpretation of S. 17, Court-fees Act.)]

11. AIR 1965 Mad 537 (539) ILR (1966) 1 Mad 620 (DB) (Section 67 A aims at relieving harassment to a mortgagor who has executed more than one mortgage in favour of the same mortgagee) ** AIR 1961 Andh Pra 175 (176 177) ** AIR 1953 Ajmer 50 (2) (5.) Suit on mortgage — Objection to suit on ground that it being on only one of two mortgages held by plaintiff was not maintainable — Plaintiff asking for permission to amend plaint — **Held** amendment should be allowed AIR 1935 Pat 365, **Foll.**) ** AIR 1935 Pat 365 (366)

12. AIR 1965 Mad 537 (539) ILR (1966) 1 Mad 620 (DB) (X mortgaging his property in favour of A — Subsequently X and Y executing another mortgage in favour of A charging not only property comprised in first mortgage but also property of Y — Two mortgages cannot be regarded as executed by same mortgagor.)

13. See AIR 1941 Nad 3 (4) ILR (1942) Nag 172 (DB) (Case outside S 67-A — Mortgagee under two mortgages getting decree on one and selling property subject to the other mort-

It is now settled law in Travancore Cochin that a mortgagee is entitled to consolidate and claim repayment of the amounts due under all the mortgagors executed by the mortgagor in respect of the mortgaged properties before he can be compelled to surrender possession. This would be before the application of the T. P. Act in the State.(14)

The section is restrictive of the rights of the mortgagee and must therefore be strictly construed.(15)

Two firms have taken two separate loans from a Bank under two different transactions A person stood as a guarantor for both loans taken by two firms and executed equitable mortgages in favour of Bank by depositing title deeds Though mortgages were created of different times through different mortgage deeds, the property mortgaged was common The Bank filed one suit for realisation of the loans, **Held** that although the mortgages were executed by way of security for the loans taken, that would not alter the legal position and S 67-A r/w O 1, R 3, O. 2, R. 3, CPC that the suit did not suffer from vice of misjoinder It was not necessary for the Bank to file two separate suits.(16)

The language employed in the section *prima facie* indicates that the direction as to consolidation of suits is mandatory and not directory (17) The benefit of the provision, however, can be waived by the mortgagor (18) The object of the section being to benefit the mortgagor he has a right to object to the maintainability of the suit instituted by the mortgagee on one of the mortgages alone But if he fails to raise such objection, it would not be just and equitable to deny the mortgagee the right to sue on the other mortgage on a different property subsequently (19) This section does not incorporate a prohibition against institution of suit of one of the mortgages in case where no objection to form of suit is taken on earlier occasion.(20) The mortgagee is not obliged to file a consolidated suit in one Court on different mortgages when the Court has no territorial jurisdiction over any of the properties hypothecated under one of the mortgages (21) The section further leaves it open to the parties to contract to the contrary. Thus the mortgagor can ask for time to extend the period of the due date, in which case the mortgagee can file a suit on the mortgage which has become due and postpone the suit with respect to the mortgage regarding which he has postponed payment.(22)

It has been held that the defect in the constitution of the suit contrary to the provisions of this section is a defect of form and does not touch the merits of the case and if objection is raised the mortgagee should be allowed to withdraw the suit with liberty to bring a fresh suit in compliance with the provisions of this section (23) It has also been held that where, on objection being raised to the maintainability of the suit the plaintiff prays for amendment of the plaints the amendment should be allowed, the policy of the legislature being to avoid multiplicity of suits.(24)

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gage can sell again in execution of the decree on the other mortgage 20 All 322 **Distinguished.**)

14. AIR 1952 Trav-Co 363 (364).
15. AIR 1934 Cal 862 (863) : 61 Cal 1047 (DB).
16. 1999 (1) Bank LJ 150 (152) (Madh Pra)
17. AIR 1961 Andh Pra 175 (176) ** AIR 1956 Mad 467 (470).
18. AIR 1961 Andh Pra 175 (176) ** AIR 1959 Mad Pra 426 (428)
18. AIR 1961 Andh Pra 175 (176) ** AIR 1959 Madh Pra 426 (428) ** AIR 1956 Mad 467 (470)
20. AIR 1969 Mys 20 (21) : (1967) 2 Mys LJ 56.
21. ILR (1972) Andh Pra 279.
22. AIR 1961 Andh Pra 175 (176, 177).
23. AIR 1956 Madh B 63 (65).
24. AIR 1953 Ajmer 50 (2) (51) (AIR 1935 Pat 365, **Rel. on.**) ** AIR 1935 Pat 366 (365, 366)

The second suit cannot be held to be barred under O 2, R 2, Civil P C as the causes of action for the two suits are not the same but are different (25)

2. Retrospective operation of the section.

This section is not retrospective in its operation Section 63 of the amending Act of 1929 which came into force on the 1st of April 1930 expressly provides that nothing in S 32 of that Act which introduced this section, shall be deemed to affect, in any way the terms or incidents of any transfer of property effected before the abovementioned date, or any right title obligation or liability already acquired, secured or incurred before the date This section, therefore, can have no application to mortgages executed before the 1st of April 1930 (1)

3. Section if applicable to charges created by operation of law.

Section 100 provides that all the provisions contained in the previous sections which apply to a simple mortgage shall, *so far as may be*, apply to a charge It has been held by the High Court of Calcutta, that the requirement in this section that the mortgages should be by *the same mortgagor* and the words "in the absence of a contract to the contrary" are inappropriate to charges by operation of law, and that, consequently, S 100 will not enable this section to be applied to statutory charges.(1)

4. Mortgages must have been executed by the same mortgagor.

This section has no application unless all the mortgages have been executed by the same mortgagor.

Illustrations

(1) *A*, claiming to be the adopted son of *X* deceased executed a mortgage in favour of *P* *X*'s widows *B* and *C* also executed a mortgage in respect of the same property to *P* *P* filed a suit on both the mortgages impleading *A* *B* and *C* as parties It was held that as the mortgagors were different S 67A did not enable the filing of a single suit on both the mortgages (1)

(2) *A*, *B* and *C* executed a mortgage to *D* *E* and *F* Subsequently *B* and *C* only executed a mortgage of the same properties in favour of *F* *G* and *H* It was held that S 67A did not apply so as to compel a suit to be filed on both the mortgages.(2)

(3) A made a mortgage in favour *X* of his share in certain joint property Subsequently *A* *B* and *C* who were all the sharers in the property, mortgaged all their shares to *X* It was held that a suit on the first mortgage did not prevent a subsequent suit on the later mortgage (3)

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25. AIR 1959 Madh Pra 426 (428) ** AIR 1956 Mad 467 (469)

Section 67-A — Note 2

1. AIR 1935 Nag 226 (228) : 31 Nag LR Supp 1 (FB). (AIR 1933 Nag 171 **Overruled**) ** AIR 1934 Cal 325 (327) 60 Cal 1470 ** AIR 1938 Bom 196 197 (DB) ** AIR 1936 Lah 1020 (1020) (DB) ** AIR 1931 Rang 208 (208) ** AIR 1933 Rang 377 378 (DB) ** AIR 1940 Oudh 235 (236) : 15 Luck 399 ** AIR 1940 Pat 65 (70) (DB)

Section 67-A — Note 3

1. AIR 1934 Cal 862 (864) 61 Cal 1047 (DB) (The section does not apply to charges under Calcutta Municipal Act, 1899, S 205 **Reversing.** AIR 1934 Cal 325 60 Cal 1470)

Section 67-A — Note 4

1. AIR 1937 Nag 99 (100) ILR (1937) Nag 349 (Such mortgagors cannot be joined in one suit under O. 1, R 3 or O 2, R 3.)

2. AIR 1931 Rang 208 (208).

   [See also (1880) 50 LJ Ch 187 (189) 16 Ch D 117 (119), In re Raggett Ex parte Williams ** AIR 1932 All 676 (677) (DB) (Mortgage by A — Subsequent mortgage by A, B and C — Mortgages not by same mortgagor.)]

3. AIR 1965 Mad 537 (539) ILR (1966) 1 Mad 620 (DB) (X mortgaging his property in favour of A Subsequently X and Y executing another mortgage in favour of A charging

There is no statutory provision or rule or principle by which the wife and the husband could be treated as one entity for the purpose of mortgages. Where the husband and the wife own separate and distinct property and each mortgages his property and also jointly, the suit to enforce the joint mortgage does not bar a suit to enforce the mortgage by one spouse Section 67-A is not attracted as the mortgagor is not the same in these cases.(4)

Where 'A' executed a mortgage and B and C stood sureties but B and C independently executed on the same day two independent mortgages in favour of the plaintiff with regard to the same property and the amount on these mortgages having become due claim respecting these mortgages had also to be made in the same suit i.e. plaintiff had to sue on all the three mortgages.(5)

A mortgage by *A* and, after his death, a mortgage by *B*, his legal representative, cannot, for the purpose of this section, be taken as having been executed by *different mortgagors*.(6) So also where a father executed a mortgage as *karta* of joint Hindu family consisting of the father and his son, and subsequently the father and the son together executed another mortgage, it was held that the "mortgagor" in both the mortgages was the same, the joint family (7) See also section 59A

5. "Same kind of decree".

The second essential for the applicability of the section is that two or more mortgages must be such that the mortgagee should have a right to obtain the *same kind of decree* in respect of each of them A decree for *sale* can, for instance, be obtained on a simple mortgage, but not on a usufructuary mortgage Consequently, a person having a simple as well as a usufructuary mortgage is not bound under this section to sue on both of them in the same suit.

The question, however, arises whether apart from this section, the mortgagee can under any circumstances, be compelled to sue on both the mortgages It has been held in the undermentioned cases(1) that there is nothing in O 34, R. 1 of the Code of Civil Procedure to prevent the mortgagee from suing on his *later* simple mortgage *subject* to his *prior* the usufructuary mortgage As to whether he can sell the properties *free* of the usufructuary mortgage, see the A I R. Commentaries on the Code of Civil Procedure 10th (1985) Edition O 34, R 12, Note 4

On the other hand, the question as to whether a mortgagee can sue on his *earlier* simple mortgage without also claiming relief on his *subsequent* mortgage is more difficult to answer, by reason of the fact that the explanation to O 34, R. 1 of the Code of Civil Procedure 1908, provides only that a *prior* mortgagee need not be made a party to a suit on the subsequent mortgage According to the undermentioned cases(2) the mortgagee cannot sue on his *earlier* simple mortgage alone without mentioning his second usufructuary mortgage, and if he does so a second suit on the later

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not merely property comprised in the first mortgage but also property belonging to Y — Two mortgages cannot be regarded as executed by same mortgagor — There can be no consolidation of mortgages in such a case) ** AIR 1934 Cal 421 (423) (DB) ** (1880) 14 Ch D 699 (709) 49 LJ Ch 563, Cummins v Fletcher (There can be no consolidation between a mortgage by A for his own debt, and a mortgage by A and B of other property for their partnership debt.)

4. AIR 1971 SC 884 (885) : (1972) 1 SCJ 515.

5. (1972) 74 Pun LR 24 : ILR (1974) 1 Punj 654.

6. AIR 1931 Rang 208 (208).

7. AIR 1935 Pat 365 (366).

Section 67-A — Note 5

1. AIR 1927 All 341 (342) (26 All 14 decided under S 85 of the Act is **No longer good law** on this point) ** AIR 1919 Pat 129 (129, 130) (DB) ** AIR 1916 Pat 113 (114, 115) (DB) ** AIR 1914 Cal 455 (456) 41 Cal 727 (DB). (Obiter) ** (1908) 31 Mad 530 (530) (DB)

   [See AIR 1921 Mad 624 (626) (DB) (Mortgagee is entitled to sell property in execution of his mortgage decree subject to his prior usufructuary mortgage)]

2. AIR 1919 Oudh 352 (355) ** (1901) 25 Mad 108 (115) (DB) (Suit for sale under earlier

mortgage would be barred. The first of those cases has been dissented from in a later case(3) of the same Court, in which, however, both the mortgages were simple The second of the cases was one arising under the old S. 85 of the Act which did not contain any explanation corresponding to that contained in O 34, R 1 of the Code The wording of the section seems to support the view that in all cases not covered by the section, a mortgagee can sue and obtain decrees of each of his mortgages separately.

6. Property mortgaged, if need be the same.

The wording of the section is wide enough to include mortgages over *different* properties A person having several mortgages executed by the same mortgagor must, therefore, combine all the mortgages in one suit if the other conditions of the section are satisfied (1) The High Court of Madras has, however, observed that the principle of consolidation of mortgages becomes necessary where the mortgages relate to the same property and therefore this section requires to be suitably amended by compelling only a mortgagee who holds two or more mortgages over the same property executed by the same mortgagor to sue on all mortgages and not a mortgagee who holds two or more mortgages over different properties from the same mortgagor (2) There is further one limitation to the above proposition All the mortgages on different properties may be consolidated in one suit but the Court before whom the suit is instituted must have jurisdiction to enforce all the mortgages. In case the property subject to one of the mortgages is outside the territorial jurisdiction of the Court, there can be no consolidation of claims and therefore this section cannot apply (3) Thus where two mortgages executed in favour of the same mortgage by the same mortgagor related to different properties each in a different district and hence within the jurisdiction of different Courts it was held that this section did not apply and that it was not obligatory upon the mortgagee to bring a consolidated suit on both the mortgages as neither this section nor section 17 of the Code of Civil Procedure, 1908, could give either Court jurisdiction as regards the mortgage of the property situated beyond its jurisdiction (4) In a suit for land with leave under Cl 12 of the Letters Patent (Cal) the plaintiff has to show that whole or part of the land is within the jurisdiction of the High Court If there are two separate mortgages the High Court will have no jurisdiction to try the suit unless each mortgage contains the whole or part of the land within the jurisdiction of the High Court (5)

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mortgage subject to later mortgage cannot lie)

3. AIR 1925 Oudh 379 (380) (DB).

[See also AIR 1940 Oudh 235 (236) 15 Luck 399 (Case of mortgages executed before S 67-A was introduced.)]

Section 67-A — Note 6

1. AIR 1934 Cal 862 (863) 61 Cal 1047 (DB) ** (1936) 63 Cal 720 (723) (DB) (Mortgages on different properties consolidated in one suit — Case under S 17 Court fees Act)

[See also AIR 1938 Bom 196 (197) (DB) (Quaere.)]

2. AIR 1956 Mad 467 (469)

[See also AIR 1965 Mad 537 (539) ILR (1966) 1 Mad 620 (DB) (X mortgaging his property in favour of A — Subsequently X and Y executing another mortgage in favour of A charging not only property comprised in first mortgage but also property belonging to Y — It is not open for purposes of S. 67-A to split up integrity of the second mortgage and treat it in two parts one relating to property of X and other relating to property of Y Consolidation not possible.)]

3. AIR 1954 Madh B 156 (158) (Section 67-A does not amend S 16, Civil PC — 41 CWN 854 and AIR 1939 Rang 247, Rel. on) ** (1937) 41 Cal WN 854 (866 867) (DB) ** AIR 1939 Rang 247 (248, 249) : 1939 Rang LR 207.

4. AIR 1939 Rang 247 (249) : 1939 Rang LR 207.

5. AIR 1959 Cal 616 (617, 618).

7. "In the absence of a contract to the contrary."

As has been seen in Note 1, the object of the section is to benefit the mortgagor.(1) Liberty has, therefore, been given to him, if he chooses to waive himself out of the benefit.(2) Where previously there were two mortgages but one of the mortgage deed stipulated that mortgagee shall be entitled to sue on the mortgage only, stipulation, provided for "a contract to contrary" and as such S. 67A would be inapplicable.(3) Contract need not be in writing.(4)

8. Money must have been due on all the mortgages.

A mortgagee having several mortgages is bound to sue on all of them at the same time only if the *mortgage-money has become due on* all of them.(1)

The question whether and when the mortgage-money in respect of a particular mortgage has become due has necessarily to be decided with reference to the terms of the particular document or transaction in question For illustrative cases, see the A I R Commentaries on the Limitation Act, 1963, 7th (1997) Edn., Article 62, Note 22.

A mortgage deed provided for the payment of the mortgage amount in instalments with a default clause that if two consecutive instalments were in arrears, the mortgagee could claim the whole The mortgagee elected to sue on only two of the instalments that were in arrears It was contended that on the principle of this section the suit must be for the whole amount.It was held by the Madras High Court that assuming that this section can be applied to the case, it could not be said that the portion of the mortgage not sued on became payable by reason merely of the default of the two instalments The mortgage had an *option* to treat the whole amount as payable and if he waives it, the portion other than that sued for cannot be said to have become payable (2)

9. Court-fee.

See A. I. R. Commentaries on the Court-fees Act, S 17, Note 9

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^[68. RIGHT TO SUE FOR MORTGAGE-MONEY.— (1) The mortgagee has a right to sue for the mortgage money in the following cases and no others, namely :—

(a) where the mortgagor binds himself to repay the same;

(b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security

Section 67-A — Note 7

1. AIR 1934 Cal 862 (863) : 61 Cal 1047 (DB).
2. AIR 1961 Andh Pra 175 (176, 177) (Mortgagor asking for time to extend period of due date — Mortgagee can file suit on mortgage which has become due and postpone suit with respect to mortgage regarding which payment is postponed)
3. (1977) 81 Cal WN 300 (307) (DB).
4. AIR 1959 Madh Pra 426 (428). (It can be based on waiver.)

Section 67-A — Note 8

1. AIR 1940 Mad 296 (297) (Mortgage money payable by instalments - Whole becoming due on default of two — Suit for the instalments lies) ** (1880) 49 LJ Ch 563 (564) : 14 Ch D 699 (708) 42 LT 859 28 WR (Eng) 772, Cummins v. Fletcher. (Default on one mortgage only — Mortgagee not entitled to right of consolidation.) ** AIR 1941 Nag 3 (3) : ILR (1942) Nat 172 (DB) (Suit on second mortgage before amount on first mortgage fell due — Section does not apply.)
2. AIR 1940 Mad 296 (297)

is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

(d) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor :

Provided in the case to in clause (a) transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money

(2) Where a suit is brought under clause (a) or clause (b) of sub-section (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property]

[A] Substituted for the original section by the Transfer of Property (Amendment) Act 1929 (20 of 1929), S. 33

Synopsis

1. Scope of the section.
1A. Mortgage money.
2. Clause (a) — Where the mortgagor binds himself to repay the mortgage money.
3. Clause (b) — Security destroyed or rendered insufficient.
4. Clause (c) — Deprivation of security owing to wrongful act or default of the mortgagor.
(A) Wrongful act.
(B) Wrongful default.
5. Clause (d).
(A) Failure to deliver possession.
(B) Failure to secure possession.
6. Effect of acquiescence by mortgagee in disturbance of possession.
7. Dispossession owning to default of mortgagee himself.
8. Transferee from mortgagor.
9. Legal representative of mortgagor.
10. Minor not personally liable.
11. Guardian not personally liable.
12. Anomalous mortgages.
13. Void mortgages.
14. Interest — Personal liability for.
15. Claim under section is an actionable claim.
16. This section and O. 34, R. 6 of the Civil Procedure Code.
17. Mortgagee claiming under this section, if can sue for sale.
18. Sub-section (2).
19. Applicability of the section to the Punjab and North-West Frontier Province.
20. Applicability of section to charges.
21. Limitation for suits to enforce personal liability. See the A.I.R. Commentaries on the Limitation Act, 7th (1997) Edition, Art 55, Note 14-C and Art. 113, Note 52
22. Succession certificate.

1. Scope of the section.

This section deals with the *personal liability* of the mortgagor for the mortgage-money The mortgagor may, in the mortgage contract itself, bind himself to pay the amount, in which case, the personal liability will arise under cl (a) by the terms of the contract of mortgage itself, independently of such contractual obligation, it may arise under clause (b), (c) or (d) (1) As was pointed out

Section 68 — Note 1

1. AIR 1916 PC 119 (120) : 44 Cal 388 : 44 Ind App 87.

by the High Court of Calcutta in *Sukhadakanta v. Jogineekanta*,**(2)** clause (a) of this section gives the mortgagee a right *ex contractu*; clause (b), a right on equitable grounds and clauses (c) and (d), a right *ex delicto*.

The rules laid down in the section were well recognised even before 1882, and the Act has only formulated those rules in this section in precise and convenient language.**(3)**

The section precludes the mortgagee from suing the mortgagor for the mortgage-money except in the cases provided for, that is, it precludes the mortgagee from maintaining a suit in which his primary relief claimed is a relief against the mortgagor personally, unless the case comes within any of the clauses (a), (b), (c) or (d) **(4)** A suit under cls (b) and (c) is not a suit to recover the mortgage-debt on the basis that the debt is due but it is a suit for compensation where the mortgagee is a deprived of his security.**(5)**

But the section presupposes the existence of a *valid* mortgage But independently of this section the mortgagee under an invalid mortgage may be entitled to a decree for the money advanced. (See Note 13).

The section gives a right to *sue* for the mortgage-money, i e to bring a *suit* for the mortgage-money.**(6)**

A mortgagee's right to recover the mortgage-money by sale of the hypothecated property cannot in any way be affected by a mere decree obtained by a stranger against the hypothecator declaring that he is not the owner of the property. The stranger does not, by such a decree, acquire the rights of the hypothecator.**(7)**

But the question of giving relief under Section 68 arises only when there is a mortgage apart from the fact that it is not a valid mortgage Where the document is not of mortgage relief cannot be granted.**(8)**

Section 68 is independent of S. 65 and it does not in terms provide a remedy for any breach of the covenants prescribed in S. 65 of the Act.**(9)**

Like S 60, S. 68 is unqualified in its terms and contains no saving provisions in favour of contracts to the contrary. It is, therefore, independent of provisions of S 98 and does not conflict with it.**(10)**

Section 68 is an independent provision vis-a-vis Section 98 of the T P Act as the mortgagee

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2. AIR 1934 Cal 73 (76) · 60 Cal 1197 (DB)

3. (1884) 6 All 298 (302) (DB).

4. **AIR 1964 SC 1295 (1299) ; (1964) 5 SCR 635.** (Section 68 confers a right upon the mortgagee to sue for the mortgage money in four different classes of cases and no others) ** AIR 1962 Pat 413 (415). (A decree for interest only cannot be passed)

[**See** (1956) 58 Bom LR 622 (623) (If a suit is brought by mortgagee against the mortgagor in order to enforce his personal liability under the bond the Court would require him to give up the security or stay the suit until mortgagee has enforced his security) ** (1892) 14 All 513 (519) (DB).]

5. AIR 1963 Guj 112 (116, 119) ** AIR 1956 Sau 27 (29).

6. **AIR 1945 PC 91 (94) : 72 Ind App 165.** (The privilege conferred by S 68 on a mortgagee to sue for money canot be availed of by a charge holder in proceedings in execution of a decree without resorting to a suit even if the security has been impaired by the conduct of the person creating the charge) ** AIR 1952 Trav Co 150 (153) ** AIR 1950 Madh B 72 (76).

7. AIR 1953 Mys 111 (113) : ILR (1953) Mys 98.

8. (1970) 72 Punj LR 312 : 1970 Cur LJ 169 (Punj).

9. AIR 1956 Mad 128 (129).

10. AIR 1959 Pat 235 (237, 238) : 38 Pat 35.

is not bound to sue for realisation of security such a suit is not barred under Order 2, Rule 2, Civil P. C (11)

A mortgagee can realise the whole amount of the mortgage-debt from any one of his debtors and so it cannot be said that the mere fact that it is found that four out of the seven mortgagors are not bound by the mortgage would exonerate the others from repaying the money which they had borrowed.(12)

Where, a property is mortgaged to one person and that person subsequently dies leaving two or more heirs jointly entitled to his estate, payment of the mortgage amount to one of those heirs without the concurrence of the rest cannot amount to a valid discharge of the debt One of the heirs cannot enforce the mortgage without the concurrence of the rest of the heirs (13)

If one of the mortgagees brings a suit for part of share in the mortgaged property and the other mortgagees are not impleaded within limitation the suit is not maintainable (14)

The section does not deal with the period of limitation for filing a suit or extension of the period prescribed by the Limitation Act for filing a suit (15) The right conferred by the section is again not a right to enforce the mortgage but a right to sue for the mortgage-money on the personal covenant or to claim compensation when the mortgagee is deprived of his security (16)

There was a usufructuary mortgage with a lease back The transaction was hit by the provisions of Debt Relief Act whereunder the mortgage stood converted into simple mortgage by statutory fiction, enabling mortgagee to realise only mortgage amount with 6% interest Preliminary decree was accordingly passed. It could not be said that the suit for mortgage amount with interest was not maintainable in view of S. 68.(17)

Where the overdraft facility granted by a bank to its constituent the principal debtor was secured by promissory note executed by him and by guarantee agreements by guarantors and equitable mortgage was also created, the suit for realisation of money due by the bank is not by the mortgagee for mortgage money Accordingly S 68 cannot have any application (18)

1A. Mortgage money.

The term "mortgage money" in S 58 is not exhaustive If includes all sums payable by the mortgagor to the mortgagee at the time of redemption The cost of reconstruction and repairs agreed to be paid by the mortgagor is includible.(1)

2. Clause (a) — Where the mortgagor binds himself to repay the mortgage-money.

Where the mortgagor *binds himself* to repay the mortgage-money the mortgagee is obviously entitled to sue on the covenant for recovery of the money personally from the mortgagor (1) The covenant may be express or implied As has been seen in Note 29 on S 58, a personal covenant to pay the mortgage-money (i e , a covenant to pay apart from the mortgaged property) must be presumed to exist in all mortgages unless there is something in the nature or terms of the mortgage to

11. AIR 1976 Pat 372 : 1976 BLJR 294.
12. AIR 1951 All 618 (620).
13. (1903) 27 Bom 292.
14. AIR 1968 All 201.
15. AIR 1964 SC 1295 (1299).
16. AIR 1964 SC 1295 (1299).
17. (1990) 2 Bank CLR 175 (179) (Ker).
18. AIR 1987 Cal 157 (161).

Section 68 — Note 1A

1. AIR 1984 (NOC) 297 (All).

Section 68 — Note 2

1. AIR 1968 Assam 10 (12) (Usufructuary mortgage Suit for recovery of mortgage debt

negative it.(2) Thus, the nature of a usufructuary mortgage or a mortgage by conditional sale is such that there is no personal liability to pay implied in it.(3) The remedy of the mortgagee is, as a general rule in such cases, intended to be only against the *mortgaged property*. The test, in fact, to find out whether the mortgagor has "bound himself" to pay the amount, within the meaning of this section is to see *what remedy* the mortgagee is intended to have for the recovery of the amount; the general rule is that a remedy limited to a *particular manner* will exclude the general personal liability for such payment; where the remedy of the mortgagee is intended to be only against the

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not maintainable in the absence of personal covenant to pay.) ** AIR 1963 Raj 100 (103) : ILR (1963) 13 Raj 54 (Express personal covenant to pay not destroyed by stipulation as to possession) ** (1909) 3 Sind LR 17 (26) (DB) ** (1911) 9 Ind Cas 660 (661) (DB) (Cal) ** (1907) 10 Oudh Cas 14 (16) (DB) ** (1870) 4 Beng LR App 48 (49) (Mortgagee suing for a simple money decree — He is entitled to it, available against movable property only) ** (1906) 4 Cal LJ 246 (248) (DB) (Mortgage containing an express covenant to pay)

[See AIR 1919 Oudh 379 (380). (Right to sue for mortgage money — Deeds of further charge — Agreement that whole amount should be paid on redemption — Amount of further charge recoverable only when mortgagee came to redeem mortgage and not when redemption first became possible.)]

[See also AIR 1937 Oudh 87 (88) : 12 Luck 435 (DB).]

2. AIR 1953 Cal 208 (210) (In an equitable mortgage the mortgagee has a right to sue for the mortgage money within the meaning of S 68(1)(a) and further under such an equitable mortgage the mortgagor binds himself to repay the mortgage money within the meaning of S 68(1)(a)) ** AIR 1939 Pesh 41 (43, 44) ** (1900) 22 All 453 (461) (DB) (In every simple mortgage, the security for the debt is two-fold the personal security and the security of property — The liability of each kind of security is to the extent of the whole amount of debt) ** AIR 1917 Pat 200 (201) (DB) (Usufructuary mortgage — Personal covenant — Mortgagee held entitled to personal decree) ** AIR 1932 Lah 630 (632) 13 Lah 508 (DB) (The mere fact that the mortgagee is entitled to take possession in default of payment of the principal does not convert an otherwise simple mortgage into a usufructuary mortgage — Where a mortgage is simple it must be held to carry with it a personal covenant to pay the principal and interest.) ** AIR 1932 Lah 164 (166, 167) 13 Lah 259 (DB) (In case of usufructuary mortgage, only in absence of express covenant to repay clear proof of implied covenant is required than is necessary in other cases) ** (1892) 14 All 513 (519) (DB) ** (1908) 30 All 388 (390) (DB). (A personal covenant to pay, although not expressed, is implied in and is an essential part to every simple mortgage) ** AIR 1923 All 408 (409) ** (1873) 19 Suth WR 281 (281) (DB) ** (1912) 13 Ind Cas 440 (442) (DB) (Cal) (Every loan implies a promise to repay, and an unqualified admission of indebtedness is equivalent to an express covenant and creates a personal obligation) ** AIR 1955 Lah 103 (104) 16 Lah 612 (DB) (AIR 1932 Lah 164 13 Lah 259, Followed) ** AIR 1921 Low Bur 34 (36) · 11 Low Bur Rul 148 (DB) ** (1906) 4 Cal LJ 246 (253) (DB) ** (1909) 1 Ind Cas 442 (443) (DB) (Cal).

3. AIR 1929 Nag 254 (256) : 25 Nag LR 187 (FB). (AIR 1924 Nag 97, **Overruled;** AIR 1915 Nag 63 held not **Overruled** by AIR 1916 PC 119) ** 1892 All WN 66 (67) ** (1910) 13 Oudh Cas 155 (157) (Personal liability arises when the possession of the usufructuary mortgagee is disturbed) ** 1881 All WN 71 (71) (DB) (Do) ** AIR 1941 Mad 885 (886) (DB). (Ordinarily no personal covenant in usufructuary mortgage — Onus is on person alleging its existence) ** 1881 Pun Re No 127, page 315 (316) (DB) ** 1873 Pun Re No 57, p. 83 (83) (DB) ** 1870 Pun Re No 15, page 51 (52) (DB) ** AIR 1915 Nag 63 (64, 65) . 12 Nag LR 19 (Intention of Legislature is to exclude personal liability in all cases where it is not expressly provided for) ** AIR 1920 Nag 183 (183) (Mortgage by conditional sale) ** AIR 1922 Nag 98 (99) 18 Nag LR 145 (DB) ** AIR 1938 Pat 585 (587) : 17 Pat 737 (DB) ** AIR 1934 Pat 624 (626) ** AIR 1922 Nag 119 (119) : 19 Nag LR 67

Also see S. 58, Note 29.

mortgaged property, there is no personal liability even if the mortgagor has stated in the mortgage document that he will pay the money, for some such sentence is found almost in all mortgages (4) Thus, where in a mortgage bond the mortgagor covenanted to pay the amount in three years in default of which the mortgagee was entitled to *sue for foreclosure*, it was held that there was no personal covenant to pay the mortgage-debt within the meaning of this section.(5) So also, where in a possessory mortgage, the covenant to repay the mortgage-money within a certain time, is coupled with a stipulation that if the money be not paid within the time fixed, the mortgagee would continue to be in possession and the mortgage bond would remain in force, it was held that there was no covenant to repay on the part of the mortgagor (6) See also the undermentioned cases(7) to a similar

4. AIR 1917 Oudh 230 (232) 20 Oudh Cas 155 ** AIR 1916 All 137 (138) (A simple more decree can be given only as a matter of grace) ** AIR 1915 Oudh 147 (147) (Where the mortgage deed provided that the property should be sold to the mortgagee in case of non payment of the mortgage money within a certain time there is no personal liability on the part of the mortgagor to pay — Nor does a mere covenant for title or a mere promise to pay the money within a fixed period import a personal liability) ** AIR 1925 Oudh 628 (628) (Usufructuary mortgage deed containing clause that mortgagor s other properties should be liable for debt if mortgagee lost possession — Clause ineffective where mortgagee never got possession) ** (1909) 12 Oudh Cas 275 (278) ** (1907) 6 Cal LJ 639 (649) (DB) ** **(1884) 10 Cal 740 (743) : 11 Ind App 83 : 4 Sar 522 (PC)** ** AIR 1937 Oudh 517 (519) (DB) (Where a mortgage is one by conditional sale the remedy provided for the mortgagee is foreclosure — The fact that it contains a mere promise to pay the money within a certain period does not per se import a personal liability) ** AIR 1930 Pat 152 (153) (DB) ** AIR 1921 Mad 636 (636) (DB) (Where a usufructuary mortgage provided "till the above stated time *(vaida)* you shall take possession make improvements and enjoy and also pay the *thirva* due in respect of the property " — **Held,** that there was no covenant to pay.)

[**See also** AIR 1934 Pat 432 (435) (Covenant to pay is implied in every transaction of loan)]

5. 1959 Andh LT 98 (99) ** AIR 1939 All 260 (262) ILR (1939) All 313 (DB ** AIR 1916 Nag 5 (9) : 13 Nag LR 121.

6. AIR 1930 Pat 152 (152) (DB). **(24 Cal 677, Followed.)**

7. (1889) 16 Cal 540 (544) (DB) ** AIR 1933 Mad 613 (616) 56 Mad 892 (DB) (Words in a usufructuary mortgage merely indicating the time and the mode of redemption are not sufficient to import a personal covenant) ** AIR 1919 Mad 847 (848) (DB) (At whatever cultivation season in the month of Chitrai in any year, after the stipulated period of 10 years, I may pay the principal amount, you shall at that time receive the amount leave the undermentioned lands in my possession and deliver the documents also to me — *Held* that the clause did not contain an implied covenant to pay) ** AIR 1928 Mad 648 (650 651) ("After the expiry of the 12 years if in kumbham of any year we pay the kanom of Rs 3,000, you must receive the amount and deliver back possession of the lands — *Held,* that there was no covenant to bind the mortgagor to pay the mortgage amount to the mortgagee) ** (1912) 13 Ind Cas 174 (174, 175) (DB) (Mad) (Where there is a general covenant to pay within a date specified, which in the ordinary course renders the promisor personally liable, and where there is a stipulation in case of default, the plaintiff is bound to proceed against the hypotheca, as stipulated, before claiming a personal decree) ** AIR 1924 Nag 53 (55) (DB) ("If I fail to re-pay the amount at the stipulated time the aforesaid immovable property shall be foreclosed in your favour that is the right of redeeming the mortgage shall cease — *Held,* that these words did not amount to stipulation binding the executant to re-pay the money within clause (a) of S 68) ** AIR 1937 Pat 94 (96) (Mortgagees to remain in possession till payment of principal, and if dispossessed to realise principal in any manner — Mortgage held to be plain usufructuary mortgage — Mortgagees held not entitled to decree for money or sale so long as they remained in possession.)

effect. It has been held in the undermentioned cases(**8**) that clause (a) refers to an *express* covenant and not to an implied covenant to pay. This view is against the general trend of opinion. Where there is a clear covenant to pay but there is a clause added which not merely *limits* but destroys the liability itself, as where a person covenants to pay, but says that this shall not import a personal liability, such a clause will be regarded as repugnant to the covenant and void.(**9**)

'Otti' mortgage in Travancore is an anomalous mortgage in which by customary law a personal covenant to repay is implied, therefore, a suit for mortgage money on loss of possession is maintainable.(**10**)

Subject to the principles stated above, the question whether there is a personal covenant to pay in any particular case will depend upon the particular language of the document and the other facts of the case.(**11**) Where the mortgagor covenanted to pay the mortgage amount in the event of the mortgagee being dispossessed but no possession was delivered to him 'initially', it was held

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[**See however** (1862) 1 Mad HCR 114 (114) (DB) (Besides an agreement to re-pay money by a certain day there was a further stipulation in the mortgage deed that if mortgagor failed to pay he would put the mortgagee in possession — *Held*, that on mortgagor's default, mortgagee might sue for money and was not bound to accept possession.)]

8. 1954 All LJ 336 (341) (DB) ** AIR 1936 Pesh 48 (AIR 1935 Pesh 10, **Overruled.**) ** AIR 1938 Pat 585 (587) 17 Pat 737 (DB) ** AIR 1915 Nag 63 (64) 12 Nag LR 19

9. (1911) 80 LJ Ch 242 (245) (1911) 1 Ch D 414 104 Lt 132 Watling v Lewis ** (1877) 26 WR (Eng) Dig 58 (58) : 6 Ch D 544, Williams v. Hathaway

10. 1966 Ker LJ 559.

11. **(1903) 26 Mad 662 (667) (FB) ** (1899) 17 Mad 131 (133) (FB)** AIR 1956 Pat 312 (313) (DB) (Provision in mortgage deed for repayment of debt by certain date — In case of failure, mortgagee to remain in possession of mortgaged property as before — In case of dispossession mortgagor liable to pay entire debt — *Held* there was no personal covenant.) ** AIR 1940 Pat 512 (513) (Documents disclosing a plain promise to repay — But hypothecation clause securing not payment of principal but payment of interest on it — *Held* there could be no objection to giving plaintiff money decree for amount of principal.) ** AIR 1925 Mad 991 (992) (Existence of personal covenant depends on facts of each case and intention of parties as evidenced by circumstances.)

In the following cases it was held that there was a personal covenant to pay

AIR 1936 Pesh 43 (45) (DB) (Mortgage with possession for three years — After expiry of the period property to be redeemd — *Held* that fixation of period implied a personal covenant to pay — *Held* further that the word "with regard to redemption after the period of 3 years had elapsed" indicated that the redemption was considered *de rigueur* at the end of the stipulated period and that it was not intended that the mortgagee should continue to occupy the land afterwards — Mortgage therefore was not usufructuary but anomalous. AIR 1929 Pat 605 8 Pat 16, Rel on.) ** AIR 1922 Cal 52 (53) (DB) (English mortgage containing also a covenant to pay.) ** AIR 1919 Oudh 270 (270) (DB) (Simple mortgage — Possession to be delivered on default of payment within the stipulated period — Stipulation does not negative personal covenant.) ** AIR 1963 Raj 100 (103) ILR (1963) 13 Raj 54 (On facts document held to be simple mortgage — Express covenant to pay not destroyed by stipulation as to possession.) ** AIR 1924 Mad 513 (514) (DB) (Deed fixing date for payment — Land to be returned on payment.) ** (1896) 19 Mad 411 (413) (DB) ** AIR 1916 Mad 13 (14) (DB) (Where by a deed of hypothecation the executant promised to pay the amount secured within a specified period and further agreed that in case of default the sum due on the mortgage may be realised from the hypothecated property, held that the deed did not exclude a personal covenant to pay.) ** AIR 1918 Mad 530 (530) (DB) (Where a mortgage deed contained a stipulation by the mortgagors that "we shall discharge the debt" held that the mortgagors were personally liable to pay the mortgage-money.) ** AIR 1935 Lah 103 (104) · 16 Lah 612 (DB) (Mortgage partly usufructuary containing express promise to pay sum of particular date and redeem land.) ** (1873) 5 NWPHCR 128 (130) (DB) ** 1895 Bom PJ 310 (DB). (Use of the words "*ang udhar*"

that the covenant did not come into operation at all and that the mortgagee could not get any relief on the basis of the covenant.(12)

It has been held by the Calcutta High Court that the rights of a creditor who takes a security in the shape of a mortgage are not exactly as wide as the rights of a creditor under the general law his rights are to some extent curtailed by the provisions of this Act, he has no right to relief independently of the mortgage, and apart from his rights as mortgagee he cannot enforce the personal liability against the other members of the family of which the mortgagor is the manager (13)

It has been held in England that a mortgagee will not be allowed to sue on the covenant to pay if he has so dealt with the property as to render it impossible for him to restore it to the mortgagor on full payment.(14) But the principle does not apply where he cannot restore the estate by reason of his being evicted by a title paramount (15) Nor does the principle apply where the mortgagee, under the power of sale which he has, sells the property and after adjusting the amount realised towards the mortgage finds that there is still a balance He can sue the mortgagor for the balance even though he cannot restore the property to the mortgagor on payment (16) It has been held that even after foreclosure, the mortgagee is entitled to sue for the money on the covenant, but in such a case the mortgagor will get a new right to redeem the property (17)

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denotes personal liability) ** (1893) 17 Bom 425 (428) (DB) (Simple mortgage usufructuary — Distinct covenant to pay principal — Land security for the same) ** AIR 1918 Mad 558 (559) (DB) ** 1901 Pun LR No. 155 (DB)

In the following cases it was held that there was no personal covenant to pay

(1887) 11 Bom 475 (478) (DB) ** AIR 1914 Mad 114 (115) (DB) (In mortgage deed mortgagor said "Whenever we pay the same to you you shall receive it and give back the deed — *Held*, no covenant to pay — Per Sadasiva Aiyar J Seshagiri Aiyar J contra) ** (1932) 140 Ind Cas 430 (430) (DB) (Lah) (No personal covenant express or implied — Personal remedy not given) ** AIR 1914 Mad 317 318) (DB) Kanam — Liberty to mortgagors to pay mortgage money to the mortgagee at any time they like after one year — No personal covenant to pay imported) ** AIR 1928 Rang 16 (17) 5 Rang 558 (DB) ** AIR 1941 Pat 486 (488) (DB) (Provision for redemption at expiry of specified term In case of non-payment at expiry of term deed to hold good till payment — No personal covenant) ** (1908) 10 Bom LR 615 (617) (DB) (Usufructuary mortgage deed containing a personal covenant to pay — Covenant does not give right of sale)

12. AIR 1933 All 97 (98) (DB) (Mortgagee held could sue only for possession and mesne profits.) ** AIR 1937 All 711 (713) (AIR 1933 All 97, Foll.)

13. AIR 1934 Cal 73 (76) : 60 Cal 1197 (DB)

14. (1859) 54 ER 136 (137) 27 Beav 349, Palmer v Hendrie ** (1925) 94 LJ Ch 221 (223) 1925 AC 489 133 LT 60 41 TLR 336 Ellis & Co s Trustees v Dixon Johnson (This equitable rule is not applicable strictly where security consists of shares which can be purchased in market.)

Also see S 60, Note 17

15. (1869) 38 LJ Ch 382 (385) 7 Eq 399 In re Burrell Burrell v Smith ** AIR 1928 Mad 888 (888) (DB) (Part of mortgaged security lost owing to acquisition under Land Acquisition Act — Mortgagee can recover his debt.)

16. (1926) 42 TLR 694 (695, 696) 1926 AC 781 95 LJPC 167 135 LT 740 Gordon Grant & Co Ltd v F L Boos (Sale in executing of mortgage decree) ** (1873) 42 LJCP 127 (128) 8 CP 358 28 LT 537, Rudge v Richens ** AIR 1926 Mad 841 (845 846) (DB) (However a wrongful sale of mortgage property by mortgagee will deprive him of his right to recover balance of mortgage-money.)

17. (1888) 57 LJ Ch 905 (906) 39 Ch D 636 59 LT 433 37 WR (Eng) 234 Kinnaird v Trollope. (In the same way a mortgagor who has entirely parted with equity of redemption acquires, upon being sued by mortgagee, a new right to redeem)

See also cases cited in Note 3 on S. 91.

The mere fact that the mortgagee acquires the mortgaged property, for instance, by succession to auction-purchaser who has purchased the property in execution of a maintenance decree against the mortgagor, would not debar the mortgagee from recovering his debt, unless the acquisition has the effect of extinguishing his debt.(18)

The fact that a second mortgagee submits to a decree for foreclosure on the first mortgage does not prevent him from suing on the personal covenant to pay against the mortgagor.(19)

Though a mortgage, like that by conditional sale, may not import a personal covenant to pay, it necessarily implies a 'debt' within the meaning of the debt relief legislation.(20) (See also S 58 Note 29.)

3. Clause (b) — Security destroyed or rendered insufficient.

This clause merely enacted the rule well recognised in England and in India, that where the mortgaged property is lost to the mortgagee owing to no fault of the mortgagor or mortgagee, the latter would be entitled to sue for the mortgage-money. Thus where the property is lost to the mortgagee by its being destroyed by fire or flood, the mortgagee would be entitled to sue for the mortgage-money.(1) It is, however, necessary that the mortgagor should be given a reasonable opportunity to provide further security enough to render the whole security including what may remain of the original security, sufficient (2) It is only after such opportunity is given, and the mortgagor fails to furnish the additional security that the mortgagee is entitled to sue.(3)

What is reasonable opportunity will depend upon the facts of the particular case.(4) The clause does not apply where the destruction of the property is caused by the 'wrongful act' of the mortgagee(5) or where he has acquiesced in the diminution of the security.(6)

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18. AIR 1949 Nag 354 (357) : ILR (1949) Nag 284 (DB).

19. (1910) 79 LJ Ch 252 (255) (1910) 1 Ch 588 101 LT 895, Worthington & Co v Abbott (Second mortgagee submitting to a foreclosure order) ** AIR 1922 Pat 154 (157) 6 Pat LJ 670 (DB)

20. AIR 1944 Nag 289 (291) : ILR (1944) Nag 568 (FB). (Mortgage by conditional sale does not cease to be "debt" even after preliminary decree for foreclosure — Case under C.P. Relief of Indebtedness Act, 1939.)

Section 68 — Note 3

1. AIR 1968 Punj 35 (36, 37) ** 1954 Madh B LJ HCR 880 (881) (DB) (See where by appointing receiver for three-forth portion of mortgaged property the interest of mortgagee was sufficiently safeguarded, High Court will not interfere) ** (1869) 38 LJ Ch 382 (385) LR 7 Eq 399, In re Burrell, Burrell v Smith ** (1874) 21 Suth WR 226 (227) (DB). (Flood) ** (1898) 25 Cal 450 (454) (DB) (Property destroyed by inundation.) (1871) 7 Bom HCR 116 (118) (DB) (Fire) ** AIR 1923 All 433 (435) 45 All 388 (DB) (Property diminished by diluvion.)

2. See AIR 1919 All 292 (293) (DB) (It is highly doubtful whether the discovery of some defect of title is a "rendering of security insufficient" within the meaning of the clause — But if it is, it is then the duty of the mortgagee to come to the mortgagor and to ask him to give fresh security.)

3. (1910) 6 Ind Cas 569 (570) (DB) (All) (On facts period of six months held to be liberal allowance to enable mortgagor to furnish fresh security.) ** AIR 1934 Mad 644 (645) (DB) (Notice requiring mortgagor to furnish another security is condition precedent to suit for mortgage money) ** (1910) 8 Ind Cas 576 (577) (DB) (Lah)

4. (1910) 6 Ind Cas 569 (570) (DB) (All) (Period of six months allowed on the facts as reasonable time.)

5. (1913) 21 Ind Cas 581 (582) (Oudh).

6. AIR 1956 Mad 128 (129).

A 'destruction' of the mortgaged property may be said to take place in the following cases :

(1) Diluvion of the property.(7)

(2) Land washed away by flood.

(3) Property being burnt down.(8)

(4) House falling down.(9)

As illustrations of security becoming 'sufficient' may be mentioned the following

(1) Where the mortgagor being in possession as lessee of the mortgagee applies to the revenue Court and gets the rent reduced.(10)

(2) Where the mortgagor obtains a decree for pre-emption of certain properties and mortgages them but subsequently the claim for pre-emption is disallowed (11)

(3) Where A mortgages certain property to B, who sub-mortgages his right to C and A thereafter redeems B, and C is not paid his amount, C's security as against B is rendered insufficient and he can proceed against B under this clause (12)

(4) Where the mortgaged property is sold away in execution of a decree on a prior mortgage to which the mortgagee is a party.(13)

(5) Where one co-sharer mortgages the entire property and the other co-sharers obtain a decree declaring that the mortgage is not binding on their shares (14)

(6) Where there is a perpetual lease of mortgaged property by mortgagor (15)

There is a difference of opinion as to whether the mortgaged property can be said to be "destroyed" when it is acquired under the provisions of the Land Acquisition Act The general view is that there is no "destruction" of the property in such a case.(16) though where the mortgage is one with possession the mortgagee may be entitled to relief under cl (d) (17) A contrary view namely that such acquisition constitutes a "destruction" of the property has been held in the undermentioned cases (18) It is submitted that this view is not correct By the doctrine of substituted

7. AIR 1933 Pat 693 (694) ** (1874) 21 Suth WR 226 (227) (DB) ** AIR 1923 All 433 (435) 45 All 388 (DB).

8. (1870) 7 Bom HCR 116 (118) (DB) (Case before the Act)

[See also (1879) 2 Mad 187 (192) (DB). (Case before the Act.)]

9. AIR 1929 All 348 (349)

10. AIR 1923 All 584 (585) (DB).

11. AIR 1934 Oudh 415 (416) (DB)

12. AIR 1929 Oudh 455 (455) : 5 Luck 369

13. AIR 1929 Cal 121 (122) (DB).

14. AIR 1954 All 314 (315).

15. AIR 1927 Oudh 148 (149)

16. 1973 Pun LJ 540 1973 Rev LR 598 (A usufructuary mortgagee has no right to sue for mortgage money If the Government acquires mortgaged property and full compensation amount is received by the mortgagee, it cannot be said that the mortgagee have been deprived or destroyed of his security) ** (1890) 13 Mad 321 (322) (DB) (The only effect of the acquisition is to change the nature of the security — Compensation money becomes security in new form — Mortgagee entitled to claim this amount) ** AIR 1930 Oudh 292 (293) 5 Luck 702 (DB) (Do) ** (1909) 1 Ind Cas 264 (278) (DB) (Cal) ** (1913) 1 Upp Bur Rul 164 (165) (Mortgage of canal — Canal taken over by Government — Mortgagee's rights arise under cl. (c) (now cl. (d).)

17. 1969 Raj LW 391 ILR (1970) 20 Raj 629 ** (1913) 1 Upp Bur Rul 164 (165)

18. AIR 1961 Madh Pra 216 (219) (Mortgage of Jagir land with possession — Security is destroyed on resumption of land by Government — Mortgagee is, however, entitled to sue

security, the property is merely transmuted into money on which the mortgagee has his charge for the mortgage amount The mortgagee's security cannot be said either to have been destroyed or to have been rendered insufficient within the meaning of this clause.

Where 'A' had usufructuarily mortgaged some land with 'B' and there was compulsory acquisition of the said land by the Government, the compensation amount paid by the Govt for the said land was utilised by mortgagee 'B' in part satisfaction of mortgage amount and a suit was brought for balance of the mortgage amount, it was held that the usufructuary mortgage did not create a debt, and held that there was no personal covenant by the mortgagor for the repayment of mortgage money and the compulsory acquisition of mortgaged property did not amount to any destruction or deprivation. The collateral security for the mortgage amount was substituted by the compensation amount paid for the property by the Govt and as the entire compensation amount had been taken in satisfaction of the mortgage amount, the security had been exhausted, the suit of the mortgagee 'B' for recovery of balance mortgage amount was, therefore, liable to be dismissed.(**19**)

It has been held that the partition of India did not legally have the effect of destroying the rights of Hindu owners of property in Pakistan or of Muslim owners in India.(**20**) A mortgagee claiming property not mortgaged to him in substitution of the destroyed mortgaged property must establish circumstances so as to raise an enquiry in his favour (**21**)

The "insufficienty" in this clause must be such as is contemplated by S 66 A 'misdescription' of the property in the mortgage-deed does not render the security "insufficient" within the meaning of S 66 (**22**) Nor does the mere discovery of some defect in the mortgagor's title "render the security insufficient" as defined in section 66 (**23**)

In the undermentioned case it was held that in taking proceedings for commutation of bhaoli rent to money rent under S 40 of the Bihar Tenancy Act, the mortgagees who were tenants were exercising only the right which law conferred upon them and if under the law of the bhaoli rent was excessive and liable to be commuted to money rent, the mortgagees cannot be held responsible for reduction of the jama as a consequence of the commutation which was effected under the law.(**24**)

If a mortgagee in possession of Milkiat interest and Zerat land is divested of Milkiat interest by the State under Bihar Land Reforms Act unless mortgagor is given an opportunity to give further security suit for mortgage money is not tenable (**25**)

It has been held that it is not essential under this clause that the destruction of the mortgaged property should be in consequence of the acts of the mortgagor himself.(**26**)

See also Notes on Section 66.

4. Clause (c) — Deprivation of security owing to wrongful act or default of the mortgagor.

Clause (b) deals with the destruction or insufficiency of security in whole or in part by causes

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Jagirdar for mortgage money in view of deeming provision of S 6 of V P Act 1 of 1952) ** AIR 1917 Oudh 233 (234) 20 Oudh Cas 256 ** AIR 1915 Cal 699 (700) 42 Cal 1146 (1152) (DB). (Assumed.)

19. 1973 Pun LJ 540 ; 1973 Rev LR 598.

20. AIR 1955 All 706 (707).

21. (1911) 7 Nag LR 2 (7)

22. AIR 1922 Bom 217 (218) (DB) (If there is misdescription, mortgagee can get decree amended.)

23. See AIR 1919 All 292 (293) (DB).

24. AIR 1959 Pat 235 (239) : 38 Pat 35.

25. 1969 BLJR 625

26. AIR 1968 Punj 35 (37).

'other than the mortgagor's or mortgagee's wrongful act or default.' This clause deals with the 'deprivation' of security owing to the "mortgagor's wrongful act or default" On such a deprivation the mortgagee would be entitled to sue for the mortgage-money (1) It is not necessary that the deprivation of the security in part should have rendered the security insufficient within the meaning of S. 66. A deprivation to 'any' extent will entitle the mortgagee to sue under this clause even though the portion of the mortgaged property of which the mortgagee is not deprived cannot be said to be not sufficient within the meaning of S 66 (2) Under this clause a suit against persons who have not mortgaged their property but are party to the mortgage bond, is maintainable (3) The fact that the mortgagee allowed his remedy under Cl. (a) of this section to get barred by time cannot in any way affect his right to apply for a personal decree on the basis of this clause (4)

(A) Wrongful act.

A 'waste' committed by the mortgagor is a 'wrongful act' of the mortgagor which will entitle the mortgagee to sue for the mortgage-money (5) The words "wrongful act in S 68(1)(c) would include trespass or forcible possession of the mortgaged property by the mortgagor (6) Where property, the subject of an unregistered mortgage-deed for less than Rs 100(7) was subsequently sold by the mortgagor by a registered sale deed to a third person without notice of the mortgage, it was held that the mortgagee was thereby deprived of the security by the wrongful act of the mortgagor (8) Where, however, the mortgagee with possession leases back the property to the mortgagor and the latter either fails to pay the rent(9) or gets the rent reduced under the tenancy Act,(10) his act cannot be considered a wrongful act of the "mortgagor" within the meaning of this clause

In *Hira Lal v. Ghasitu*(11) where a mortgagee in possession leased back the property to the mortgagor, but on the expiry of the lease the mortgagor refused to delivery possession back to the

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Section 68 — Note 4

1. AIR 1944 All 195 (196) ILR (1944) All 277 ** (1911) 33 All 138 (142) (Sub mortgagee dispossessed owing to negligence of mortgagee — Mortgagee is responsible for the loss ** (1911) 12 Ind Cas 407 (Oudh) (Loss of security — Substitution of inferior land in partition — Mortgagee is entitled to compensation for loss suffered — Case under old Act) ** (1869) 38 LJ Ch 382 (385) L R 7 Eq 399 17 WR Eqy 516 In re Borell Borell v Smith ** AIR 1920 Cal 334 (335) (DB) ** (1897) 19 All 193 (193) ** (1884) 6 All 298 (301) (DB).
2. AIR 1938 Oudh 210 (211) (DB) (Fall in letting value of security due to mortgagor's failure to repair the property is deprivation of part of security within the meaning of the clause although such diminution does not render the security insufficient within the meaning of S 66 AIR 1923 All 584. Relied on)
3. AIR 1949 Cal 530 (532) ILR (1945) 2 Cal 473 (DB) (Attention drawn to change in wording of the section under the T P Amending Act 20 of 1929 whereby the words "the mortgagor" which occurred between the word sue and the words "for the mortgage money" were omitted.)
4. (1948) 53 Mys HCR 331 (335) (DB).

   [See 1910 Mad WN 825 (826) (DB).]
5. AIR 1915 Mad 633 (634) (DB) (Having regard to S 100 the provisions of S 68 as to the liability of a mortgagor who commits waste apply enquatly to persons creating a charge)
6. (1991) 3 Bom CR 105 (113).
7. Such a mortgage was valid under the law as it stood before 1929
8. (1906) 29 Mad 362 (364)
9. AIR 1938 All 188 (190) : ILR (1938) All 218 (DB).
10. AIR 1932 All 51 (51) (DB).
11. (1894) 16 All 318 (322, 324) (FB).

mortgagee, it was held by two Judges of the Full Bench that there was a deprivation of the security by the wrongful act of the mortgagor within the meaning of this clause, while the other three judges held that the clause applicable was clause (d) and not this clause.

Where the mortgagee is deprived of whole or part of his security by wrongful act of the mortgagor, suit for mortgage money will be in the nature of a suit for wrong done to the mortgaged property.**(12)**

Where a possessory mortgagee leased back the property to the mortgagor on the same date and under the mortgage the mortgagee was entitled to recover mortgage dues only in the case of dispossession on failure of the mortgagor to pay rent the remedy of the mortgagee was to sue for mortgage dues and not sue for possession.**(13)**

A transfer of the 'equity of redemption' by the mortgagor cannot be said to be a wrongful act of the mortgagor by which the mortgagee can be said to be deprived of his security.**(14)** Nor is the mortgagor guilty of any wrongful act by allowing a sale in rights in any way **(15)** It would of course be otherwise, where the sale would be binding on the mortgagee.**(16)** It has been held by the Nagpur High Court that the co-sharers of a village cannot be made responsible under this clause for the diminution in the mortgage security caused by the wrongful act of the lambardar it is not proved that he did it with their consent.**(17)**

The cause of action for enforcing the personal remedy under this clause arises, only on the date on which the mortgagee loses the benefit of the security by reason of the wrongful act of the mortgagor.**(18)**

In the case of a usufructuary mortgagee losing security as a result of the wrongful act of the mortgagor his remedy is either to sue for money or for possession and in such case the period of limitation is six years under Art. 120, Limitation Act, 1908.**(19)**

(B) Wrongful default.

A failure by the mortgagor to disclose,**(20)** or to pay up a prior incumbrance**(21)** or to disclose a defect in his title**(22)** would be a 'wrongful default' within the meaning of this section.

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12. AIR 1973 Orissa 141

13. AIR 1972 Pat 295 (297) : 1972 BLJR 671.

14. AIR 1936 Rang 80 (81, 82) (DB) (Unless there is a covenant against alienation) ** (1884) 6 All 298 (302) (DB) ** (1904) 6 Bom LR 288 (289) (DB).

[**See also AIR 1945 PC 91 (94) : 72 Ind App 165.** (Person executing security bond charging property and subsequently transferring the major portion of the property included by him in the security bond — "It is open to some doubt" whether he thereby impairs the security by his conduct.)]

[**But see** 1892 All WN 66 (67) ** 1901 All WN 52 (52) (Submitted not correct)]

15. (1892) 15 Mad 304 (305) (DB) ** 1881 All WN 59 (59) (DB)

16. (1910) 7 Ind Cas 173 (174) (DB) (Mad) (Money decree declaring right of A to sell the property in execution thereof — Subsequent mortgage — Mortgagor asking mortgagee in the deed to pay off the decree but subsequently countermanding it — Sale in execution of money decree — **Held,** clause (c) applied.)

17. AIR 1949 Nag 319 (323) : ILR (1949) Nag 122 (DB).

18. (1948) 53 Mys HCR 331 (338) (DB).

19. 1971 Ker LJ 51

20. (1876) 25 Suth WR 51 (52) (DB) ** (1910) 7 Ind Cas 251 (252) (DB) (Cal).

21. (1800) 13 Mad 192 (195) (DB)

22. AIR 1931 Oudh 5 (5) 6 Luck 374 (No title to a portion of property mortgaged — This clause applied) ** (1886) 10 All 47 (48) (DB). (Mortgage of non-transferable cultivatory holding.)

Thus, where joint family property is mortgaged by a member of the family for purposes not binding on the family and the mortgagee is deprived of the property in a suit by the other members of the family, the mortgagee would be entitled to relief under this clause.(23) The case would, however, be different where the mortgagee is 'aware' of the defect in the title of the mortgagor to mortgage the property.(24)

A failure to pay the Government revenue due on the mortgaged property, resulting in the sale of the property is a wrongful default of the mortgagor entitling the mortgagee to sue for his money under this clause.(25)

It was held in a case before the Act that where the mortgagee was deprived of 'part' of the security he could sue only for a 'proportionate' part of the mortgage-money (26) Under this section it is clear that he can sue for the whole of the mortgage money even if he is deprived only of a part of the security There is, however, nothing in this section to take away the right of the mortgagee to claim a portion of the mortgage-money, when deprived of a part of the security, as damages for breach of implied contract under S. 65 of the Act.(27)

The word "mortgagor" would include persons deriving title from him (see S 59A) and the latter would be liable under this section not only in respect of 'their own wrongful act or default.(28) but also in respect of the default of the mortgagor himself, though in this case, they would be liable only to the extent of the property got by them from the mortgagor (29) The wrongful act or default must be 'anterior' to the deprivation of the security in whole or in part Where the mortgagee is for instance deprived of the property by the owner of a paramount title the mortgagor's failure to defend his title against the holder of such title is not a wrongful act or default within the meaning of this clause.(30)

5. Clause (d).

Clause (d) is an enabling provision (1) In order that this clause might apply the mortgagee must, under the terms of the mortgage, be 'entitled to possession'(2) and the mortgagor must have failed either to deliver possession of the mortgaged property or if he has delivered possession, to

23. (1913) 21 Ind Cas 581 (582) (Oudh).

[**See also** (1883) 9 Cal 234 (236) 11 Cal LR 355 (DB) (Case before the Act)]

24. AIR 1939 All 260 (263) ILR (1939) All 313 (DB) (Mortgagee knowing that property belonging to joint family and loan was not for legal necessity) ** AIR 1921 Oudh 47 (47) (DB). (Do.) ** AIR 1938 Cal 48 (51).

25. (1948) 53 Mys HCR 331 (DB) ** AIR 1934 Rang 227 (228) ** (1909) 3 Ind Cas 311 (313 314) (DB) (Cal).

26. (1876) 25 Suth WR 7 (8).

27. AIR 1949 Pat 487 (490) : 28 Pat 359 (DB)

28. AIR 1949 Nag 319 (336) ILR (1949) Nag 122 (DB) ** AIR 1939 Nag 256 (258) ILR (1940) Nag 63. (AIR 1930 Nag 139 held **Overruled** by S 59-A) ** AIR 1915 Mad 633 (634) (DB) ** AIR 1932 Pat 273 (274) (DB).

[**But see** (1884) 6 All 298 (301, 302) (DB).]

29. (1910) 7 Ind Cas 173 (174) (DB) (Mad)

30. AIR 1919 Mad 876 (876) : 42 Mad 578 (DB).

Section 68 — Note 5

1. AIR 1956 Madh B 110 (112) : ILR (1956) Madh B 92

2. AIR 1982 Pat 180 (183) 1982 Pat LJR 441 ** ILR (1956) Madh B 92 ** AIR 1921 Oudh 47 (47) (DB).

[**See also** AIR 1966 Ker 234 (234) ILR (1966) 1 Ker 345 (DB) (Usufructuary mortgage — Mortgagor is under obligation to give possession to mortgagee)]

secure such possession without disturbance by the mortgagor or by any other person claiming under a title superior to that of the mortgagor Where, therefore, the mortgagee has been given possession and there has been no disturbance thereof by anybody, this clause will not apply even though it is discovered that the mortgagor has no title to a portion of the property.(3) In the undermentioned case(4) the mortgagor sold the equity of redemption to *X* and the mortgagee pre-empted *X* It was held that the change in the nature of the possession, from that of a mortgagee to that of a purchaser, did not bring the case within this section so as to entitle the mortgagee to sue for his money. It is necessary under this clause that the mortgagee must not only be entitled to possession but must be entitled to possession according to law Thus, a mortgagee of an undivided share of coparcenary property not being entitled under the Hindu Law to joint possession cannot recover mortgage-money under this claue (5) This clause will not apply where a usufructuary mortgage provides that if the mortgagee is dispossessed, he should be entitled to recover the amount advanced by him In such a case where the mortgagee does not obtain possession of the property, he would be entitled to recover the mortgage-money with interest as stipulated in the bond not as a claim with respect to a personal covenant in the bond or under S 68 (d) of the Act but as one to enforce a charge upon the immovable property under the covenants in the bond itself (6)

The failure to deliver or to secure possession need not for the purposes of this clause, be in respect of the whole of the mortgaged property A failure to deliver or to secure possession of even a 'portion' of the property will entitle the mortgagee to sue for the mortgage-money (7)

It is not necessary that the failure to deliver or to secure possession should be 'intentional' on the part of the mortgagor (8) Nor is it necessary under this clause that the mortgagee should, in the first instance, call upon the mortgagor to furnish fresh security equivalent to the one of which he was dispossessed, as is required by clause (b) The contrary view expressed in the undermentioned case(9) cannot be regarded as correct.

If the mortgagee is not put into possession under the usufructuary mortgage on the date of the mortgage and the mortgagor neglects to deliver possession, the mortgagee is entitled to sue for mortgaged money.(10)

(A) Failure to deliver possession.

Where the mortgagee is entitled, under the terms of the mortgage, to possession, and the mortgagor fails to deliver the same to him, the mortgagee will be entitled to sue under this clause for the mortgage-money (11)

3. AIR 1919 All 292 (292) (DB)

4. AIR 1916 Oudh 332 (333).

5. AIR 1952 Kutch 18 (19).

6. AIR 1921 Pat 403 (405).

7. AIR 1919 Pat 487 (489) (DB) (Mortgagee dispossessed of part of security can repudiate contract, relinquish possession of the other part, sue for whole mortgage money and obtain money decree) ** ILR (1944) All 359 (362) (Mortgagee purchasing mortgaged property — Portion which was already attached going out by auction sale — Possession of mortgagee over rest of property — Previous mortgages revived giving right to mortgagee to sue.) ** AIR 1924 All 877 (878).

8. (1901) 4 Oudh Cas 320 (327, 328) (DB).

9. AIR 1919 Mad 876 (876) 42 Mad 578 (DB) (Case under old clause (c), now clause (d))

10. AIR 1969 Mys 20 (21) : (1967) 2 Mys LJ 56.

11. AIR 1966 Ker 234 (234) ILR (1966) 1 Ker 345 ** AIR 1957 Raj 120 (121) ILR (1956) 6 Raj 1070 (DB) ** AIR 1956 Madh B 110 (112) ILR (1956) Madh B 92 ** AIR 1953 Hyd 231 (232) ILR (1953) Hyd 331 (DB) ** (1912) 13 Ind Cas

This was the law even before the Act.(12) The mortgagee has also other remedies open to him He may sue for 'damages' for breach of the contract to deliver possession and claim as part of the damages, the amount advanced on the mortgage.(13) He may sue for possession of the property.(14) It has been held in the undermentioned cases that where the mortgagor fails to deliver possession and the mortgage deed also specifically provides a personal covenant to pay, the mortgagee may either exercise his option under S. 68(1)(d) or may act under the terms of the personal covenant itself. If the option is exercised by him under S. 68(1)(d), the mortgage amount becomes due and the mortgagor will have to submit to a decree for the payment of the said amount. If the option under S. 68(1) is not exercised by the mortgagee, the amount cannot be said

336 (336) (Cal) ** AIR 1941 Pat 301 (302) (DB) ** AIR 1923 All 584 (585) (DB) (Property not belonging to the mortgagor included in the mortgage-deed.) ** AIR 1925 All 736 (736). (Sub-mortgagee of occupancy holding can sue his mortgagor for money if the latter fails to put him in possession.) ** (1884) 6 All 298 (301) (DB). ** (1907) 4 All L Jour 249 (252) (DB) ** AIR 1921 Mad 636 (636) (DB) ** AIR 1920 Lah 355 (357). ** (1912) 17 Ind Cas 362 (362) (Lah) ** (1892-96) 2 Upp Bur Rul 573 (574).

[**See also** (1894) 17 Mad 469 (471) (DB). (Mortgagor executing a second mortgage and putting second mortgagee in possession — First mortgagee unable to obtain possession — He can sue for mortgage money instead of for possession.) ** (1898) 12 All 203 (206) (DB). (A mortgage deed for four years certainly provided that interest should be paid at a certain rate and that the mortgagee should have possession of the property and credit the profits thereof first in respect of the interest and then the balance, if any, in respect of the principal and that the property was redeemable at the expiry of the term on payment of the interest and principal that may then remain due on the mortgage. — The mortgagee not having obtained possession brought first a suit for unpaid interest due and got a decree. It was held that second suit for principal and residue of that interest up to the date of suit was barred under the section, the claim having arisen out the same cause of action, viz., the non-delivery of possession of the mortgaged property.) ** AIR 1927 All 417 (418). 49 All 430 (DB).]

12. **(1846-50) 4 Moo Ind App 444 (451) (PC)** ** (1875) 7 NWPHCR 55 (56) (DB) ** (1900) 2 Bom LR 201 (202) (DB). (Such a suit will be one for a consideration that failed.)

[**See also** (1864-65) 2 Mad HC R 315 (316) (DB). (When the demiser of land under a kanor agreement is unable to give possession, the demisee may repudiate the contract and recover the amount advanced.)]

13. AIR 1954 Hyd 41 (43). ILR (1953) Hyd 642 (DB). (Anomalous mortgage providing for foreclosure on default of payment of mortgage money — Foreclosure not possible — *Held* that the mortgagee could only claim mortgage money by way of compensation for breach of contract and decree for possession was rightly refused in absence of prayer in plaint for possession until payment of mortgage money.) ** AIR 1953 Hyd 231 (232). ILR (1953) Hyd 331 (DB) ** **(1890) 17 Cal 432 (436) (PC).** (Damages being the amount of money advanced together with interest.) ** (1864) 1 Suth WR 365 (366) (DB) ** (1874) 22 Suth WR 260 (262) (DB).

14. AIR 1956 Madh B 110 (113). ILR (1956) Madh B 92 ** AIR 1953 Hyd 231 (232). ILR (1953) Hyd 331 (DB). (Mortgagee granting lease to mortgagor — Possession not delivered back to mortgagee after expiry of lease — Mortgagee can sue for possession on basis of lease deed.) ** (1953) 32 Pat 903 (914, 915). (In a suit brought before expiry of term of mortgage, mortgagee is entitled to obtain decree for possession and decree cannot be refused on ground that mortgagor was not in possession on date of execution of mortgage.) ** AIR 1921 Lah 309 (310) (DB) ** (1912) 16 Ind Cas 735 (736) (DB) (Cal). (Mortgagee may sue for money or for possession at his choice.) ** (1912) 14 Ind Cas 260 (261) (All) ** (1899) 2 Oudh Cas 24 (25). (Remedy provided by cl. (c) now cl. (d) is an alternative remedy and does not debar a suit for possession.) ** AIR 1942 Oudh 172 (174) : 17 Luch 362 (Do.) ** (1894) 17 Mad 469 (471, 472) (DB) ** AIR 1936 Pesh 38 (39).

[**See also** AIR 1919 Cal 46 (48) : 46 Cal 448 (DB).]

to be due and the mortgagor will have to wait for the expiration of the stipulated period before he can redeem the property (15) Where the mortgage provides the period of redemption and the mortgagor fails to deliver possession of mortgaged property agreed upon, and the option under S. 68(1)(d) is not exercised by the mortgagee, the amount of mortgage cannot be said to be due till the expiry of the period of redemption Therefore the failure of mortgagee to sue immediately on the default either for recovery of money or for possession under S. 68(1)(d) is not fatal for recovery of mortgage debt after the period of redemption (16) Where, being entitled to several reliefs on the same cause of action, he sues for one of them only, he will be barred under the provisions of O 2, R. 2 of the Code of Civil Procedure from subsequently suing for the other reliefs (17) It has, however, been held in the case noted below(18) that the right conferred under this clause is nothing but compensation to the mortgagee for the default of the mortgagor to surrender possession of the mortgaged property and not an alternative remedy for recovery of the mortgage-money based on the right founded upon the personal covenant contained in the mortgage deed to repay the mortgage-amount and that there could be no election, in the legal sense, in the case of a mortgagee entitled to sue for the mortgage-money both by reason of the covenant in the contract and the provisions of this clause, but who chooses to enforce the covenant and not the statutory right, for getting any payment.(19)

The failure to deliver possession is not restricted to a failure 'initially' to deliver possession at the time of the mortgage Where the mortgagee, not entitled to possession at the time of the mortgage, becomes subsequently entitled to possession.(20) e g., where the mortgagor covenants to deliver possession on default of payment of interest and such default occurs,(21) a failure to deliver possession on such date will entitle the mortgagee to claim relief under this clause.

In the undermentioned case(22) the mortgagee was entitled on failure of the mortgagor to pay the mortgage-money in five years, to 'take possession' of the mortgaged property But he never demanded possession from the mortgagor. It was held that there was no failure to deliver possession within the meaning of this clause.

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15. AIR 1963 Mad 342 (346) ILR (1963) Mad 580 (It was open to him to wait till the expiry of the period fixed for payment in the mortgage deed and to bring a suit within 12 years after the expiry of that period despite the accruing of the right to sue for the mortgage money earlier under S 68(1)(d) — AIR 1954 Bom 407, Foll.) ** AIR 1954 Bom 407 (408) ILR (1954) Bom 717.

16. (1988) 1 LS (AP) 292 (294) : (1988) 1 Andh LT 890

17. See the AIR Commentaries on the Code of Civil Procedure, 10th (1985) Edn , O 2, R 2, Note 18

18. AIR 1963 Mad 342 (344) · ILR (1963) Mad 580 (Right to sue for mortgage money is only a privilege and not an obligation — Notice to pay mortgage money under S. 68(1)(d) does not amount to election to abandon remedy based upon cause of action containd in deed in preference to remedy provided under S. 68(1)(d)

19. See ILR (1960) 10 Raj 1608 (1611) (Suit to recover money and damages on mortgagor's failure to secure possession — Plaintiff referring to express covenant in mortgage deed to refund mortgage-money in such circumstances — Suit held fell under S 68(1)(d) and could not be regarded as one for enforcing covenant.)

20. (1908) 30 All 400 (402) (DB) (There was a covenant that the mortgagee will be entitled to recover his money if possession was not delivered on default of payment of instalment — Mortgagee brought suit for recovery of money — *Held* that suit in effect was suit for compensation for breach of contract and was governed by Art 116 of the Limitation Act.)

21. (1901) 4 Oudh Cas 320 (326) (DB) ** (1892) 15 Mad 65 (66) (DB)

22. AIR 1933 Lah 174 (175) (Mortgage by conditional sale)

(B) Failure to secure possession.

The mortgagor is bound to secure possession to the mortgagee without disturbance —

(1) by himself, or

(2) by any person claiming under a title superior to that of the mortgagor

A dispossession of the mortgagee by the mortgagor will be a disturbance by the mortgagor and will entitle the mortgagee to sue for the mortgage-money **(23)** Where the mortgagee in possession leased the mortgaged property to the mortgagor, but on the expiry of the lease the latter refused to deliver possession, it was held by three Judges of the Full Bench of the Allahabad High Court that there was a failure by the mortgagor to secure possession to the mortgagee within the meaning of this clause **(24)** Where *A*, *B* and *C* executed a Zarpeshgi mortgage in favour of *D* and later on *D* granted a lease in favour of *A* and *B* only and *A* and *B* remained in possession after the expiry of the lease, it was held that this section did not apply as there was no dispossession by *C* even though possession of *A* and *B* would amount to dispossession of *D* **(25)**

Clause (e) of the section, as it stood before the amendment of 1929 and which corresponded with clause (d) of the present section, used the words "or any other person" These words were however, generally interpreted to mean persons with a paramount title and not others **(26)** though in the undermentioned case,**(27)** those words were interpreted to mean any person claiming through the mortgagor' and not a person claiming under a superior title The amendment now makes the position quite clear.

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23. AIR 1965 Ker 154 (155) (To secure possession to mortgagee is implied agreement of usufructuary mortgage — Mortgagee has right to sue for money advanced) ** ILR (1965) 15 Raj 503 (509) (Usufructuary mortgagee deprived of his possession filing suit for possession — S 68 T P Act is no bar to file suit for possession) ** AIR 1961 Punj 477 (480) (Usufructuary mortgage — Possession taken back by mortgagor — Mortgagee entitled to sue for mortgage money) ** AIR 1958 Mys 32 (33) ILR (1957) Mys 125 ** (1903) 2 Cal LJ 493 (495) (DB) (Dispossession of usufructuary mortgagee by mortgagor) ** 1881 All WN 71 (71) (DB) ** AIR 1931 Lah 694 (695) (Mortgagor liable only if dispossession is caused by him or by person deriving title through him — He cannot be held liable for tortious acts of strangers) ** (1875) 24 Suth WR 426 (426) (DB) ** AIR 1927 Pat 230 (230) (DB) ** (1910) 5 Ind Cas 130 (131) (DB) (Cal) (Dispossession by a co sharer of the mortgagor) ** AIR 1922 All 197 (199, 200) 44 All 77 (DB) ** (1912) 16 Ind Cas 735 (736) (DB) (Cal) (Remedy provided by cl (c) (now cl (d)) not exhaustive — Mortgagee may sue for money or for possession) ** AIR 1933 Oudh 35 (36) 8 Luck 190 (DB) (1907) 6 Cal L Jour 143 (145) (DB).

[**See also** (1910) 13 Oudh Cas 155 (157) (Mortgagee was dispossessed under a decree obtained by certain person, on the ground that the mortgagors were members of a joint Hindu family and had no authority to make the mortgage)]

24. (1894) 16 All 318 (322, 323, 324) (FB). (Dissenting from 6 All 298)

[**See also** AIR 1949 Pat 166 (168) (Usufructuary mortgage — Mortgagor in possession as lessee on monthly rental — Default in payment of rent — Suit by mortgagee for possession or for rent in lieu of interest — Term of mortgage expiring on date of suit — Suit held not maintainable — Remedy held lay under S 68, for mortgage amount)

25. AIR 1954 Pat 304 (307)

26. (1892) 15 Mad 304 (306) (DB) (The words "any other person" mean any other person having a title and not a trespasser) ** (1897) 19 All 191 (193) (Do) ** AIR 1924 All 48 (49) 43 All 484 (DB) (A sale of the property was effected in favour of the usufructuary mortgagee This sale was pre empted and the mortgagee was deprived of his possession of the property — **Held,** that the case was not one of novation of contract and notwithstanding the sale, the mortgage revived and as the mortgagee could no longer get back possession he could recover the mortgage-money.)

27. AIR 1931 Lah 694 (695).

The following are illustrations of persons with a superior title to that of the mortgagor :

(1) A co-sharer of the mortgagor.(28)

(2) A prior encumbrancer.(29)

(3) A landlord of the mortgagor who gets the mortgage set aside (30)

A 'trespasser' with no title is not a person claiming under title superior to that of the mortgagor and a disturbance by him is not within this clause (31) Certain property belonged to two persons *A* and *B* *A* bequeathed by his will, his share to *C* who subsequently transferred the same to *B*, so that *B* became full owner *B* then mortgaged the property with possession to *X*, and delivered possession Thereafter a creditor of *A* obtained a decree against the 'assets' of *A* in the hands of his widow and *C* and attached the mortgaged property in execution of his decree *X* preferred a claim which was dismissed but did not file a suit to challenge this order The creditor brought the property to sale, purchased it and then dispossessed *X*. *X* thereupon sued for relief under this clause It was held that the creditor was not a person with any title inasmuch as the mortgaged property did not constitute the 'assets' of *A* and could not be attached as such, that the disturbance of possession could not therefore be said to be by a person with a title superior to that of the mortgagor, and that therefore this clause did not apply.(32)

In the undermentioned case,(33) *A* mortgaged property to *X*. *B*, claiming title to the property in himself, mortgaged the same property to *Y* who dispossessed *X*. It was held that this clause applied.

As to the failure to deliver possession or disturbance of possession by persons claiming under the mortgagor, see Notes 6 and 7.

The mortgagee has also other remedies open to him. He may sue for possession of the property (34) Where it may be a usufructuary or anomalous mortgage, it would be open in either case to

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28. (1873) 20 Suth WR 484 (486) (DB) ** (1910) 5 Ind Cas 130 (131) (DB) (Cal) (On partition) ** AIR 1936 Oudh 174 (175) · 11 Luck 711 (DB) (Section 68(d) of the T P Act is sufficiently general to cover a case where the mortgagee of an undivided share of a co-sharer is dispossessed of the property by the co-sharers of the mortgagor who have been allotted that property at a subsequent partition. It authorises the mortgagee to sue the mortgagor for the mortgage-money if the latter fails to show what property, if any, is allotted to him in lieu of the property covered by the mortgage which has been allotted to the shares of other co-sharers.) ** AIR 1924 Pat 91 (93) (DB).

29. AIR 1922 All 197 (199) 44 All 77 (DB) (Where eleven villages were usufructuaraly mortgaged by a deed, but subsequently nine villages were sold in execution of a prior mortgage decree and the mortgagee did not repudiate the entire mortgage at that time and remained content with the security of two villages only for the money advanced by him it was held that he could not, unless he was dispossessed from these two villages, put forward a claim for his money) ** (1905) 27 All 488 (491). (Property sold under prior mortgage decree — Subsequent mortgagee can sue for his money even if he himself purchased the property at the sale in order to save the property.)

30. AIR 1934 Lah 853 (857) : 15 Lah 751 (FB). (61 Ind Cas 604, Overruled.)

31. (1892) 15 Mad 304 (306) (DB) ** (1897) 19 All 191 (193).

[But see AIR 1918 Pat 316 (317, 318) 3 Pat LJ 162 (DB). (The decision seems to imply that the mortgagee in such cases may have also a remedy against the mortgagor, in addition to his remedy against the trespasser — Submitted wrong)]

32. AIR 1936 Oudh 263 (264) : 12 Luck 144.

33. AIR 1924 Rang 143 (144).

34. See AIR 1950 Pat 34 (35) (DB) (Subsequent simple mortgagee dispossessing prior usufructuary mortgagee in execution of his decree to which latter was not party — Latter can bring suit against former for possession and is not confined to suing for mortgage-

the mortgagee to sue for possession of the mortgaged property (35)

If the mortgagee under a usufructuary mortgage fails to sue for possession from an alienee and only sues for the mortgage money no decree can be passed against the alienee if the mortgagee does not sue for possession from the mortgagor (36)

See also the undermentioned(37) case and Note 14

6. Effect of acquiescence by mortgagee in disturbance of possession.

Where the mortgagee acquiesces in the disturbance of possession(1) or in the failure of the mortgagor to give possession,(2) he will lose the right to claim interest or damages for the period he is out of possession. It is conceived that he would lose also his right to sue for the money under clause (d) of this section (3) In the case of a disturbance of possession however the acquiescence

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money) ** AIR 1943 Pesh 1 (3) (DB) (*A* and *B* mortgaging land with possession to *C* and *D* — *A* and *B* paying whole mortgage money to *C* and subsequently mortgaging same land to E with possession — Payment to *C* held did not discharge whole mortgage and *D* was entitled to sue for possession of half of the land mortgaged

35.AIR 1971 Mys 312 (316) : (1971) 2 Mys LJ 24

36. ILR (1974) Kant 468

37. AIR 1963 Pat 350 (353) (Unless the non payment of the interest on the mortgage in the case of a lease back causes the principal mortgage-money to become due an earlier suit for arrears of rent in lieu of interest cannot bar a subsequent suit for the principal money as they would arise out of two distinct causes of action) ** AIR 1963 Pat 87 (92) 43 Pat 747 ** AIR 1962 Pat 413 (414 415) ** AIR 1960 Pat 485 (486) (Zarpeshgi case — Mortgagor leasee holding over — Suit for recovery of rent by mortgagee lessor — **Held** unless zarpeshgi deed and kabuliyat formed part of one and same transaction suit for recovery of rent was not maintainable.) ** AIR 1960 Pat 106 (108, 109)

Section 68 — Note 6

1. AIR 1956 Mad 128 (129) ** AIR 1922 Oudh 102 (103 104) ** **(1902) 24 All 521 (531, 532) : 29 Ind App 148 (PC).** (Mortgage of 12 villages — Mortgagee dispossessed of 6 villages — Mortgagee remaining satisfied with diminished security for 14 years — No attempt even to enhance rent of remaining villages — Mortgagee held not entitled to claim interest) ** AIR 1932 Oudh 57 (58) (DB) (Where a mortgagee after dispossession acquiesces in the situation he cannot put forward a claim for interest) ** (1904) 27 All 313 (316, 317) (DB) ** AIR 1934 Cal 149 (150) (DB) ** AIR 1919 Pat 227 (229) (DB) (Letters patent appeal from AIR 1917 Pat 526 which is confirmed) ** AIR 1922 Oudh 102 (103) ** AIR 1927 Oudh 87 (88) ** (1912) 13 Ind Cas 156 (157) (DB) (All)

2. AIR 1927 Oudh 594 (595) 2 Luck 676 (DB) (Mortgagee not getting possession over a small portion — Failure to take further remedy to recover possession — He is not entitled to claim interest on that account) ** AIR 1926 Oudh 224 (225) (Do) ** AIR 192 Nag 96 (97) ** (1909) 31 All 325 (328) (DB) ** (1906) 9 Oudh Cas 144 (145 146)

[See also AIR 1945 All 202 (203) : ILR (1945) All 676 (FB). (Where in the case of a usufructuary mortgage possession of part of the property mortgaged is not delivered to the mortgagee, the mortgagee cannot claim by way of interest the profits of the property which had not been delivered to him as a charge upon the property at the time of redemption) ** AIR 1921 Bom 28 (29) 45 Bom 523 (DB) (There is nothing in S 68 which can enable mortgagee to claim interest which is not given by mortgage bond) ** (1886) 8 All 194 (198) (DB) (Usufructuary mortgage for ten years — Interest at one rupee per cent per mensem agreed — In case possession not given to mortgagee provision entitling him to sue immediately for principal money with interest at Rs 1-6-0 per cent per mensem — Mortgagee not getting possession but keeping quiet for 9 years — *Held* that creditor waived the provision and transaction must be looked at simply as loan at the rate of one rupee per cent per mensem.)]

Also see S. 58, Note 35 and S. 60, Note 10.

3. 1883 All WN 91 (91) (DB) ** (1913) 18 Ind Cas 286 (287) (Oudh)

will result in the mortgagee losing his right to sue for the money only in respect of the 'particular disturbance' acquiesced in.(4)

The question whether there has been acquiescence such as would deprive the mortgagee of his rights is a question of fact depending upon the facts and circumstances of each case.(5)

7. Dispossession owing to default of mortgagee himself.

The mortgagee cannot take advantage of his own default. If he is dispossessed owing to his own default, he cannot sue for the mortgage-money.

Illustrations

(1) A mortgagee bound to pay assessment on the mortgaged property fails to pay it with the result that the mortgaged property is sold for the recovery of such amount. He cannot sue for the mortgage-money under this section.(1)

(2) A mortgagee entitled to make a valid defence to a suit by a subsequent mortgagee failed to make it with the result that his security was diminished. It was held that he could not sue for the mortgage-money.(2)

(3) A simple money creditor of the mortgagor attached the mortgaged property in execution of his decree. The mortgagee objected under O. 21, R. 62, Civil Procedure Code but the objection was dismissed. He failed to file a suit under O. 21, R. 63 within one year of the dismissal of the objection, but filed a suit for the mortgage-money, on his being dispossessed by the auction-purchaser in execution of the money decree. It was held that he was not entitled to do so.(3)

See also the undermentioned cases.(4)

8. Transferee from mortgagor.

Under the old section which did not contain any proviso such as that found now in the section, it was held that the words "binds himself" in clause (a) of the section were an express provision showing that the word "mortgagor" in that clause did not include a person deriving title from him and that therefore the personal liability under that clause was not enforceable against the transferee from him,(1) though a contrary opinion was also expressed in the case noted be-

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[See AIR 1922 All 197 (199) : 44 All 77 (DB). (Mortgage of 11 villages — Mortgagee put in possession of only 2 villages and remaining content with this security — *Held* that so long as he continued in possession of these 2 villages, he was not entitled to sue for the mortgage-money.)]

4. AIR 1922 All 197 (199) : 44 All 77 (DB).

5. AIR 1919 Pat 227 (229) (DB).

[See AIR 1925 Oudh 30 (33). (Mere delay in suing held not to amount to acquiescence.)]

Section 68 — Note 7

1. AIR 1929 Pat 209 (210) : 8 Pat 569 (DB) ** AIR 1925 Pat 291 (292, 293) ** 1879 Bom PJ 487 (DB). (Security lost because the mortgagee did not pay the assessment which he was bound to pay under the contract.) ** (1906) 3 Cal LJ 220 (221, 222) (DB).

2. AIR 1917 Pat 451 (452) : 2 Pat LJ 490 (DB).

3. AIR 1936 Oudh 263 (264) : 12 Luck 144.

[See (1962) 3 Guj LR 1002 (1003). (Purchaser of equity of redemption of mortgage at Court sale not a 'debtor' under S. 30(1) of Bombay Money Lenders Act, 1947 — Mortgage debt — Does not become debt of purchaser of equity of redemption.)]

4. AIR 1933 Lah 836 (838) (DB). (Priority lost by mortgagee's mistake of law.) ** AIR 1923 Lah 357 (358) (DB). (Usufructuary mortgagee losing possession owing to his default in not obtaining proper sanction of the Commissioner under the law in force.)

Section 68 — Note 8

1. AIR 1928 Rang 189 (190) : 6 Rang 297 (DB).

low.(2) The proviso now makes the position clear, and is in accordance with general principles of law. Where, therefore, a mortgage contains a personal covenant and cl. (a) is applicable, the personal liability can be enforced only against the mortgagor or his legal representative but not against the transferee from the mortgagor or from his legal representative (3).

Section 59-A which provides that the word "mortgagor" shall be deemed to include persons deriving title from him, cannot apply to cases coming under cl. (a) inasmuch as the proviso is an express provision to the contrary. A personal covenant to pay does not run with the land(4) and therefore cannot be enforced against the assignee of the property (5). In *Nanku Prasad v. Kampta Prasad*(6) their Lordships of the Privy Council held, on the facts, that the purchaser of the equity of redemption did not become personally liable to the mortgagee to discharge the mortgage debt (7). The proviso to section is however, limited to cl. (a) of the section. So far as the other clauses of the section are concerned, the word "mortgagor" would in view of S. 59-A include a transferee from him.(8)

Where a mortgage suit is filed against the mortgagor and subsequent purchaser of mortgaged security and the mortgagor died during pendency of the suit, the suit can continue against the purchaser.(9) The undermentioned case(10) holding that right of mortgagee to sue for mortgage money is only against mortgagor and not third person even in cases covered by other clause of sub-sec. (1), it is submitted is not correctly decided.

[See also AIR 1917 Lah 31 (33); 1917 Pun Re No. 98 (DB). (Transferee from mortgagor not personally liable for the claim of interest.)]

2. AIR 1926 Rang 145 (146). (Mortgage containing personal promise to pay — Transferee from mortgagor held personally liable in equity.)

3. AIR 1937 Oudh 517 (520) (DB).

[See also AIR 1934 All 8 (9, 10). (Subsequent mortgagee not personally liable to prior mortgage.)]

4. See Notes on S. 40.

[See also AIR 1937 Oudh 20 (23) : 12 Luck 313 (DB).]

5. AIR 1938 Nag 80 (82); ILR (1938) Nag 268 (DB) ** AIR 1934 Pat 1 (2) (DB) ** (1913) 18 Ind Cas 747 (749) (DB) (Cal) ** AIR 1925 Oudh 593 (594) ** AIR 1937 Oudh 20 (23); 12 Luck 313 (DB).

Also see S. 58, Note 29.

[But see 1887 All WN 119 (120) (DB). (Mortgagee held entitled to claim compensation for the breach of promise of the mortgagor to pay interest on the principal sum after giving up possession and such a claim held sustainable against the assignee of the mortgagor who was in possession of the premises and enjoyment of the profits.)]

6. AIR 1923 PC 54 (54).

7. See also AIR 1926 Pat 474 (477) : 5 Pat 468 (DB).

8. AIR 1934 Pat 1 (2) (DB). (Case under clause (d).) ** AIR 1915 Mad 633 (634) (DB). (Case under old clause (b).) ** AIR 1932 Pat 273 (274) (DB). (Case under old clause (c).) ** AIR 1939 Nag 256 (258); ILR (1940) Nag 63. (Case under clause (c). AIR 1930 Nag 139 held overruled by S. 59-A.)

Also see Section 59-A, Note 3.

[But see (1904) 6 Bom LR 288 (289) (DB). (Case before the amendment — Dispossession by purchaser of equity of redemption — Mortgagee cannot sue for mortgage-money but can only sue for possession.)]

9. AIR 1988 Cal 131 (133) : (1986) 2 Cal HN 202.

10. 1986 Pat LJR 610 (611).

The mere agreement by the purchaser with the vendor to pay the mortgaged-debt does not, without any communication with the 'mortgagee', make it the personal debt of the purchaser (11) Such a covenant or agreement is merely considered one for indemnity against the mortgage, on which the transferee may be personally liable to the mortgagor.(12) But if the transferee enters into a new contract with the mortgagee, as for different times and modes of payment, he would be personally liable.(13) In *Woods v. Huntingford*,(14) the Master of the Rolls, Sir William Arden, said :

> "Where a man buys subject to a mortgage, and has no connexion or contract or communication with the mortgagee, and does no other act to shew an intention to transfer that debt from the estate to himself as between his heir and executor, but merely that, which he must do, if he pays a less price in consequence of that mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally."

The fact that the transferee pays interest on the mortgage does not render him personally liable for the debt.(15)

9. Legal representative of mortgagor.

The word "mortgagor" would include his legal representative ordinarily, but such legal representative will, so far as the act or default of the mortgagor himself is concerned, be liable only in respect of the estate which he has inherited, and so far only as such assets extend.(1) He may, however, make himself personally liable by himself entering into a contract with the mortgagee to

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11. AIR 1957 Punj 169 (173) (Money left with second mortgagee to pay off prior mortgage — No trust is thereby created in favour of prior mortgagee and, hence he cannot maintain suit to recover it) ** AIR 1949 Nag 319 (324) ILR (1949) Nag 122 (DB) (Purchaser does not become trustee for mortgagee) ** (1800) 31 ER 724 (726) 5 Ves Jus 534 (Butler v Buder) (Tweddel v Tweddel 29 ER 58 Foll) ** (1787) 29 ER 87 (88) · 2 Bro CC 152 Tweddel v Tweddel. (Affirming 29 ER 58.) ** **(1912) 34 All 63 (64) : 39 Ind App 7 (PC).** (Confirming on appeal 2 Ind Cas 460) ** AIR 1936 Oudh 313 (315) : 12 Luck 215 (DB) ** AIR 1935 Mad 115 (116) (DB) (Mortgagor selling property leaving part of purchase-money in hands of purchaser to pay off mortgagee — Purchaser informing mortgagee of this arrangement — Former held personally liable to pay the latter) ** AIR 1923 Lah 459 (460)

    [See also AIR 1954 All 348 (350) (Sale of equity of redemption — Money kept with vendee for payment to mortgagor - No obligation between mortgagee and purchaser is created — Purchaser is merely an agent — Fresh suit against purchaser by mortgagee for mortgage money not maintainable.)]

12. (1797) 29 ER 87 (88) 2 Bro CC 152, Tweddel v Tweddel (Affirming 29 ER 58) ** (1808) 33 ER 581 (583) 14 Ves 417, Oxford v Rodney ** **(1909) 31 All 583 (589) : 36 Ind App 203 (208) (PC)** ** (1912) 1 Ch 231 (236) (235 237) 81 LJ Ch 210 (215) Mills v United Counties Bank ** (1912) 28 TLR 40 (41) (1912) 1 Ch 1, Re Tewkesbury Gas Co , Tysoe v The Co (The obligation to indemnify may however be negatived by other circumstances ** (1991) 40 WR (Eng) 253 (253), Bridgman v Daw (In absence of special agreement to contrary there would be an implied covenant by the purchaser to indemnify the vendor) ** (1802) 32 ER 136 (137, 138) · 7 Ves 332 (337) Waring v Ward ** (1912) 16 Ind Cas 73 (74) (DB) (Cal) (Buyer bound to indemnify vendor without any specific contract.) ** **AIR 1932 Pat 273 (274) (DB)**

13. (1808) 33 ER 581 (583) · 14 Ves 417 Oxford v Rodney ** AIR 1936 Oudh 313 (315) 12 Luck 215 (DB). (Mere fact that certain payments on account of interest were made by purchaser to mortgagee did not create a contract between them.) ** AIR 1925 Mad 115 (116) (DB).

14. (1796) 30 ER 930 (932) 3 Ves 131 (Tweddel v. Tweddel, 29 ER 58, Referred to)

15. **AIR 1936 Oudh 313 (315) : 12 Luck 215 (DB).**

Section 68 — Note 9

1. AIR 1932 Lah 164 (168) 13 Lah 259 (DB) ** AIR 1922 Oudh 48 (50).

pay the amount.(2)

10. Minor not personally liable.

Where a mortgage of the joint family property is executed by a Hindu father, in which he has bound himself to pay the amount, the son who is a minor on the date of the mortgage is not personally liable to pay the mortgage-money.(1)

11. Guardian not personally liable.

Where a guardian executed a hypothecation bond 'as a guardian' containing a stipulation "I have agreed to pay", it was held that there was no covenant to pay by the executant, except as guardian and that he was not personally liable for the mortgage amount (1)

12. Anomalous mortgages.

There is a conflict of decisions as to the applicability of this section to anomalous mortgages. The High Courts of Allahabad and Lahore and the Chief Court of Sind have held that this section applies to such mortgages.(1) The contrary view has been held by the High Courts of Calcutta and Madras and the Chief Court of Oudh (2) The former view is it is submitted correct (See S 98 Note 1) A later decision(3) of the Madras High Court has also taken this view and has held that the section applies to anomalous mortgages A simple mortgage usufructuary was under the Act before the amendment of 1929, not an anomalous mortgage, and it was held by their Lordships of the Privy Council that where in such a case the mortgagor failed to deliver possession the mortgagee could sue under clause (c) of the old section corresponding to the present clause (d) (4) Under the present amendment, such a mortgage will be an anomalous mortgage governed by S 98

13. Void mortgages.

The section presupposes the existence of a 'valid' mortgage If there is no valid mortgage no relief can be claimed under any of the clauses of this section (1)

Where a mortgage contains a 'personal covenant' to pay but the mortgage as such is inoperative and void for any reason, can a suit be maintained on the personal covenant ? According to one

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2. (1864) 55 ER 585 (587) : 34 Beav 134, Bagot v. Bagot.

Section 68 — Note 10

1. AIR 1928 PC 165 (171) : 24 Nag LR 186. (His separately acquired property will also not be liable.) ** AIR 1931 Mad 140 (143) : 54 Mad 163 (DB)

Section 68 — Note 11

1. AIR 1925 Mad 525 (525).

Section 68 — Note 12

1. (1890) 12 All 203 (206) (DB) (Assumed) ** AIR 1935 Lah 103 (104) 16 Lah 612 (DB) ** AIR 1943 Sind 59 (61) : ILR (1942) Kar 452 (DB).

2. AIR 1924 Cal 592 (594) (DB) ** (1898) 21 Mad 1(3) (DB) ** AIR 1942 Oudh 172 (174) 17 Luck 362 ** AIR 1932 Oudh 178 (179) (DB).

3. AIR 1953 Mad 13 (15) : ILR (1952) Mad 993 (DB).

4. AIR 1929 PC 139 (141) : 56 Ind App 299 : 4 Luck 363.

[See also AIR 1952 Mys 125 (126, 127) ILR (1953) Mys 1 (28 All 157 AIR 1938 All 418 (FB), 10 Bom LR 615, Not foll.; AIR 1929 PC 139, Foll, 14 Mad 232 17 Mad 331 27 Mad 526 (FB), AIR 1922 Pat 167, 6 Ind Cas 153 (Cal), 13 Mys CCR 45, Rel on))

Section 68 — Note 13

1. AIR 1962 Punj 465 (467) (Usufructuary mortgage — Deed not registered — But mortgagee establishing that though he was entitled to possession, mortgagor had failed to deliver same to him — Mortgagee entitled under S 68(1)(d) to recover mortgage amount AIR 1937 All 711 and AIR 1938 Lah 497, **held not good law** in view of AIR 1916 PC 119) ** AIR 1956 Sau 27 (28) ** (1911) 4 Bur LT 117 (When a mortgage cannot be enforced

group of cases a suit can be maintained.(2), but the relief granted in such a case would not be a 'decree for sale' of the mortgaged property, but merely a decree for money executable by 'attachment and sale' of the mortgagor's properties.(3) According to another group of cases(4) if the mortgage is 'illegal' as being prohibited by law or opposed to public policy, even the personal covenant to pay cannot be enforced, the ground of the decisions being that a contract which is illegal cannot be enforced to any extent especially if the legal part cannot be separated from the illegal part.

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against the property owing to the Revenue Laws relating to the property, a money-decree can be granted) ** AIR 1942 All 409 (409) ILR (1942) All 817 (DB) (Mortgage of occupancy holding — Such mortgage being forbidden by law is void – Proprietor of land ejecting both mortgager and mortgagee — Mortgagee can have no claim against mortgagor under this section) ** AIR 1937 Oudh 517 (520) (DB) ** (1909) 2 Ind Cas 516 (517) (All) (Unregistered mortgage deed — *Held*, not admissible in evidence as mortgage but admissible to prove fact of borrowing — Money decree passed — S 68 held to be not applicable.) ** AIR 1923 Lah 357 (359) (DB)

[**See also** (1903) 6 Oudh Cas 339 (340) (The document did not create a mortgage at all — Therefore S. 68 did not apply)]

[**But see** AIR 1924 Oudh 147 (148, 149) (Mortgage void Mortgagee held entitled to claim relief under cl (d) of S 68), Submitted wrong) ** (1888) 10 All 47 (48) (DB). (Submitted not correct.)]

2. **(1909) 32 Mad 410 (414) (FB).** (Attestation) ** AIR 1956 Sau 27 (29) (Unregistered mortgage — Mortgagee can base his cause of action for money had and received taking advantage of S 70 of Contract Act) ** AIR 1944 All 276 (277) ILR (1944) All 574 ** (1911) 11 Ind Cas 443 (445) (Lah) (Mortgage executed by a member of joint Hindu family — Suit by another member for its cancellation — *Held* that the deed might be declared void as mortgage but would remain operative against the executant personally) ** AIR 1915 Bom 102 (104, 106) 39 Bom 358 (DB) (The assumption that S 65 of the Contract Act applies to a claim under the covenant is incorrect) ** AIR 1929 Pat 375 (375, 376) 8 Pat 212 (DB) (Mortgage prohibited by law without sanction of authority — Relief of personal covenant which is always implied in a mortgage granted) ** AIR 1926 Rang 145 (146) (Mortgage void for want of attestation) ** AIR 1939 Rang 142 (142) (Mortgage invalid for want of registration) ** AIR 1914 Bom 141 (142) 38 Bom 177 (DB) (Mortgage invalid for want of proper attestation) ** AIR 1925 Mad 991 (992) (Do) ** AIR 1931 Mad 140 (143) 54 Mad 163 (DB) (Do) ** AIR 1931 Mad 124 (128) (DB) (Defect of attestation) ** **(1909) 32 Mad 410 (414) (FB).** (Attestation) ** AIR 1927 Oudh 315 (315) (DB) (Property mortgaged was joint family property and the loan was not taken for legal necessity) ** AIR 1928 Oudh 465 (467) 4 Luck 107 (DB) (Do) ** AIR 1922 Oudh 257 (258) 26 Oudh Cas 164 (Do) ** AIR 1933 All 468 (472) (DB) (Debtor incompetent to mortgage) ** AIR 1916 Oudh 185 (187) (DB (Want of proper attestation) ** (1899) 26 Cal 222 (225) (DB) (Surety bond hypothecating immovable property invalid as a mortgage for want of registration and proper attestation — *Held* personal decree can be passed against the surety) ** (1870) 6 Beng LR App 69 (70) (Not registered — Deed held admissible as evidence of debt) ** (1906) 4 Cal LJ 510 (517) (DB) (No attestation.) ** AIR 1933 Cal 786 (787) (Unregistered) ** AIR 1937 Cal 347 (350) (DB) (The deed must be treated as unregistered even for the purpose of the personal covenant to pay A suit for recovery of the money on the personal covenant is governed by Art. 66 or Art 57 and not by Art 116) ** AIR 1915 All 254 (255) (Improper attestation Deed admissible as a simple money bond) ** (1899) 26 Cal 78 (79) (DB) (Want of proper attestation.)

[**See also** (1907) 10 Oudh Cas 289 (291) (DB) (Mortgage by a coparcener of his undivided interest in joint family property — *Held*, invalid — Personal decree can be obtained against the mortgagor) ** AIR 1922 Cal 168 (171) 49 Cal 438 (DB) (Not attested) ** 1888 Pun Re No 193, P 527 (528) (DB) (Not registered) ** (1889) 2 CPLR 243 (244) (Want of necessary sanction of Court) ** 1893 1900 Low Bur Rul 124 (126)]

3. **AIR 1927 Oudh 214 (215) (DB).**

4. **(1910) 32 All 383 (388) (DB)** (Usufructuary mortgage of ex-proprietary tenure is void in

Independent of any personal covenant to pay in a mortgage the mortgagee may be entitled, when the mortgage is discovered to be void, to claim from the mortgagor the amount paid by him under S. 65 of the Contract Act.(5) The question of giving relief under S 68 would arise only when there is a mortgage, apart from the fact that it is not a valid mortgage In the instant case decree for possession ordered by the Courts below was modified to the extent that the plaintiff would be entitled to decree for possession subject to payment of the sum evidence by Bahi entry (6) In the

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view of the terms of Ss 10 and 20 of the Agra Tenancy Act 2 of 1901) ** AIR 1926 Rang 186 (187) (Mortgage of property inalienable by law — Even personal decree cannot be passed against mortgagor) ** (1912) 16 Ind Cas 42 (42) (All) (A usufructuary mortgage of an occupancy holding is illegal) ** AIR 1921 All 392 (392) 43 All 81 (DB) (Usufructuary mortgage of occupancy holdings — Covenant that the mortgagee was to realise the money from other property in case he went out of possession was held to be unenforceable as being part of the same transaction) ** **AIR 1927 All 499 (501, 502) (FB).** (AIR 1921 All 392, Relied on — Main contract being bad in law the subsidiary covenant should fail with it) ** AIR 1917 Oudh 230 (232) 20 Oudh Cas 155 (Mortgage of reversionary interest) ** AIR 1924 All 668 (668) 46 All 622 (Mortgage of occupancy holding) ** AIR 1931 All 461 (461) (DB) (Contract for the possessory mortgage of occupancy holdings if permitted would defeat the provisions of the tenancy law and is therefore void under S 23 of the Contract Act Consequently a covenant enabling the mortgagee to recover money if there was no delivery of possession is not enforceable) ** AIR 1922 All 134 (135) 44 All 486 (DB) (Where a usufructuary mortgage is void as effecting a transfer of an occupancy holding the personal covenant in the mortgage is also void and unenforceable) ** (1929) 116 Ind Cas 17 (17 18) (All) (Mortgage in contravention of law — Personal covenant falls along with it) ** AIR 1934 All 418 419 (Usufructuary mortgagee of occupancy holdings cannot recover possession nor mortgage money.)

[See also AIR 1926 Oudh 270 (270 271) (DB) (Usufructuary mortgage of simple tenancy with covenant to pay — Mortgage unlawful — Money advanced if essence of the consideration for the transaction of mortgage, consideration also must fail if mortgage is unlawful — This result flows from the combined effect of S 24 Contract Act and S 6(2)(b), T P Act — Such consideration cannot be recovered — But if the money paid constituted an independent transaction of loan between the parties mortgagee can recover such sum.)]

5. AIR 1957 Trav-Co 6 (10) ILR (1956) Trav-Co 1181 ** **AIR 1943 PC 29 (33, 34) : 70 Ind App 1.** (Note — The mortgagee was allowed restitution under S 65 Contract Act even though he did not lead it as a separate ground of claim in his plaint in the mortgage suit or in the memo of appeal therefrom **Reversing** on this point AIR 1937 Oudh 410 13 Luck 531) ** AIR 1942 All 409 (409) ILR (1942) All 817 (DB) In the absence of any special circumstances, the cause of action arises at the date of void agreement and not at the date of dispossession) ** AIR 1918 Oudh 22 (24) 20 Oudh Cas 306 (DB)

[See also AIR 1914 Bom 102 (103) 38 Bom 249 (DB) (Mortgage void under Bhagdari Act — Personal covenant by mortgagor to compensate mortgagee in case of obstruction of possession — Mortgagor cannot recover possession without payment of proper compensation) ** (1909) 2 Ind Cas 516 (517) (All) (The money decree that was given in this case must be deemed to be only under S 65, Contract Act, though the section is not referred to.)]

Also see S. 59, Note 8.

[But see AIR 1920 Nag 183 (183) (S 65 held not to apply as mortgage was void from beginning — This view is **no longer good law.** See AIR 1922 PC 403 (405) 50 Ind App 69.)]

6. **2000 (1) ICC 326 (327) (Punj and Har).**

undermentioned cases(7) where the mortgage was bad in law and there was no personal covenant to pay, it was held that no relief of any kind could be granted to the plaintiff Section 65 of the Contract Act was, however not adverted to.

Section 65 of the Contract Act will not apply where the mortgage is by a person 'incompetent to contract' Thus, where a 'minor' makes a mortgage, no relief can be granted to the mortgagee under S. 65 of the Contract Act,(8)

See also the undermentioned cases.(9)

14. Interest — Personal liability for.

Interest of which payment is secured by the mortgage contract forms part of the mortgage-money (See S 58). Consequently, the right to sue for the mortgage-money under this section will include the right to sue for the interest, the payment of which is secured by the mortgage contract (1) Thus, where a usufructuary mortgage contains a covenant to pay interest in the event of loss of possession, and the mortgagee loses possession, the mortgagee can claim the mortgage-money which will include not only the principal amount but the interest payable under the contract during the period he has been out of possession.(2) Where no interest is secured by the mortgage contract, as where a usufructuary mortgagee is merely to retain possession in lieu of interest, and the mortgagee is dispossessed, the right to sue for the mortgage-money will not include any right to

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7. (1909) 12 OUdh Cas 275 (277) (Unregistered mortgage — On construction held that there was no personal covenant) ** AIR 1925 All 543 (544) : 47 All 780 (DB) (It is not clear from the facts of this case whether there was a personal covenant to pay) ** AIR 1923 Lah 357 (359) (DB) (Section 68 can be invoked only when mortgage is not void) ** AIR 1925 Oudh 628 (628). (Unregistered mortgage.)

8. **(1903) 30 Cal 539 (548) : 30 Ind App 114 (PC).**

9. AIR 1980 Sikkim 1 (11) (If the mortgage is invalid for want of registration the plaintiff is entitled to a remedy by way of enforcement of right on title or for refund of money under the rule called "Secundum Allegata El Probata") ** AIR 1954 All 314 (314) (Mortgage by co-sharer in excess of his share — Other co-sharers obtaining decree that mortgage is not binding on them — As security is rendered insufficient mortgagee is entitled to refund of money advanced) ** (1913) 35 All 405 (406) (DB) (A granted a mortgage of occupancyholding to B — B sub-mortgaged his rights to C — Held, though the mortgage to B was void C could obtain a simple money decree against B as no interest in occupancy holding had been transferred to him, the first mortgage being void.) ** **AIR 1930 All 1 (3, 7) : 52 All 338 (FB).** (Where a transfer made by registered mortgage deed includes along with other properties which are transferable, non-transferable occupancy lands, the legal effect of including non-transferable occupancy lands along with other properties which are transferable is not to make the whole transaction bad, if without defeating the provisions of the Transfer of Property Act or the Tenancy Act, part of the mortgage can be enforced by allowing claim to principal amount.)

Section 68 — Note 14

1. AIR 1938 Rang 113 (114). (Mortgage bond containing personal covenant to pay interest at regular interval besides providing for payment of principal with interest on demand — Suit for personal decree on account of interest can be brought.) ** AIR 1914 Nag 16 (18) : 10 Nag LR 9.

2. AIR 1923 All 457 (457, 458) (DB) ** AIR 1925 Oudh 30 (32). (Covenant to pay interest implied.)

[**See also** (1907) 10 Oudh Cas 29 (31) (DB) (Mortgage with possession — Covenant to pay interest if profits insufficient to meet interest in full — Possession not given at all — Mortgagee entitled to interest as part of mortgage-money at time of redemption.) ** AIR 1962 Mad 395 (395, 396).]

interest as such, but the Court will award interest as 'damages' in such cases.(3) unless, as has been seen in Note 6, the mortgagee has acquiesced in such dispossession or has failed by his own negligence to take possession (4) The rate of interest in such cases is at the discretion of the Court Again where the mortgage provides that the mortgagor should pay principal and interest within a particular date and that on default on that date the mortgagee is entitled to take possession of the property, but it is found that the mortgagor could not mortgage the property, it has been held that though the mortgage-deed is not enforceable, the mortgagor would be liable as on a personal covenant for the money borrowed but the creditor would be entitled to interest only by way of damages, the rate of which would be within the discretion of the Court (5) A provision in a mortgage deed for payment of interest on arrears of interest at a rate higher than that payable on the principal sum is not penal Such a stipulation is an independent and secondary contract though connected with the primary one and can be enforced.(6)

The liability to pay interest cannot be avoided by the mortgagor on the ground that he forestalled the mortgagee by the institution of a suit for redemption when if mortgagee institutes a suit for the recovery of the mortgage amount he would undoubtedly be entitled to recover from the mortgagor the interest which he claims.(7)

As a general rule interest is only an 'accessory' to the principal and cannot be recovered apart from the principal,(8) so that if the right to recover the principal money personally from the mortgagor is barred by limitation, the right to recover interest will also fall with it (9) If principal can be claimed in a suit for interest, a further suit for principal is barred under O 2, R 2 Civil PC (10)

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3. AIR 1966 Ker 234 (235) ILR (1966) 1 Ker 345 (DB) ** AIR 1964 Mad 201 (202) (Oth mortgage — No provision for interest Possession not delivered Mortgagee entitled to interest and charge upon mortgaged property for breach of covenant to deliver possession) ** AIR 1944 Oudh 208 (210) (Mortgage with possession — Mortgagee dispossessed due to mortgagor's fault — Mortgagee is entitled to interest on mortgage money as damages, although the mortgage deed does not provide it) ** AIR 1932 Mad 175 (177) (Claim for damages is not barred so long as claim for principal is not barred) ** AIR 1932 Mad 173 (175) ** (1894) 17 Mad 469 (472) (DB) ** (1882) 4 All 245 (247) (DB) In estimating the measure of damages interest at the specified rate in the contract can be taken as a reasonable guide.)

   [See also AIR 1921 Lah 351 (352) (Mortgagee allowed compensation for mortgagor's failure to deliver possession to which mortgagee was entitled) ** AIR 1933 Mad 672 (673) ** 1882 Bom PJ 385 (385) (DB).]

4. AIR 1935 Nag 249 (250)

5. AIR 1927 Oudh 315 (315) (DB) (Interest being by way of damages may not be awarded at contractual rate.)

6. AIR 1943 Mad 301 (303)

7. AIR 1967 Mys 41 (44).

8. AIR 1929 Rang 96 (96) 6 Rang 743 (DB) ** AIR 1918 Lah 373 (374) 1918 Pun Re No 69 (Mortgage deed and lease forming one transaction — Suit for rent after mortgage debt had become due — Subsequent suit for recovery of principal and interest due on mortgage barred.)

9. AIR 1935 Lah 516 (517) (Mortgagee given two options, viz to sue for interest at end of one year or sue for possession of land to be held as usufructuary mortgagee — If remedy for personal decree for principal and remedy to sue for possession is barred suit for interest is also barred) See Note 1 on Art 25 and Note 12 on Art 62 of the AIR Commentaries on the Limitation Act, 7th (1977) Edn.

   [See also AIR 1937 Lah 79 (80) ILR (1937) Lah 87 (DB) (AIR 1928 Lah 653 and AIR 1930 Lah 737 Explained and istinguished.)]

10. AIR 1954 Sau 93 (94) 6 Sau LR 362 ** AIR 1926 Lah 661 (662)

There is, however, an exception to the general rule, namely, that where there is an 'independent contract' to pay interest it may be recovered by suit even though the personal remedy for the principal amount may have become barred **(11)** See also Note 5.

A mortgagee is not under a duty to recover his mortgage money as soon as possible and he does not lose his right to get interest if he does not do so.**(12)**

In the undermentioned case**(13)** where the understanding between the parties was that the mortgagee was to liquidate his interest in a particular way namely, by recovery of the rent under a lease which was executed by the mortgagor in favour of the husband of the mortgagee, it was held that there was no personal liability to pay interest.

Where a prior mortgage which did not contain a personal covenant was transferred to the usufructuary mortgagee he was not entitled to interest on the amount of the prior mortgage from the date of the transfer.**(14)**

15. Claim under section is an actionable claim.

The claim of a mortgagee against the mortgagor under this section for failure of the mortgagor to give possession is an actionable claim and can be transferred as such.**(1)**

16. This section and O. 34, R. 6 of the Civil Procedure Code.

A mortgagee files a suit on the mortgage and obtains a decree It is thereafter found that owing to no wrongful act or default on his part, he is deprived of his security within the meaning of this section and the mortgaged property ceases to be available for the satisfaction of his decree. What is the remedy of the mortgagee ? It has been held by the Chief Court of Oudh that the remedy of the mortgagee is to 'apply' for a personal decree under O. 34, R 6 of the Code of Civil Procedure and not to file a 'fresh suit' for the purpose.**(1)** The High Court of Mysore has also expressed a similar view.**(2)**

A Full Bench of the Allahabad High Court has held that where under the mortgage the mortgagor has taken a personal responsibility to repay the loan only if the mortgaged property was found insufficient for the purpose and this provision has been interpreted by the decree in the mortgage suit to indicate that the property should be found on a sale taking place to be insufficient, the mortgagee is not entitled to a personal decree where no sale has taken place at all **(3)** According to the Nagpur High Court, although it is open to mortgagee to enforce his right under this section by

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11. See Note 1 on Art. 25 of the AIR Commentaries on the Limitation Act, 7th (1977) Edn.

[**See also** AIR 1934 Rang 159 (160) (Suit for interest held maintainable even though the principal had not become due) ** AIR 1917 Low Bur 9 (10) ** AIR 1930 Lah 148 (149) (DB) ** AIR 1954 Sau 93 (94) 6 Sau LR 362 (Where a mortgage-deed contains two distinct agreements, one for the payment of the half yearly interest in advance to be recovered personally from the mortgagor and the other for the payment of the principal together with the unpaid interest and any other sum due under the mortgage, the cause of action for recovering the half yearly interest in advance is not the same as the one for recovering the principal. In such a case, therefore, O 2, R. 2 does not apply.)]

12. AIR 1938 Pesh 73 (75).

13. (1903) 27 Mad 86 (91) (DB).

14. AIR 1924 Mad 852 (853) : 85 IC 205

Section 68 — Note 15

1. (1894) 16 All 315 (317) (FB).

Section 68 — Note 16

1. AIR 1920 Oudh 251 (252) : 23 Oudh Cas 145 (DB).

2. (1948) 53 Mys HCR 331 (336, 337).

3. AIR 1951 All 195 (198) (FB). (AIR 1928 All 71, **Overruled** relying upon AIR 1938 All 98, AIR 1930 Oudh 377 and **AIR 1933 Oudh 1 (FB).**)

a separate suit the more desirable course would be to apply for a personal decree on general principles of justice but not under O. 34, R. 6 of the Code of Civil Procedure (4). These decisions however, seem to require consideration in view of the decision of the Judicial Committee in *Kesar Chand v. Uttam Chand.*(5)

17. Mortgagee claiming under this section, it can sue for sale.

Where a right to sue for the mortgage money arises under this section it must be, taken that the mortgage-money "has become due" for the purposes of S. 67 (1). It would, therefore seem to follow that whenever a case arises under this section for recovery of the mortgage-money, a suit for sale or for foreclosure as the case may be will lie under S. 67. Under the latter section, however, a 'usufructuary' mortgagee cannot sue for sale of the mortgaged property.

The question therefore, arises whether a 'usufructuary mortgagee' who gets a right to sue for the mortgage-money under S. 68 can sue for sale of the mortgaged property. There has been a conflict of opinion on the point among the High Courts. Before the decision of their Lordships of the Privy Council in *Lal Narsingh Partab Bahadur Singh v. Md. Yakub Khan*(2) in the year 1929 **the following views were expressed :**

(1) Section 68 follows S. 67 : the latter provides for a decree for 'sale' : the former for a decree for 'money'. Therefore a decree under S. 68 can only be one for money and not for sale.(3)

(2) Where a usufructuary mortgage contains a 'covenant to pay' and there is a 'hypothecation of the property, then the mortgagee can sue for sale (4). But if the personal covenant does not import any hypothecation of the property, the mortgagee cannot sue for sale (5).

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4. AIR 1949 Nag 319 (327) : ILR (1949) Nag 122 (DB). (The judgment in this case (delivered by Sen J.) contains a very learned discussion of the meaning of the word 'sue'. But there is no reference to AIR 1945 PC 91 (94) which seems to militate against the view taken and which seems to be against attributing such a wide meaning to the word 'sue' as the Nagpur High Court in this case favoured. The PC seems to take the word 'sue' in this section in the narrow sense in which the word is used in the Civil PC as a proceeding instituted by the presentation of a plaint (vide Civil PC, S. 26). (This narrow meaning of the word "suit" has also been taken with reference to the Limitation Act in another decision of the Privy Council (Hansraj v. Dehradun-Mussoorie Electric Tramway Co. Ltd. AIR 1933 PC 63 : 60 Ind App 13 (PC), cited and discussed in AIR Commentaries on the Civil PC (the 1977 Edn.) S. 2(2), Note 5. This decision has also not been referred to in this Nagpur case.)

5. **AIR 1945 PC 91 (94) : 72 Ind App 165.** (Privilege conferred by S. 68 on a mortgagee to sue for money cannot be availed of by a charge holder in proceedings in execution of a decree, without resorting to a suit, even if the security has been impaired by the conduct of the person creating the charge.)

Section 68 — Note 17

1. **AIR 1919 Mad 1164 (1165) : 41 Mad 259 (FB).** (2) Mad 476 (FB) **Overruled.**) ** **(1898) 21 Mad 476 (481) (FB)** ** AIR 1919 Cal 46 (48) : 46 Cal 448 : 454, (DB), ** AIR 1933 Oudh 35 (36) : 8 Luck 190 (DB)

2. **AIR 1929 PC 139 (141) : 56 Ind App 299.**

3. 1891 All WN 168 (169) (DB) ** (1892) 15 Mad 174 (178) (DB) ** (1899) 22 Mad 332 (336) (DB) (Per Subramania Ayyar, J. — 21 Mad 476 (FB) Foll.)

4. 1881 All WN 63 (64) (DB) ** (1907) 6 Cal LJ 143 (145) (DB) * (1893) 17 Bom 425 (428) (DB) * (1898) 21 All 4 (9, 11) (DB) ** (1908) 30 All 162 (162) (DB)

   Also see S. 67, Note 18

5. (1905) 28 All 157 (160) (DB) ** (1908) 10 Bom LR 615 (617) (DB) ** (1904) 6 Bom LR 288 (289) (DB).

   Also see S. 58, Note 35 and S. 67, Note 15.

(3) a usufructuary mortgage with a personal covenant to pay is not a 'pure usufructuary mortgage' such as is contemplated by S. 67 and the mortgagee is entitled to sue for sale.**(6)**

(4) A usufructuary mortgage with a covenant to pay is an 'anomalous' mortgage, the rights of the 'parties' being governed by the 'intention of the parties' as disclosed by the contract If the intention is to give a right of sale, then a decree for sale can be passed **(7)**

(5) A usufructuary mortgagee who gets a right to sue under S. 68, otherwise than under clause (a) thereof, can sue for sale **(8)**

(6) A usufructuary mortgagee who gets a right to sue in cases referred to in (5) above, can merely sue for possession or obtain a 'money decree' but cannot sue for sale **(9)**

In *Lal Narsing Partab's case*,**(10)** referred to above, the mortgagee under a mortgage which was combination of a simple and a usufructuary mortgage was not given possession of the mortgaged property by the mortgagors It was held by their Lordships of the Privy Council that the mortgage was not an 'anomalous' mortgage so that the rights of the parties were governed only by the terms of the contract of mortgage, that the failure by the mortgagors to deliver possession to the mortgagee rendered the mortgagee money payable under S 68 and 'that if the money became payable under S 68' a decree for sale could be made under S 67 "It would be a startling result of the legislation," said their Lordships, "if in such a case as this where a default has been made by the mortgagors of a kind which materially affects the mortgagee's security, there existed no remedy for the immediate enforcement of the mortgage."

Even after the decision of the Privy Council referred to above, the conflict of opinions has continued, and the following views have been expressed :

(1) A usufructuary mortgagee to whom possession is not delivered or who is deprived of his possession is entitled to sue for sale.**(11)**

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6. **(1903) 26 Mad 662 (669) (SB) * (1894) 17 Mad 131 (133) (FB) **** (1891) 14 Mad 232 (234) (DB) ** (1891) 14 Mad 284 (286, 287) (DB) ** (1896) 19 Mad 411 (413) (DB) ** **(1903) 27 Mad 526 (527, 528) (FB).** (It is a simple mortgage usufructuary) 1897 Bom PJ 416 (417) (DB).

7. (1907) 10 Oudh Cas 14 (16) (DB) ** AIR 1924 Cal 592 (593, 594) (DB)

   [See also (1866) 6 Suth WR 283 (284) (DB).]

8. 1883 All WN 216 (216) (DB). (No possession given to mortgagee) ** (1905) 2 Cal LJ 493 (495) (DB) (Subsequent dispossession of the mortgagee) ** **AIR 1919 Mad 1164 (1165) : 41 Mad 259 (FB).** (A mortgage does not become usufructuary until the mortgagee gets possession.) **(1904) 6 Bom LR 288 (289) (DB). (Assumed)**

   [See also (1897-1901) 2 Upp Bur Rul 518 (519).]

9. (1900) 2 Bom LR 201 (202) (DB) (Mortgagee not obtaining possession) ** AIR 1918 Cal 797 (797) (DB) (Dispossession of usufructuary mortgagee — Only remedy is simple money decree) ** (1912) 13 Ind Cas 336 (336) (Cal) (Usufructuary mortgagee not given possession — His remedy is either to sue for possession or for mortgage-money — He cannot convert it into a simple mortgage and claim a decree for sale)

10. **AIR 1929 PC 139 (141) : 56 Ind App 299.**

11. (1940) 188 Ind Cas 669 (670) (DB) ** AIR 1943 Sind 59 (60) ILR (1942) Kar 452 (DB) (Dispossession enables an usufructuary mortgagee to avoid the proviso to S 67 which bars a suit for sale by a usufructuary mortgagee "as such", for the suit for sale is then based upon a breach by the mortgagor of a term of the contract) ** AIR 1936 Pat 439 (441) (AIR 1919 Mad 1164 (FB), Relied on.) ** **AIR 1938 All 418 (421, 422) : ILR (1938) All 714 (FB) **** (1935) 157 Ind Cas 657 (658) (Oudh).

    [See also AIR 1960 Madh Pra 44 (45, 46) (Usufructuary mortgagee — Decree for sale obtained by mortgagee — Decree remaining unexecuted — Mortgage not extinguished — Mortgagee's right to continue to possess mortgaged property not lost — Merely by reason of the existence of a decree for sale remaining unexecuted during the period of limitation,

(2) He is also entitled to sue for sale where the mortgage contains a personal covenant to pay.**(12)**

(3) A usufructuary mortgagee cannot sue for sale on the basis of a personal covenant to pay, 'unless' such covenant imports also a 'hypothecation' of the property.**(13)**

(4) A usufructuary mortgage with a personal covenant to pay is really an anomalous mortgage**(14)** and, if the contract of the parties gives the mortgagee a right of sale, he can sue for sale.**(15)**

(5) The only decree that can be passed in a suit under S. 68 is a decree for money **(16)**

The first view is fully supported by the Privy Council decision in *Lal Narsing Partab's case* **(17)** As regards the second view it is submitted that a usufructuary mortgage in which there is also covenant to pay, will be an anomalous mortgage as defined in S. 58, clause (g), and governed by S. 98 and that, consequently, unless such personal covenant imports a 'right of sale' (in other words imports a 'hypothecation' of the property) there can be no right of sale. In this view the third and fourth views are correct. The fifth view is clearly opposed to the Privy Council decision and is not

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mortgagor does not acquire the unfettered title to the property to support his suit for possession as against the usufructuary mortgagee.)]

[**But see** AIR 1933 All 97 (98) (DB). (This must be taken to have been **Overruled** in AIR 1938 All 418 (FB).)]

12. (1967) 80 Mad LW 631 (635) ** AIR 1954 Mys 177 (178). ILR (1955) Mys 15 (DB). ** AIR 1952 Mys 125 (126, 127). ILR (1953) Mys 1. (Case decided under S. 67 or 68 as it stood before amendment in 1929. AIR 1929 PC 139. Followed. AIR 1938 All 418 (FB). ILR 615. **Not foll.**) ** 1937 Mad WN 81 (82) (DB) ** AIR 1933 Mad 613 (615). 56 Mad 892 (DB) ** AIR 1938 All 188 (191). ILR (1938) All 218 (DB) * AIR 1938 Pat 585 (588, 589). 17 Pat 737 (DB). (Assumed.) ** AIR 1941 Mad 885 (886) (DB). (Assumed. – No decree for sale was given as there was no personal covenant to pay.)

Also see S. 67, Note 15.

13. AIR 1942 All 326 (327). ILR (1942) All 368 (DB). (AIR 1938 All 418. ILR (1938) All 714 (FB). Relied on.) ** **AIR 1938 All 418 (420) : ILR (1938) All 714 (FB).**

Also see S. 58, Note 35

14. AIR 1943 Sind 59 (61). ILR (1942) Kar 452 (DB) ** AIR 1942 Cal 55 (58) (DB)

[**See also** AIR 1936 Pesh 43 (45) (DB). (Mortgage with possession for three years — Provision for redemption after three years. – **Held,** this implied a personal covenant to pay and the mortgage was an anomalous mortgage.)]

15. AIR 1963 Pat 7 (93). 42 Pat 747 ** AIR 1952 Mad 856 (859) ** **AIR 1947 Lah 40 (45) : ILR (1946) Lah 805 (FB)** ** AIR 1943 Sind 59 (61). ILR (1942) Kar 452 (DB) ** **AIR 1933 Oudh 35 (36) : 8 Luck 190 (DB).**

[**See** AIR 1936 Pesh 43 (45) (DB). (Mortgage with possession for certain period — Covenant that after expiry of the period property would be redeemed — **Held,** a personal covenant was implied and the parties intended that the mortgagee should not occupy the mortgaged land after the expiry of the period — Mortgage was anomalous and not usufructuary — Mortgagee was entitled to a decree for sale contemplated by O. 34, C.P.C. after the expiry of the period.)]

[**See also** AIR 1935 Lah 103 (104). 16 Lah 612 (DB). (Usufructuary mortgage with personal covenant to pay — **Held,** mortgagee could sue for sale, but money decree was given as he asked only for that relief.)]

Also see S. 67, Note 15 and S. 98 Note 5.

16. AIR 1952 Mad 856 (858). (AIR 1919 Mad 1164 (FB) **Held no longer good law** after amendment of S. 58 in the year 1929.) ** AIR 1937 Oudh 20 (22, 23). 12 Luck 313 (DB)

17. AIR 1929 PC 139 (141) : 56 Ind App 299.

correct It may be noted that at the date of the Privy Council decision in *Lal Narsing Partab's case*.(18) a simple mortgage usufructuary was not an anomalous mortgage and their Lordships decided the case with reference to Ss 67 and 68. Such a mortgage would, however, under the present Act, be an anomalous mortgage and the rights of the parties would be governed by section 98.

Where a usufructuary mortgagee who is given possession of only a portion of the mortgaged property sues for mortgage money under Clause (d) and obtains a final decree for sale, the mere fact that execution of that decree is barred by limitation does not extinguish the mortgagee's right to possession of the property The mortgagee has a right to continue in possession and the mortgagor does not, in these circumstances, acquire any title to the property to support a suit for possession against the mortgagee (19) (See also S 60 Note 26.)

18. Sub-section (2).

The 'personal' remedy given by this section is 'additional' to the remedy given by S. 67 against the 'mortgaged' property And although the remedies are concurrent, the policy of the law is that the mortgagee should not enforce the personal liability before exhausting his remedy against the property (1) This principle is, to a certain extent, found enacted in O 34, R 14 of the Code of Civil Procedure Under that rule where a mortgagee 'has obtained a decree' for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property 'to sale' otherwise than by instituting a suit for sale in enforcement of the mortgage The rule does not prohibit the execution of such decree against the person by arrest, or by attachment of his other properties.

The aim of sub-s (2) of this section is to enable the Court to prevent 'even a decree for money being obtained' until the mortgagee has exhausted all the available remedies against the mortgaged property or what remains of it, unless he abandons his security and, if necessary, re-transfers the mortgaged property The sub-section, however,enables the Court only to 'stay' the suit, and does not prevent a suit being 'instituted at all'.

The sub-section enables the Court to stay a suit for the mortgage-money in cases falling under clauses (a) and (b) A mortgagee will if his case falls under clauses (c) and (d), have an unconditional right to sue for the mortgage-money Even in a case falling under cl. (a) or cl (b), if the mortgagee 'gives up his security,' the Court has no power to stay the suit for the mortgage-money (2) If the mortgagor chooses to create a personal liability by independent transaction like a promissory note, cheque or other independent engagement completely dissociated from the mortgage he does not come within the scope of clause (a) nor within the principle that security should be called up first before personal liability is enforced. In such a case the suit to enforce that personal liability is not one by the mortgagee for mortgage-money and such a suit cannot be stayed under this sub-section (3).

The power to stay a suit given by this sub-section is entirely discretionary with the Court and the discretion has to be exercised on cogent grounds and not arbitrarily. Further, this power to stay is 'notwithstanding any contract to the contrary." Any contract, therefore, between the mortgagor

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18. AIR 1929 PC 139 (141) : 56 Ind App 299.

19. AIR 1960 Madh Pra 44 (46) (DB).

Section 68 — Note 18

1. 1937 Mad WN 373 (374) (DB).
2. AIR 1938 ad 132 (132) (That a mortgagee can, if he gives up his lien, bring a suit for the money advanced was well established even before the introduction of this sub-section — See the following cases) ** AIR 1927 Cal 393 (394) 54 Cal 424 (429, 430) (DB) ** AIR 1926 Cal 765 (766) ** 1907 All WN 83 (84) : 29 All 369.
3. AIR 1953 Cal 208 (211) (The right which belongs to the mortgagee is in his capacity as a mortgagee only and not in a totally different capacity.)

and the mortgagee excluding the relief conferred on the mortgagor under this sub-section cannot override or fetter the discretion of the Court if the Court is of opinion that in spite of such contract the suit should be stayed.(4)

If the trial Court in proper exercise of its jurisdiction refused to stay the suit the Court of appeal will not interfere.(5)

In the undermentioned case,(6) *A* mortgaged certain property to *B* and then transferred the property to *C*. *B* sued *A* and *C* for sale of the mortgaged property and for a personal decree against *A* for the balance that may remain due after the sale of the property. During the progress of the suit *B* compromised with *C*, received a certain amount from him, gave up his security and claimed to proceed against *A* personally for the balance. It was held that S. 68 had no application to the case and that no personal decree could be granted in a suit for sale under S. 67 until the mortgaged property had been put to sale and had failed to realise the entire amount due.

The benefit of the sub-section can be claimed only by the mortgagor or his representatives-in-interest and not by others. *A* executed a pro-note in favour of *X*, and *K* executed security bond in respect thereof. *X* filed a suit against *A* and *K*. He claimed against *A* a money decree on the promissory note and against *K*, for sale of the secured property. *A* contended on the principle of this sub-section that *X* should exhaust his remedy against the secured property. It was held that *A* was not a mortgagor and that his contention was unsustainable.(7)

A mortgagor who wishes to avail of this sub-section can only do so on the tacit assumption that there is a valid mortgage. He cannot deny the mortgage and at the same time invoke to apply the discretionary relief under this sub-section.(8)

The prohibition contained in sub-section (2) will apply only if the remedy against the mortgaged property can be available to the mortgagee in the State in which the personal remedy is sought. It will not apply where admittedly such a suit to enforce the mortgaged security cannot be filed.(9)

19. Applicability of the section to the Punjab and North-West Frontier Province.

The principle of this section has been applied to cases arising in the Punjab and the North West Frontier Province to which the Act and, therefore, this section does not in terms apply.(1)

20. Applicability of section to charges.

Section 100 makes it clear that all the provisions of the Act applicable to simple mortgages apply, so far as may be, to charges also. Consequently, this section also will apply to charges.(1) The privilege conferred by this section on a mortgagee to sue for mortgage-money cannot be availed of by a charge-holder in proceedings in execution of a decree, without resorting to a 'suit', even if the security has been impaired by the conduct of the person creating the charge.(2)

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4. AIR 1953 Cal 208 (211).
5. AIR 1977 Cal 391 (DB).
6. AIR 1937 Oudh 20 (23, 24) : 12 Luck 313 (DB).
7. 1937 Mad WN 373 (374) (DB).
8. AIR 1953 Cal 208 (211).
9. AIR 1957 Mad 106 (110) (DB).

Section 68 — Note 19

1. **AIR 1934 Lah 853 (857) : 15 Lah 751 (FB)** ** AIR 1932 Lah 630 (632) : 13 Lah 508 (DB) ** AIR 1933 Lah 174 (175) ** AIR 1936 Pesh 43 (45) (DB).

Section 68 — Note 20

1. AIR 1915 Mad 633 (634) (DB) (Obiter — Case before the amendment of S. 100.)
   [**But see** (1887) 15 Cal 492 (495) (DB) (Case before the amendment of S. 100 in 1904 — **No longer good law.**)
2. **AIR 1945 PC 91 (94) : 72 Ind App 165.**

21. Limitation for suits to enforce personal liability.

See the A.I.R. Commentaries on the Limitation Act, 7th (1997) Edition, Article 55, Note 14-C and Article 113, Note 52.

A document styled as a conditional sale was executed coupled with a condition that if payment was made within 3 years, the property would be reconveyed. The mortgagee filed a suit to recover mortgage debt. Held that even if the suit were to be construed as a suit to enforce mortgage amount on the basis of the personal covenant, the personal covenant gave a right and also allowed the mortgagor to pay the amount within 3 years of execution of mortgage. It is 12 years thereafter and therefrom that the mortgagee was entitled under S. 68 to sue for mortgage money.(1)

See also the undermentioned cases.(2)

22. Succession certificate.

Where a usufructuary mortgagee dies and his heirs in possession are deprived of the property under circumstances which enable a mortgagee to sue for the mortgage-money under this section, and they thereupon sue for the mortgage-money, S. 4 of the Succession Certificate Act, 1889 (now see S. 214, Succession Act XXXIX of 1925), does not apply, inasmuch as the right to demand the money accrues to them for the first time after the death of the mortgagee.(1)

A decree under Order 34, Rule 4 or 5, C.P.C. in a mortgage suit is not a decree against a debtor for payment of his debt within the meaning of Section 214 of the Indian Succession Act, which is limited to suits where a personal decree against a debtor is required to be passed. Therefore, non-production of probate by legal representatives of the mortgagee does not bar their suit for sale.(2)

Section 68 — Note 21

1. 1983 Mah LJ 670 (673)
2. ILR (1975) Cut 729 (1975) 41 Cut LT 571. (In a suit to enforce the personal covenant, express or implied in the mortgage under a simple mortgage the mortgagee has the right to sue within three years from expiry of the period fixed.) ** AIR 1985 Ker 275 (276) (Usufructuary mortgage — Converted into simple mortgage in view of Kerala Agriculturists Debt Relief Act, 1958 — Suit for recovery of mortgage amount — Limitation for — Would not be governed by Kerala Act but by terms of mortgage deed.)* * AIR 1972 Guj 166 ILR 1972 Guj 497 (Where there is a mortgage of land along with machinery the charge is as on immovable property and suit for mortgage money is governed by Article 62 of the Indian Limitation Act, 1963.) ** ILR (1972) Guj 481. (Limitation for a suit on the basis of personal covenant contained in a mortgage deed starts from the date of deprivation of the security under Article 120 of the Indian Limitation Act 1908.) ** AIR 1969 Mys 20 (21, 22) (1967) 2 Mys LJ 56 (Limitation for a suit for a decree for sale commences to run in a suit for decree for sale on the date on which the mortgagor does not deliver the possession on the date he was expected to do.) ** AIR 1976 Kant 146 (1976) 1 Kant LJ 430. (Where a person executes a mortgage and also agrees to repay the loan within stipulated period the mortgagee has a right for mortgage money. This right is independent of the right to enforce the mortgage and limitation in such a case starts from the date of expiry of the stipulated period to refund the loan and not from the date of the mortgage.)

Sectio 68 — Note 22

1. (1901) 28 Cal 246 (249) (DB).
2. AIR 1973 Guj 78 (79) : 13 Guj LR 905.

69. POWER OF SALE WHEN VALID.— [A][(1)] [B][C][* * *] A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely :—]

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist [D][or a member of any other race, sect, tribe or class from time to time specified in this behalf by the [E][State Government], in the [F][Official Gazette]];

(b) where [G][a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and] the mortgagee is [F][Government];

(c) where [G][a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and] the mortgaged property or any part thereof [H][was, on the date of the execution of the mortgage-deed], situate within the towns of Calcutta, Madras, Bombay, [I][*] [J][* * *] or in any other [K][town] [L][or area] which the [J][State Government] may, by notification in the [F][Official Gazette], specify in this behalf].

[M][*] [N][2] No such power shall be exercised unless and until—

[O][(a)] notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money or of part thereof, for three months after such service; or

[O][(b)] some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

[P][(3)] When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person demnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

[Q][(4)] The money which is received by the mortgagee, arising from the sale after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

[R][(5)] Nothing in this section or in section 69A applies to powers conferred before the first day of July, 1882.]

[S][* * * * * * * *]

[A] Section 69 was *renumbered* as sub-section *(1)* of that section, by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 34.

[B] *Substituted for certain original words,* ibid.

[C] The words "Notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, 1866" were *omitted* by the Repealing and Amending Act, 1952 (XLVIII of 1952), S 3 and Sch II [2-8-1952].

[D] *Inserted* by the Transfer of Property Act (1882) Amendment Act, 1885 (III of 1885), S 5

[E] Substituted for the words 'Provincial Government' by A L O 1950

[F] Substituted for the words 'Local Official Gazette' and for 'Crown by A O 1937

[G] *Inserted* by Act XX of 1929, S 34.

[H] *Substituted* for the word "is"; *ibid.*

[I] The word "Karachi" was *omitted* by A C.A.O , 1948 [23-3-1948].

[J] The words "Rangoon, Moulmein, Bassein, Akyab" were *omitted* by A O., 1937 [1-4-1937]

[K] For notifications relating to the towns of—

Ahmedabad, *see* Gaz of Ind. 1935, Pt I, p 936 and Bom Gaz., 1960, Pt IV-A, p. 902

Bandra, Kurla, Ghatkopar-Kirol, *see* Gaz of Ind., 1929, Pt I, p. 1064 These areas are now included in Bombay

Cawnpore, Allahabad, Lucknow, *see* Gaz of Ind., 1933, Pt I, p 158

Coimbatore, Madura, Cocanada (Kozhikode) and Cochin, *see* Gaz of Ind., 1935, Pt I, p 526

Ajmer, Jaipur and Jodhpur; *see* Raj. Gaz., dt 16-4-64, Pt IV (Ga), p 27

Delhi, New Delhi, *see* Gaz. of Ind., dt 1-12-1962, Pt II, S 3(i), p. 1944.

Delhi Cantonment, *see* Gaz. of Ind , dt 1-6-1963, Pt II, S 3(i), p. 1020

[L] *Inserted* by Act XX of 1929, S. 34.

[M] The word "But" in the beginning of second paragraph was *omitted* by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 34.

[N] Second paragraph was numbered as sub-section *(2)*, *ibid.*

[O] Clauses *(1)* and *(2)* of the second paragraph were *lettered* as (a) and (b), respectively *ibid.*

[P] The third paragraph was numbered as sub-section *(3)* by the Transfer of Property (Amendment) Act 1929 (XX of 1929), S. 34

[Q] Fourth Paragraph was numbered as sub-section *(4)* by Act XX of 1929, S 34

[R] *Substituted* for the original fifth paragraph by Act XX of 1929, S 34

[S] Original last paragraph was *omitted* by Act XX of 1929, S 34.

Synopsis

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2. Legislative changes.
3. Scope.
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5. "Notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, 1866."
6. "Any part thereof."
7. Default in payment where no time is fixed.
8. Mortgage-money.
9. Default in payment of interest only.
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10A. Where the mortgagee is the Government — Sub-section (1), cl. (b).
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12. Notice requiring payment — Sub-section (2), clause (a).
13. Whether notice can be waived.
14. "Served on the mortgagor or on one of several mortgagors."
15. "Three months after such service."
16. Sale for arrears of interest — Notice not necessary.
17. Whether a mortgagee giving notice under clause (a) of sub-section (2) can, before the expiry of three months after the

service of notice, sell the property for arrears of interest under clause (b).
18. Sub-section (3).
19. "In professed exercise of such a power."
20. Who can exercise the power.
21. Conduct of sale must be bona fide.
21A. Publicity of sale.
22. Effect of sale.
23. "Improper or irregular exercise of the power."
24. Mortgagor's right to claim damages.
25. Lis pendens.
26. Stopping of sale.
26A. Postponement of sale.
27. Who can purchase.
28. Effect of purchase by mortgagee himself.
29. Position of the purchaser.
30. Sub-section (4).

1. Analogous law.

The provisions of this section correspond to Ss 19 to 21 of the Conveyancing and Law of Property Act, 1881 (44 and 35 Vict., Ch. 41), now repealed and reproduced in the Law of Property Act, 1925 (15 Geo v. Ch 20) Sub-sections (1), (2), (3) and (4) of the present section therefore now respectively correspond to Ss 101(1)(i), 103(i), 104(2) and 105 of the Law of Property Act 1925 which run as follows :

"Section 101(1) – A mortgagee, where the mortgage is made by deed shall by virtue of this Act have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed but not further (namely) :

(i) A power, when the mortgage-money has become due, to sell or to concur with any other person in selling, the mortgaged property, or any part thereof either subject to prior charges or not and either together or in lots, by public auction or by private contract subject to such conditions respecting title, or evidence of title or other matter, as the mortgagee thinks fit with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale and to re sell without being answerable for any loss occasioned thereby."

"Section 103 – A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i) Notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors and default has been made in payment of the mortgage-money or of part thereof for three months after such service; or

(ii) Some interest under the mortgage is in arrear and unpaid for two months after becoming due."

"Section 104(2)— Where a conveyance is made in exercise of the power of sale conferred by this Act or any enactment replaced by this Act, the title of the purchaser shall not be impeachable on the ground—

(a) that no case had arisen to authorise the sale; or

(b) that due notice was not given; or

(c) where the mortgage is made after the commencement of this Act that leave of the Court when so required, was not obtained; or

(d) whether the mortgage was made before or after such commencement that the power was otherwise improperly or irregularly exercised;

and a purchaser is not, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorise the sale or due notice has been given, or the power is otherwise properly and regularly exercised, but any person damnified by an unauthorised, or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power."

"Section 105 The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale or otherwise, and secondly, in discharge of the mortgage money, interest, and costs, and other money if any due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof."

2. Legislative changes.

See the changes noted just after the text of this section above.

3. Scope.

A power of sale inherent in a 'simple mortgage' can be exercised only 'through the intervention of the Court' This section deals with the power of a mortgagee to sell the mortgaged property, without the intervention of the Court (1) The section does not offend Art. 14(2) or Art 19(1)(f)(3) of the Constitution of India.

The section as it stood before the amendment of 1929 did not itself confer upon the mortgagee any power of sale out of Court. The section only recognised in the case specified therein, the validity of such a power if conferred by the mortgage-deed.(4) But under the amendments of 1929, in cases coming under clause (a) of sub-section (1), an express provision in the mortgage-deed conferring a power of sale is not necessary in order to entitle the mortgagee to sell the property without the intervention of the Court Such express power is only necessary in cases coming under clauses (b) and (c) of sub-section (1) (5) See also Note 10.

Where the mills belonging to a company were mortgaged to the debenture trustees, and the mortgage was an English mortgage, it has been held that clause (a) of sub-section (1) applies as neither the company nor the debenture trustees could be said to belong to any particular religion (6)

A mortgagee having a power of sale without the intervention of the Court cannot file a suit for that purpose in a Court of law.(7) It has, however, been held that although under this section the mortgagee need not seek the intervention of Court that did not mean that it may not be done.(8)

Section 69, T.P Act, does not take within its embrace a statutory sale of the type contemplated under the Land Revenue Act. Section 69 contemplates control over the sale proceeds of the mortgage for the mortgagee as after receiving the money on sale, to deal with it in the manner set out in sub-section (4) of Section 69. While under the Land Revenue Act such a situation is not possible.(9)

The provisions of Section 69 of the Transfer of Property Act cannot be availed of for concurring in a sale by the Collector in recovery proceedings under the Land Revenue Act The Collector

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Section 69 — Note 3

1. **AIR 1918 PC 34 (34) : 40 All 407 : 45 Ind App 130.** (Obiter.) ** (1890) 13 All 28 (48) . 1890 All WN 216 (DB) (Per Mahmood, J — The power of sale in S 58(b) is not a power to bring property to sell without intervention of Court.) ** (1899) 12 CPLR 26 (32) (Do)
2. AIR 1955 Mad 135 (138, 144).

   [**See also** AIR 1955 NUC (Mad) 1828 (1828) (Writ of Mandamus sought against mortgagees to stop sale under this section on the ground of discrimination against mortgagors in the City of Madras — **Held** as writ was not sought against State, Art 14 could have no application.)]
3. AIR 1955 Mad 135 (138, 144).
4. AIR 1928 Rang 128 (128) : 6 Rang 134.
5. ILR (1967) 3 Mad 161 (167) (Cls (b) and (c) emphasise the consensual element involved in granting the power — **Overrueld** on another point in AIR 1977 SC 774)
6. AIR 1962 Andh Pra 274 (296).
7. AIR 1964 Mad 379 (380) ** AIR 1929 Rang 71 (72) 6 Rang 771 (DB)
8. AIR 1955 Mad 455 (457 458) (In the absence of an express provision to the contrary, such procedure cannot be said to be prohibited — When a mortgagee seeks the assistance of the Civil Court to sell the mortgaged property in a manner most advantageous for both himself and the mortgagor, not only has the Civil Court jurisdiction to go to his assistance but it is also its duty in the interests of justice to do so — Note . This case was referred to but distinguished in AIR 1971 Mad 879 (880))
9. AIR 1977 All 63 : 1976 All LJ 623

has no power to liquidate or wipe out the English mortgages and consequently he has no power to sell the property in execution of certificates in respect of Government dues, free from these mortgages.(10)

In the instant case the mortgagor has executed both simple mortgage and equitable mortgage by deposit of title deeds. As per agreement between the parties all amounts paid by debtor were to be adjusted first against equitable mortgage and then simple mortgage On debt remaining outstanding, creditor was entitled to recover the amount by auction sale.

Section 69 would apply to auction sale in respect of equitable mortgage also (11)

Sub-section (5) excludes, from the operation of this section, cases where the power has been conferred before the first day of July, 1882 As to the law applicable to such cases, see Notes 4 and 5.

The Act does not apply to the Punjab. Where the parties were businessmen, and the mortgage was in the English form the stipulation giving the mortgagee a power of sale without the intervention of the Court was held valid in that Province, in the absence of any positive enactment prohibiting such a stipulation.(12)

Even when the Act did not apply to Upper Burma this section was applied on grounds of justice, equity and good conscience.(13)

The power of sale may be conferred on a second mortgagee even where no such power has been conferred on the first mortgagee (14)

In exercising the power of sale under this section, the mortgagee does not act as the 'agent of the mortgagor. The mortgagee exercises his right under a totally superior claim which is not 'under' the mortgagor but 'against' him.(15)

The power of private sale conferred by this section and the power for the appointment of a receiver under S 69-A are concurrent powers Hence the existence of a receiver appointed under S. 69-A is no impediment to the exercise of the power of sale under this section (16)

Subsequent suit by mortgagor on ground that auction sale was void after suit in which mortgagee's right to auction mortgaged property was challenged, is not barred (17)

See also the undermentiond case.(18)

4. Law before the Act.

The mortgagee's power of sale without the intervention of the Court was long recognised in the English law of mortgages (1) In this country where the parties were Englishmen, the English

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10. 1970 All LJ 853.
11. 2001 AIHC 2325 (2337) (Mad)
12. AIR 1923 PC 114 (117) : 50 Ind App 162.
13. 1909 Upp Bur Rul 5 : 4 Ind Cas 755 (757).
14. AIR 1942 Mad 232 (236) : ILR (1942) Mad 287 (DB).
15. AIR 1944 Bom 156 (158) ILR (1944) Bom 549 (Mortgagee entering into contract for sale — Mortgagor is not thereby precluded from redeeming the property)
16. AIR 1956 Mad 385 (386) : ILR (1955) Mad 1310.
17. AIR 1993 Bom 203 (212).
18. 2001 (34) SEBI & CL (Mad) 975 (982)

Section 69 — Note 4

1. (1855) 4 WR (Eng) Col Dig 74 (74) 19 Jur 974, Kershaw v Kolow ** (1903) 19 TLR 209 (210), Walsh v Derrick ** (1852) 51 ER 737 (738) 16 Beav 158 96 RR 73 Cockell v Bacon ** AIR 1942 Bom 46 (48) : ILR (1942) Bom 83.

law was applied and the stipulation for a power of sale was held valid.(2) When either or both the parties were Indians, and the mortgage was executed in large towns, where business was carried on on European lines, it was held that the mortgagor who have a definite power of sale probably understood perfectly well what he was doing, and that more inconvenience would be caused by obstructing the enforcement of such power than by giving relief under it.(3) Thus, in the island of Bombay(4) and in the town of Karachi in Sind(5) where it was apparent from the mortgage-deed that the parties intended to be governed by the English law, the stipulation giving the mortgagee the power of sale was held valid. There is no express decision on this point of the Calcutta High Court

The law relating to mortgages in the 'moffusil' between parties who were not Europeans in the Bombay and Bengal Presidencies was governed by local Regulations.(6) None of these Regulations recognised the validity of a power of sale without the intervention of the Court.(7) But in the Bombay Presidency, the High Court was in favour of holding the power of sale valid even in the 'moffusil,' if it was apparent from the transaction that the parties intended to be governed by the English law(8) In other cases the power was held invalid (9) In the Bengal Presidency such a power was held repugnant to the spirit of Regulation and hence was not recognised(10) even where the mortgage was in the English form.(11)

4A. Mortgage by manager of joint Hindu family.

There is nothing to prevent a manager of a joint Hindu family mortgaging for a family purpose immovable property situated in one of the towns mentioned in this section, from conferring a power of sale on the mortgagee which can be exercised without recourse to Court.(1)

5. "Notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, 1866."

These words were omitted by the Repealing and Amending Act 48 of 1952. What follows is only of academic interest now.

Even before the passing of this Act a power of sale without the intervention of the Court was

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2. (1865) 3 Suth WR 157 (157) (DB) ** 1875 Pun Re No 68, P 171 (173) (DB)
3. (1908) 2 Sind LR 90 (92)
4. (1878) 2 Bom 1 (8) (DB) ** (1878) 2 Bom 252 (254) (DB) (Property in mofussil and parties residents of Bombay) ** (1892) 16 Bom 141 (143) (The mortgagee is liable to pay interest on the amount if it remains in his hands — The interest runs from the date of sale)** (1893) 17 Bom 711 (716) (Mortgage-deed providing remedy by way of damages in case of breach of sale clause — No injunction can be granted to stop sale)
5. (1908) 2 Sind LR 90 (92).
6. Bombay Regulation V of 1827. Bengal Regulation XVII of 1806.
7. (1871) 8 Bom HCR (AC) 142 (145) (DB) ** (1847) 7 Sel Rep 429 (442) · (1947) SDA (Beng) 429.
8. (1878) 2 Bom 1 (8) (DB) ** (1878) 2 Bom 252 (254) (DB).
9. (1871) 8 Bom HCR (AC) 142 (147) (DB). (Per Melvill, J.)
10. (1847) 7 Sel Rep 429 (442, 444) 1847 SDA (Beng) 429
11. (1886) 12 Cal 614 (617) (DB) (Mortgage in English form between Hindus in mofussil of Calcutta treated as a mortgage by conditional sale.)

    [But see (1875) 15 Beng L R 28 (31) 23 Suth WR 96 (97, 98) (DB) (Mortgage in English form of property situated in mofussil — Court proceeded on the assumption of validity of power of sale contained in the mortgage)]

Section 69 — Note 4-A

1. AIR 1942 Mad 232 (235) : ILR (1942) Mad 287 (DB).

given under the Trustees' and Mortgagees' Powers Act, 1866,(1) to the holders of mortgages to which the English law was applicable. Under the Act it was not necessary for the parties to confer this power in express terms. This section as originally enacted contained two provisions, one in clause (a) and the other in the last paragraph which related to English mortgages. The scope of the section, however, was restricted in two ways. Firstly, by the opening clause it was restricted to those mortgages only where the power was expressly conferred and, secondly, by the penultimate clause all mortgages where the power was conferred before the commencement of the Transfer of Property Act were left unaffected by the provisions of the section excepting the last paragraph. The result was that all cases, where power was conferred, whether expressly or not, but before the commencement of the Transfer of Property Act, and all cases where the power was conferred after the commencement of the Transfer of Property Act, but not in express terms, were excluded from the scope of the section. To the former class of cases the Trustees' and Mortgagees' Powers Act 1866, clearly applied. The latter class of cases also would have been undoubtedly governed by that Act but for some reason or other there was also an express provision to that effect in the last paragraph of the old section. Thus the result was that the section as it stood in 1882 contained two provisions, one in clause (a) and the other in the last paragraph, both of which related to English mortgages which might be executed after the commencement of the Transfer of Property Act. Clause (a) applied to those English mortgages where the power of sale was expressly conferred while the last paragraph related to those English mortgages where it was not so conferred. Again in cases of English mortgages to which clause (a) applied the power of sale was to be exercised according to the provisions of the section, while in case of English mortgages to which the last paragraph applied the power was to be exercised according to the provisions contained in the Trustees' and Mortgagees' Powers Act.

There was difference between the provisions regarding the exercise of the power contained in the section and those contained in the Trustees' and Mortgagees' Powers Act. The provisions in that Act were very defective. Moreover, the English law on which they were based had also undergone considerable changes while the provisions of the sections were borrowed from the new English law as it was contained in the Conveyancing and the Law of Property Act 1881 (44 and 45 Vict., C. 41). The Legislature, therefore, at the time of passing the Transfer of Property (Amendment) Act of 1929(2) desired that the exercise of the power should in all cases be regulated by the provisions of this section. To accomplish this, the last paragraph was omitted in that year. But this alone was not sufficient. The Trustees' and Mortgagees' Powers Act was not repealed and it would still have controlled the exercise of power in those cases of English mortgages to which the last paragraph of the old section formerly applied, i.e., cases where the power was not expressly conferred. The repeal of that Act was not possible as it dealt with other matters also such as trusts and leases besides mortgages. Hence, to find a way out of this difficulty and to accomplish the desired result, the Legislature introduced the words "Notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, 1866" thereby indirectly excluding mortgages from the scope of that Act and bringing all mortgages within the scope of this section (3). As noted already those words have now been omitted by the Repealing and Amendment Act, 48 of 1952.

6. "Any part thereof."

Under this section a mortgagee is entitled to sell a 'part' of the mortgaged property. A 'legal incident' of the mortgaged property cannot be considered to come within the words "any part thereof" and be sold apart from the property to which it is a legal incident. In *In re Yates Batchelder*

Section 69 — Note 5

1. Act XXVIII of 1866.
2. Act XX of 1929.
3. See the Report of the Special Committee. Clauses 33 and 34 (S. 69 and S. 69-A).

v Yates(1) where there was a mortgage of land with things attached to it and the mortgagee claimed to sell only the things attached apart from the property itself, Bowen, L. J., observed as follows

> "But then we have to consider the power of sale which is given by the Conveyancing and Law of Property Act of 1881, and no doubt, a serious question arises as to whether or no that power of sale, having regard to its special terms which enable mortgagees to break up into lots and to sell in lots the mortgaged property or any part thereof enables a person who takes a mortgage in the ordinary form of a freehold estate on which there are trade machinery or fixtures, to sever the fixtures and sell them as if they were a part of the mortgaged property I cannot think that this was the intention of the section I think the framers intended that 'what was sold should be a separable part of the mortgaged property in the State in which it was subjected to the mortgage I cannot believe for a moment that the mortgagee of a house could sell the chimneys of the house without selling the rest of the house or could sell the fixtures or mantelpieces in the house and say they were part of the house They are part of the house in the sense that they follow the land as a necessary concomitant of it in a conveyance of the house but they are not separable parts of the house for the purposes of this section The subject-matter of the particular conveyance or mortgage has of course to be considered in applying the Act of 1881 You must seek having regard to the subject-matter which is mortgaged what power the term 'power to sell any part' gives you and when a mortgagee gets a workship with machinery in it, I do not believe that the power enables him to sell the machinery apart from the shop any more than it enables him to sell the chimneys apart from the house."

7. Default in payment where no time is fixed.

A mortgagee does not become entitled to exercise the power of sale under this section unless there has been a default in payment of the mortgage-money. There cannot be a default in payment of the mortgage-money unless it has become due (1) But the fact that the mortgage-money remains unpaid after becoming due is not necessarily a "default in payment of the mortgage-money" within the meaning of this section Where no time is fixed for the payment, there must be a 'demand' for payment before there can be said to be a 'default" within the meaning of this section, though for purposes of limitation the money might become 'due' on the date of the document itself Where a clause in the mortgage-deed provided that 'if the 'Nidhi' being in need of the principal and interest gives intimation by means of notice to pay off the same and I or my heirs fail to pay the principal and interest, the 'Nidhi' itself shall sell the aforesaid houses and grounds by public auction or private sale under S 69 of the Transfer of Property Act" and the 'Nidhi' sold the property without giving a notice demanding the principal and interest, it was held that the 'Nidhi' was not in a position to exercise the power of sale because of the initial difficulty of making out that there was a default in payment of the mortgage-money In delivering the judgment Kumaraswami Sastri, J , observed :

> "The amount due for principal is not repayable at any particular date Nor is anything stated as to when it is to be repaid. Under these circumstances it seems to me to be clear that until there is a demand made for the money, there can be no default in payment of the principal sum due No doubt the fund '(Nidhi)' could have sued the next day for the money or the mortgagor might have offered to redeem the next day, but that would not make non-payment a default within S 69 of the Transfer of Property Act" (2)

The same principle will apply where, though a time is fixed for payment, the mortgage money may become due earlier at the option of the mortgagee under specified circumstances. In such cases

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Section 69 — Note 6

1. (1888) 38 Ch D 112 (128, 129) 57 LJ Ch 697 59 LT 47 36 WR (Eng) 563

   [**See also** (1894) 2 Ch 600 (613) 64 LJ Ch 21 · 71 LT 398 In re Brooke Brooke v Brooke (In re Yates, (1888) 38 Ch D 112, Foll — Fixtures though conveyed by express words cannot be separately sold)]

Section 69 — Note 7

1. AIR 1955 Mad 135 (143) ** (1888) 38 Ch D 273 (283) 57 LJ Ch 609 59 LT 233 36 WR (Eng) 513, *Selwyn v. Garfit*
2. AIR 1926 Mad 841 (844) (DB)

the mere fact that the money has become due earlier is not a default in payment. The mortgagee must make a demand for the amount so as to enable the mortgagor to realise his position and save his equity of redemption if possible (3). In such cases, it is conceived, therefore, that if a mortgagee wants to sell the property for the recovery of the principal money, two notices will be necessary, one demanding the payment of mortgage money and the other under clause (a) of sub-section (2).

8. Mortgage-money.

Where a mortgage-debt is reduced according to the provisions of any law for the time being in force, it is the reduced amount that represents the mortgage-money(1) and if the mortgagee tries to sell the property for the recovery of more than the reduced amount, he can be restrained by an injunction obtained in a suit for that purpose.(2)

9. Default in payment of interest only.

There is a difference of opinion as to whether the fact that interest amounting to Rs. 500 falls into arrears 'before' the principal money becomes due will entitle the mortgagee to exercise his power of sale. According to the Court of Lower Burma,(1) a default in payment of interest is a default in payment of the "mortgage-money" within the meaning of sub-section (1) and consequently the mortgagee can exercise the power of sale even though the principal money has not fallen due. According to High Court of Madras(2) if interest of at least Rs. 500 is in arrears and remains unpaid for three months the mortgagee can bring mortgaged property to sale even without giving notice. According to the High Court of Bombay,(3) on the other hand, he cannot exercise such a power before 'both' the principal and interest have fallen due.

9A. "Without the intervention of the Court."

See Note 3.

10. Power must be expressly conferred.

A mortgagee cannot have a power of sale under clauses (b) and (c) unless it is expressly conferred upon him by the mortgage deed. The words "the mortgagee, his heirs, representatives and assigns shall have all the rights, powers, remedies and privileges conferred upon the mortgagee by Act 4 of 1882" (i.e., Transfer of Property Act) do not confer the power of sale upon the mortgagee. The reason is that in such cases, S. 69 does not, by itself, purport to confer any power upon the mortgagee, it only prescribes the procedure for the exercise of the power when it is conferred by the

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3. AIR 1941 Bom 339 (342) : ILR (1941) Bom 506. (An advertisement of the property for sale by public auction, by the mortgagee without any intimation being given to the mortgagor cannot amount to such an appropriate act by the mortgagee as will make the mortgage amount immediately payable at his option.)

Section 69 — Note 8

1. AIR 1955 Mad 491 (495) : ILR (1956) Mad 229 (DB) ** AIR 1939 Mad 4 (5). (Mortgage-debt reduced under Agriculturists' Relief Act.)
2. AIR 1955 Mad 491 (495) : ILR (1956) Mad 229 (DB) ** AIR 1939 Mad 4 (5).

Section 69 — Note 9

1. AIR 1918 Low Bur 64 (65) : 9 Low Bur Rul 106 (DB). (The term 'mortgage money' is defined in S. 58 as the principal and interest of which payment is secured and thus it appears that the interest is 'mortgage-money' just as much as principal is. The use of the conjunction 'and' does not imply that the term 'mortgage-money' is applicable to principal and interest in combination.)
2. 1991 Bank J 442 : 1990 (1) Mad LJ 323.
3. AIR 1921 Bom 421 (423) (DB). (It is open to parties to contract that if interest remained unpaid for three months the principal would become payable. In absence of such contract there is no default in payment of mortgage-money.)

mortgage deed.(1)

No particular form is necessary for the conferment of the express power of sale.(2)

The power so conferred may be a power to sell by 'private contract' or a power to sell by 'auction' A sale by private treaty, when the power to sell is by auction, would be invalid (3) But a sale by a private contract where a power to sell either by private contract or by auction is given is not bad merely because an attempt is not made first to sell by auction.(4)

10A. Where the mortgagee is the Government — Sub-section (1), Cl. (b).

Sub-section (1), Cl (b), as it originally stood, conferred a power of sale only in cases where the mortgagee was the 'Secretary of State for India in Council.' Every contract made with the local Government or Government of India could not be deemed to be such a contract Therefore, Cl (b) was held not to apply to an agreement under which a survey number was offered as collateral security for the loan advanced by the local Government under the Agriculturists Loans Act (1884) (1)

Where Govt. had auctioned the land mortgaged to it, as a result of failure to comply with the terms agreed upon mutually, by fulfilling necessary requirements of sale, it was held that the purchaser could not be deprived of the land in possession as the sale was not impeachable (2)

Where the power to sell mortgagted property either by public auction or by private contract without the intervention of the Court was conferred on the Govt mortgagee, in the mortgage deed itself, provision in S 69(1)(b) gets attracted and the objection to power of Govt to sell mortgaged property must fail.(3)

11. "Within the town of Bombay."

Property situated at Mahim within the Island of Bombay and within the local limits of the original civil jurisdiction of the High Court of Bombay is property situated within the town of Bombay within the meaning of this section.(1) The town of Bombay now includes Greater Bombay. See the Notes given immediately after the text of the section.

12. Notice requiring payment — Sub-section (2), Clause (a).

When a mortgagee desires to exercise his power of sale for recovery of the principal money he cannot do so unless and until he complies with the provision as to notice contained in this clause (1) This does not, however, mean that this provision, in any way, affects the 'power' of the

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Section 69 — Note 10

1. AIR 1928 Rang 128 (128) · 6 Rang 134 (Mortgage deed merely stating mortgagee to have all rights under the T P Act — No right of sale out of Court is conferred)
2. (1968) 1 Mys LJ 69 (80) (DB) (**Held**, clause in deed of mortgage, 'mortgagee shall be entitled to cause mortgaged property to be sold as a defaulter by revenue sale' was sufficient to confer such express power of sale without intervention of Court)
3. (1841) 3 Moo PC 457 (464) : 13 ER 186, *Bronard v. Dumaresque.*
4. (1857) 118 RR 213 (227) 26 LJ Ch 830 · 1 De G & J 535 *Davey v Durrant* (Nor is it necessary for the mortgagee to advertise the property for sale before accepting a fair offer.)

Section 69 — Note 10-A

1. AIR 1948 Mad 130 (131).
2. 1983 Pun LJ 323 (326).
3. (1992) 2 Mad LW 669 : 1992 Writ LR 775

Section 69 — Note 11

1. (1899) 23 Bom 348 (358) (DB)

Section 69 — Note 12

1. AIR 1934 Mad 644 (645) (DB).

mortgagee to sell the property or his right to exercise the power after he has become entitled to do so under the opening part of sub-section (1) The provision is only a direction with regard to the exercise of the power and if a sale is held without a notice under this clause it will only afford a ground for damages, if any, to the mortgagor damnified by the sale (2) If there has been no fraud or collusion in the matter, he has no cause for complaint (3)

When exercising power of sale under this section, it is not necessary for the first mortgagee to serve a notice on the second mortgagee.(4)

13. Whether notice can be waived.

The statutory requirement of notice in sub-section (2), Cl (a) is imperative.(1) ,not subject to a contract to the contrary and cannot be waived by the parties But if a mortgagor after the sale without a notice under Cl (a), acquiesces in the sale, his right to claim damages on the ground of the sale being irregular for want of notice will be deemed to have been waived by him (2)

14. "Served on the mortgagor, or on one of several mortgagors."

It is the 'mortgagor' on whom the notice issued under sub-section (2), Cl (a) has got to be served Clause (a) of sub-section (2) lays down in no uncertain terms that the requisite notice may be given to the mortgagor or one of several mortgagors Where there are several mortgagors the mortgagor who is given the notice is constituted the agent of the other mortgagors entitled to receive the same (1) Under S 59-A a 'mortgagor'' includes a person who derives title through him Where, therefore, the mortgagor has sold the equity of redemption, the notice has got to be served on the purchaser of the equity of redemption (2) But, where the purchaser was aware that the property was liable to be sold in default of payment of principal debt, notice to such purchaser is necessary, and unless fraud or collusion is proved or alleged he cannot have any cause for complaint.(3)

Where the mortgagor is dead, notice should be served upon his heirs (4)

As to the procedure for the service of notices, see S 102

15. "Three months after such service."

A sale cannot be held unless, after the service of notice upon the mortgagor requiring him to

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2. (1888) 11 Mad 201 (203) (DB) (Deed providing for power of sale after 15 days notice — Condition invalid but sale is valid.)

   [See also 1934 Mad WN 1146 (1151) (DB) (Sale by agent of mortgagee under power of sale — Any irregularity there may have been owing to confused sale notices or damages arising therefrom are matters in respect of which mortgagor may have a remedy for damages against the person exercising the power of sale.)]

3. AIR 1967 SC 1296 (1297) : (1967) 2 SCR 613.

   See also Note 21.

4. AIR 1965 Mad 142 (143) : ILR (1964) 1 Mad 735.

Section 69 — Note 13

1. AIR 1941 Bom 339 (344) ILR (1941) Bom 506, Babamiya Mohidin v Jehangir Dinshaw (Three months' period provided therein cannot be curtailed by agreement of parties)
2. See (1890) 44 Ch D 492 (501) 38 WR (Eng) 524 59 LJ Ch 651 62 LT 651 *In re Thompson and Holt.*

Section 69 — Note 14

1. AIR 1967 SC 1296 (1297) : (1967) 2 SCR 613.
2. See (1881) 17 Ch D 434 (435, 436) 29 WR (Eng) 601 50 LJ Ch 576 45 LT 38, *Hoole v. Smith*
3. AIR 1967 SC 1296 (1297) : (1967) 2 SCR 613.
4. (1854) 61 ER 775 (777) 2 Drew 403 1 Jur 590 2 WR (Eng) 610 100 RR 197 *Tracey v. Lawrence.*

pay the principal money, there has been a default in payment of it or any part thereof for a period of three months (1) This period of three months, as is clear from the words of the clause itself, is to commence from the date of the service of the notice and not from any other date which may have been mentioned in the notice and by which the payment was required to be made.(2)

Even though the mortgagee cannot sell the property before the expiry of three months from the service of notice, there is nothing to prohibit him from entering into a contract for the sale of the mortgaged property before the expiry of the period.(3)

Though the minimum period of three months is fixed by the section, no maximum period has been laid down within which the sale ought to be held. In the undermentioned case,(4) however, where a sale was held 15 months after the service of the notice, it was held that a fresh notice ought to have been given before the actual sale.

16. Sale for arrears of interest — Notice not necessary.

Where interest amounting to Rs. 500 is in arrears and remains unpaid for three months after becoming due, no notice to the mortgagor is necessary before the mortgagee exercises his power of sale.(1)

17. Whether a mortgagee giving notice under Cl. (a) of sub-section (2), can, before the expiry of three months after the service of notice, sell the property for arrears of interest under Cl. (b).

When the principal has become due and interest amounting to Rs. 500 has fallen into arrears and has remained unpaid for three months, the mortgagee has a choice of acting either under Cl. (a) or Cl. (b). But if he chooses to exercise Cl (a) and gives a notice as required by that clause, he cannot afterwards change his intention, 'before the expiry of three months from the service of notice,' and try to sell the property for arrears of interest as provided under Cl (b).(1)

18. Sub-section (3).

This clause is intended to protect the purchaser from any attack on the ground of any impropriety or irregularity in the exercise of the power of sale. It does not say anything as to whether the protection will be extended to him even if he had a notice of such impropriety or irregularity at the time of the sale. In *Chhabildas Laloobhai v Dayal Mowaji*,(1) it has been observed by Jenkins, C. J., that the section permits a distinction between a purchaser with notice and a purchaser without notice of an irregularity and though a sale may not be impeachable on the mere ground that the power was improperly exercised, this protection does not extend to a case when there is the addi-

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Section 69 — Note 15

1. (1899) 1 Bom LR 273 (275) (Mortgagor must pay up all the interest due up to payment to stop sale.)
2. (1908) 2 Ch 20 (23) : 77 LJ Ch 581 : 99 LT 187, *Barker v. Illingworth.*
3. (1874) 67 ER 1049 (1051) 5 Hare 598 : 71 RR 249, *Major v Ward.*
4. AIR 1926 Mad 841 (843) (DB). (Per Kumaraswami Sastri, J.)

Section 69 — Note 16

1. (1899) 1 Bom LR 273 (275) ** AIR 1926 Mad 841 (847) (DB)

Section 69 — Note 17

1. (1899) 1 Bom LR 273 (275)

[See however (1968) 1 Mys LJ 69 (80) (DB) (Clause (a) and clause (b) of sub-section (2) being alternative it is sufficient if requirements of Cl (b) are satisfied — Sale within 3 months after notice held proper.)]

Section 69 — Note 18

1. (1904) 6 Bom LR 557 (571) (DB) (Affirmed in (1907) 31 Bom 566 34 Ind App 179 (PC).)

tional ground that the purchaser had notice of the improper exercise of the power. In the undermentioned case,(2) it has been held by the Madras High Court that when there is 'fraud' there may be a cause of action against the purchaser to have the sale declared void or to have it set aside on the ground of fraud.

Though the English law also does not contain any statutory provision in this respect, the English decisions are to the same effect.(3)

A sale by a mortgagee or receiver for debenture-holders effected in pursuance of the power vested in him in that behalf by the mortgage deed or the debenture trust deed, as the case may be, without the sanction of the Court cannot be avoided as falling under either S. 171 or S. 232 of the Companies Act. A secured creditor realising his security without seeking the assistance of the Court is, thus outside the winding up and no leave of Court is needed when a receiver appointed by a mortgagee exercises his power of sale under S. 69(3), T. P. Act. If there is no allegation of want of *bona fides* or recklessness or fraud against the receiver in exercising such a power, the sale held by the receiver is valid and effectual to convey title to the purchaser and such a sale cannot be avoided on the ground either of want of due notice given by the receiver before effecting the sale or on the ground of undervalue.(4)

See also Note 21A.

19. "In professed exercise of such a power."

In order that purchaser should get an unimpeachable title, the sale must have been in professed exercise of the power. When there is no valid mortgage(1) or the power is not validly conferred,(2) the sale cannot be said to be in the professed exercise of the power and cannot give the purchaser an unimpeachable title.

The words "such a power" do not refer to a power exercised three months after the notice; they refer simply to the power of sale mentioned in the opening part of sub-section (1).(3)

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2. AIR 1940 Mad 903 (904). (If there is an improper sale, unless there is fraud the only remedy of mortgagor is by way of damages.)
3. (1888) 3 Ch D 273 (283). 57 LJ Ch 609. Selwyn v. Garfit. (Purchaser must be taken to have known proviso contained in the deed under which he bought.) ** (1898) 2 Ch. 230 (238). 46 WR (Eng) 668. 78 LT 708. 67 LJ Ch 548. Life Interest and Reversionary Securities Corporation v. Hand-in Hand Fire & Life Insurance Society. ** (1866) 2 LT (NS) 128 (132). 29 LJ Ch 493. Jenkins v. Jones. (Mortgage deed reserving purchaser of inquiry — Tender by mortgagor at sale. Purchaser ought to inquire further.) ** (1860) 62 ER 332 (334). 8 WR (Eng) 575. Parkinson v. Hanbury. (Clause in mortgage-deed that purchaser should not be required to ascertain that previous notice had been given does not enable purchaser, if he knows that notice has not been given, to sustain his purchase.) ** (1876) 3 Ch D 600 (603, 604). 24 WR (Eng) 44. Dicker v. Angerstein. (*Bona fide* purchaser without notice.) ** (1882) 20 Ch D 220 (224). 51 LJ Ch 642. Warner v. Jacob. (Mortgagee exercising power of sale *bona fide* without collusion with purchaser — Court will not interfere unless price is so low as in itself to be evidence of fraud.) ** (1894) 1 Ch 25 (36). 42 WR (Eng) 66. Bailey v. Barnes. (Purchaser without notice protected.) ** (1883) 49 LT 389 (390). 31 WR (Eng) 461. Bettyes v. Maynard. ** (1857) 11 RR 213 (226). 26 LJ Ch 830. Davey v. Durrant. (Purchaser not bound to enquire what steps had been antecedently taken for the purpose of promoting the sale.)
4. AIR 1955 Mad 331 (335) (DB).

Section 69 — Note 19

1. AIR 1936 Bom 94 (97). (Mortgage not valid owing to invalid attestation.)
2. AIR 1928 Rang 128 (128). 6 Rang 134. 110 Ind Cas 698. (It was held that the words "the mortgagee, his heirs, representatives and assigns shall have all the rights, powers, remedies and privileges conferred upon the mortgagee by Act 4 of 1882" did not confer upon the mortgagee powers of sale.)
3. (1888) 11 Mad 201 (203) (DB).

20. Who can exercise the power.

It is clear from S. 59-A that anybody who derives title through the mortgagee will be entitled to exercise the power of sale conferred on the mortgagee It has been held that the sub-mortgagee as well as second mortgagee were entitled to exercise the power of sale.(1)

Before the insertion of that section in 1929 the question as to who, besides the mortgagee, were entitled to exercise the power was determined by reference to the deed under which the right was claimed.(2)

In England, S. 106 of the Law of the Property Act, 1925, expressly provides that the power can be exercised by any person for the time being entitled to receive and give a discharge for the mortgage-money (3) Where an agent is appointed by a mortgagee, his authority is determined by the express terms of the deed of his appointment Thus, where an agent was appointed 'also to sell any real or personal estate' etc , of the principal it was held that the agent had no authority to exercise the power of sale under a mortgage.(4)

Under this section too, the power can be exercised through an agent (5)

Where a mortgage is in favour of a firm, one partner alone cannot exercise the power (6)

Where a mortgage is made in favour of two persons jointly to secure a loan advanced from a fund to which both of them are jointly entitled, the power can, on the death of one of them, be exercised by the survivor (7) See also the case noted below (8)

Where the property of Company is mortgaged under mortgage-deed to which Directors joined as sureties it was held that the Directors who merely joined as sureties were not mortgagors and, therefore, the right of sale could be exercised against the mortgagor-company (9)

21. Conduct of sale must be bona fide.

The power of sale given to the mortgagee is for his benefit and not for the benefit of the mortgagor (1) He has, therefore, a perfect right to hold the sale of the property in such manner as he thinks most conducive to his benefit. He can for this purpose even impose conditions upon the conduct of the sale (2) The conditions, however, must be such as an owner will use in the sale of his

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Section 69 — Note 20

1. AIR 1955 NUC (Mad) 3917.
2. AIR 1922 Mad 390 (391) 45 Mad 774 (DB) (Mortgagee having power of sale — Assignment of the mortgage — Power of sale also assigned in the deed — Assignee held entitled to the power.)
3. (1904) 2 Ch 219 (223) 73 LJ Ch 684 91 LT 121, In re, Dowson and Jenkin's Contract (Case under S. 21, sub-section (4) of the Conveyancing Act, 1881, which contained the same provision.)
4. (1904) 2 Ch 219 (223) 73 LJ Ch 684 91 LT 121, In re Dowson and Jenkin's Contract (Case under Conveyancing Act, 1881.)
5. 1934 Mad WN 1146 (1149) (DB). (Power of attorney agent.)
6. (1876) 24 WR (Eng) 695 (696), Warr v. Jones.
7. (1855) 69 ER 507 (508) · 1 K & J 383 3 Eq Rep 449 3 WR (Eng) 331 1 Jur (NS) 371, Hind v. Poole.
8. (1903) 13 Mad LJ 367 (369) (DB) (Mortgagee parting with title deeds by way of assignment but getting back the deeds becomes revested with the power of sale which he originally had under the mortgage deed.)
9. AIR 1969 Mys 280 (288) : (1970) 40 Com Cas 466.

Section 69 — Note 21

1. (1889) 61 LT 71 (71) : 58 LJ Ch 539, Colson v. Williams.
2. (1903) 5 Bom LR 247 (249)

own property(3) and should not be depreciatory.(4) It is also necessary that the mortgagee must act 'bona fide' in the conduct of the sale (5) Where these elements are present the sale is not vitiated even though the highest price has not been obtained.(6) In *Warner v. Jacob*,(7) Kay, J., observed

> "A mortgagee is, strictly speaking, not a trustee of the power of sale It is a power given to him for his own benefit, to enable him the better to realise his mortgage-debt If he exercises it 'bona fide' for that purpose without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous unless indeed, the price is so low as in itself to be evidence of fraud."

Though the mortgagee is not a trustee for the mortgagor, he is something more than a perfunctory agent and must at least see that, in observing his own interest, he does not sacrifice the interest of those equally interested in the property. He must not do anything which would scare away the bidders.(8)

Courts would not ordinarily interfere with the right of mortgagee on an auction sale under S 69 even though there is some negligence or mistake committed by the mortgagee in conducting the sale but then the purchaser or a transferee is none else than the mortgagee, Courts can interfere (9)

21-A. Publicity of sale.

A mortgagee is not bound to advertise the sale, but he must give it reasonable publicity (1)

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3. (1904) 6 Bom LR 557 (568) (DB) ** 1913 App Cas 299 (311) 82 LJ PC 65 108 LT 273 29 TLR 30 Mc Hugh v Union Bank of Canada ** (1889) 58 LJ Ch 539 (541) 61 LT 71 Colson v Williams (His motive in selling is not relevant so long as he acts as a prudent man in respect of his own property.)

4. (1903) 5 Bom LR 247 (249, 250) (A depreciatory condition is one which tends to deter persons from bidding or to deter those who do bid from bidding up to so high a figure and a condition which has that tendency has it because it tends to cripple the rights of a purchaser and put a fetter on him, affirmed in 6 Bom LR 557) ** (1858) 28 LJ Ch 132 (137) 4 Drew 352 62 ER 136 4 Jur (NS) 12,4 7 WR (Eng) 73 1,3 RR 395 Falkner v Equitable Reversionary Society (A condition of sale entitling the vendor to rescind the contract in case he should be unwilling or unable to answer any requisition, is depreciatory in a sense, but not so depreciatory as to be improper being one as a prudent owner would introduce.)

5. **(1907) 31 Bom 566 (583) : 34 Ind App 179 (PC)** (Appeal from 6 Bom LR 557 — Mortgagee not acting *bona fide* — Sale set aside) ** AIR 1993 Bom 203 (Sale proclamation falsely describing property, neither reserve price nor estimated price mentioned exact property tax, arrears not mentioned — Language used instead giving impression that property was seriously encumbered — Rental income property yielded not given Sale was declared void) ** AIR 1963 Mad 468 (470) ILR (1963) Mad 376 ** (1889) 40 Ch D 395 (411) 37 WR (Eng) 196 58 LJ Ch 185 60 LT 121 Farrar v Farrars Ltd

   See also Note 12

6. (1889) 40 Ch D 395 (411) 37 WR (Eng) 196 58 LJ Ch 185 60 LT 121 Farrar v Farrars Ltd ** **(1912) 13 Ind Cas 261 (264) (PC)** * (1935) 152 LT 390 (392) 1935 Ch 310 104 LJ Ch 201, Warring (Lord) v London & Manchester Assurance Co Ltd ** AIR 1933 Mad 736 (741, 742) (DB).

7. (1882) 20 Ch D 220 (224) , 30 WR (Eng) 721 51 LJ Ch 642 46 LT 656

   [**See also** AIR 1963 Mad 208 (209) (So long as the mortgage money is not paid or validly tendered, the mortgagee with full knowledge of a pending suit for redemption and perhaps to defeat the suit, can enforce his power of sale under S 69 But a purchaser at such a sale cannot avoid its setting aside by a Court on the ground of fraud.)]

8. AIR 1955 Mad 135 (143).

9. (1992) 1 Mad LJ 240 (DB).

Section 69 — Note 21-A

1. AIR 1955 Mad 135 (143).

Want of publicity may entitle mortgagor for damages, but it cannot vitiate the sale.(2)

22. Effect of sale.

In England the effect of a sale under the provision corresponding to this section is to destroy the equity of redemption and convey the property to the purchaser free from all subsequent encumbrances.(1) In this contry the same principle was held applicable in cases before the Act In Kishendatt *Ram v. Mumtaz Ali Khan*(2) their Lordships of the Privy Council observed as follows :

> "The effect of a sale under a power of a sale is to destroy the enquity of redemption in the land, and to constitute the mortgagee exercising the power of a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent incumbrancers, and ultimately for the mortgagor. The estate if purchased by a stranger, passes into his hands free from all incumbrances"

Even under the present section the effect of a sale would be the same (3) The subsequent mortgagee would be entitled to the surplus, if any, remaining out of the proceeds of the sale after payment to the vendor-mortgagee the amount due to him.(4)

(See also Note 30.)

A sale held in exercise of power under S 69 to the mortgagee does not become void simply by reason that, at the time of sale a suit had been filed by a third party claiming title to the property, or that a Receiver had been appointed in the suit for the property and no leave of the Court had been obtained for sale.(5)

A mere 'contract for sale' by the mortgagee which has not yet fructified into a completed sale does not extinguish the mortgagor's right of redemption In this respect, the position differs from the English law under which an equitable 'interest' in favour of the would be purchaser is created under such a contract.(6) A contrary view has, however, been taken in the undermentioned case (7)

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2. 1963 MPLJ (Notes) 141 ** AIR 1955 Mad 331 (335) (DB).

[**See also** (1909) 4 Ind Cas 755 (757) (UB) (In a simple mortgage a power of private sale is invalid, but if a sale is held in exercise of such power, it is not to be impeached, though the mortgagor may sue for damages on proof of having suffered damage)]

Section 69 — Note 22

1. The Law of Property Act, 1925 (15 Geo V Ch 20), S. 104 (1) ** (1935) 152 LT 390 (391) , 1935 Ch 310 · 104 LJ Ch 201, Waring (Lord) v London & Manchester Assurance Co Ltd. ** (1922) 2 Ch 449 (463) , 91 LJ Ch 216 · 127 LT 357, Belton v Bass Ratcliffe & Gretton Ltd ** (1900) 2 Ch 211 (215, 216) 4 WR (Eng) 697 69 LJ Ch 593 83 LT 148, Born v. Turner. (Property passes to the purchaser with all its legal incidents.)

2. **(1880) 5 Cal 198 (211) : 6 Ind App 145 (PC).** *(Obiter.)*

3. ILR (1967) 3 Mad 161 (177, 178) *(Note* :— AIR 1944 Bom 156 is, however, **Dissented from** in holding that right to redeem was extinguished on knocking down of an auction sale though sale deed was not executed) ** AIR 1944 Bom 156 (158, 159) · ILR (1944) Bom 549 (DB). (But the right to redeem, given to a mortgagor under S 60 does not come to an end when the mortgagee having a power of sale under the mortgage deed enters into a contract of sale in the purported exercise of that power The right to redeem is not extinguished by such a contract of sale entered into by the mortgagee, it comes to an end only when the conveyance in pursuance of the contract is executed The mortgagor can, therefore, redeem the mortgagee at any time before the completion of the sale See also S. 60, Note 22.)

4. (1885) 29 Ch D 954 (962) · 33 WR (Eng) 916 · 54 LJ Ch 1081 · 53 LT 442, West London **Commercial Bank v. Reliance Permanent Building Society.**

5. AIR 1982 (NOC) 84 : (1981) 2 Mad LJ 247.

6. AIR 1944 Bom 156 (158, 159) ILR (1944) Bom 549 (DB) (Right of redemption not affected by contract for sale 1935 Ch D 310, **Distinguished.**)

7. ILR (1967) 3 Mad 161 (191) (**Overruled** in AIR 1977 SC 774; AIR 1944 Bom 156, **Dissented from.**)

In a sale under Section 69 what is sold is the whole property and not merely the interest of the mortgagors. In a mortgage of property executed by two joint brothers notice of sale was given to one of them and the property was sold under the power of private sale Sons of the brother to whom the notice was not given born subsequent to the mortgage are bound by the sale **(8)**

Where in exercise of the power conferred on the mortgagee to sell without intervention of the Court the sale is not complete by registration, mortgagor has a right to redeem **(9)**

23. " Improper or irregular exercise of the power."

It was held in some cases**(1)** in England that the Court will consider the exercise of a power of sale improper, if it is exercised not for the purpose of getting the money which is due on the mortgage but for some indirect 'purpose' But in cases decided later, it has been held that the duty of the mortgagee is to 'conduct' the sale properly and sell at a fair value and if he observes this the sale cannot be attacked by looking to the 'motive' of the mortgagee in selling the property **(2)**

The power of sale given to the mortgagee is for his own benefit The Court will not interfere merely to prevent its exercise contrary to the wishes or interests of the mortgagee or even if the mortgagee is seeking some collateral object and not merely the payment of his debt The mortgagee is not a trustee for the mortgagor of his power of sale and the Court will not inquire into the motives for exercise of the power so long as he acts bone fide **(3)**

A sale under a depreciatory condition**(4)** or before the mortgagee became entitled to exercise the power**(5)** or without serving a notice on the mortgagor under sub-s (2) Cl (a) when the property is to be sold for recovery of the principal**(6)** is an improper or an irregular exercise of the power.

A solicitor took a mortgage from his client There was a power of sale but it was given in an unusual form and in a general manner The mortgagee-solicitor sold the property under the power without a notice to the mortgagor (as it was not necessary under the mortgage-deed) It was held that the mortgagor had a right to be informed what the terms were upon which the estate could be sold and that the absence of such information made the sale improper **(7)**

After the property was duly advertised for sale, the mortgagee verbally agreed with the mortgagor to postpone the sale for four days; but in contravention of this agreement sold the property on

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8. (1975) 2 Mad LJ 414

9. AIR 1977 SC 774 : (1977) 3 SCC 247. (ILR (1967) 3 Mad 161 **Overruled.**)

Section 69 — Note 23

1. (1881) 18 Ch D 449 (459, 461, 463) 51 LJ Ch 46 45 LT 500 30 WR (Eng) 446 Cockburn v Edwards ** (1886) 33 Ch D 111 (123) 55 LJ Ch 899 55 LT 333 34 WR (Eng) 689, Poley's Trustee v. Whetham.

2. (1922) 2 Ch 449 (466) 91 LJ Ch 216 127 LT 357, Balton v Bass Ratcliffe and Gretton Ltd. ** (1889) 61 LT 71 (72) : 58 LJ Ch 539, Colson v. Williams.

3. AIR 1973 Mad 8 (9, 10) : (1972) 2 Mad LJ 390.

4. (1904) 6 Bom LR 557 (569) (DB).

[See also 1934 Mad WN 1146 (1152) (DB) (Sale notice containing depreciatory condition — Property sold being right, title and interest of mortgagor — Person objecting to sale must not only show that purchaser was aware of conditions but that title was so good that conditions were depreciatory.)]

5. AIR 1926 Mad 841 (844, 848) (DB).

6. (1888) 11 Mad 201 (203) (DB) ** (1881) 17 Ch D 434 (436) 50 LJ Ch 576 45 LT 38 29 WR (Eng) 601, Hoole v. Smith.

7. (1881) 18 Ch D 449 (456) 51 LJ Ch 46 · 45 LT 500 30 WR (Eng) 446, Cockburn v Edwards ** (1884) 51 LT 191 (193) 53 LJ Ch 96, Croddock v Rogers

the originally advertised day It was held that the verbal agreement was not for an extension of the time for the performance of the mortgagor's promise to pay the mortgage-debt as fixed in the deed, but an agreement to refrain from exercising, for a stated period, the right of sale arising from non-performance. It was merely the expression of an intention, a "mere naked promise" not enforceable in law. And further as the mortgagor was found not prevented by any act of the mortgagee from paying within time (i e , on the advertised day of sale) the power of sale could not be said to have been exercised in an improper or irregular manner (8)

It has been held in the undermentioned case,(9) that even where there is no 'valid power' of sale at all, a sale in the professed exercise of the power would not be void, but only an irregular one governed by sub-s. (3) of the section. It is submitted that this view is not correct. The words in the professed exercise of 'such' a power," mean a power validly 'given' under clauses (a), (b) and (c) of sub-s (1) Where a power of sale cannot be validly conferred at all, the professed exercise of such a power cannot bring the case under sub-section (3).

24. Mortgagor's right to claim damages.

In order to be entitled to damages under sub-s (3) the mortgagor must have been damnified by an unauthorised or improper or an irregular exercise of the power of sale.(1) In *Ramkrishan Mudali v Official Assignee*(2) the mortgagee had two separate mortgages over the same property The power of sale was conferred in the first mortgage only. The mortgagee exercised the power of sale for the debt covered by both the mortgages It was contended that, as the power was exercised in respect of a debt not covered by the power, the whole sale must be set aside The Court, however, declined to do so and held that the mortgagor can have his remedy in damages if he can show that he has been in any way damnified by the exercise of the power.

If the mortgagor is damnified by an action of the auctioneer appointed by the mortgagee, the mortgagor can claim damages from the mortgagee.(3)

25. Lis pendens.

A sale held in exercise of the power is not affected by the doctrine of *'lis pendens'* even though it is held after the mortgagor has instituted a suit for redemption. The reason is that a mortgagor who has given under that mortgage an express power of sale cannot by starting a suit for redemption derogate from that which he has in express terms conferred upon the mortgagee (1) It has, however, been held in the undermentioned case(2) that, once a suit is filed by a mortgagor who

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8. (1899) 23 Bom 348 (357) (DB).

   [See also (1879) 5 QBD 409 (412) · 28 WR (Eng) 901 49 LJQB 663 42 LT 719 Williams v Stern (Mortgagee apprehended a danger to his security and hence sold the property before the end of the week during which he had agreed not to exercise the power — Such agreement is not waiver of the right.)]

9. 1909 Upp Bur Rul 5 · 4 Ind Cas 755 (757) (Power conferred on simple mortgagee)

Section 69 — Note 24

1. 1909 Upp Bur Rul 5 : 4 IC 755 (756).
2. AIR 1922 Mad 390 (391) : 45 Mad 774 (DB).
3. (1889) 43 Ch D 191 (194) 38 WR (Eng) 323 59 LJ Ch 164 · 62 LT 18 54 JP 486, *Tomlin v. Luce.*

Section 69 — Note 25

1. AIR 1922 Mad 390 (391) 45 Mad 774 (DB) ** (1859) 7 WR (Eng) 213 (214) 113 RR 1005, *Adams v. Scott.*

   [See also (1821) 56 ER 992 (992) 6 Mad 10, Annon (Injunction not granted to restrain mortgagee from selling under power in mortgage-deed)]

2. AIR 1950 Bom 49 (50) (DB).

is an agriculturist under S. 15D of the Dekkhan Agriculturists' Relief Act, the mortgagee cannot exercise his power of sale given under the mortgage-deed so long as the suit remains pending. But once the decree is passed declaring an amount and the mortgagor has not exercised his option of redemption and the mortgagee has not exercised his option to ask for decree for sale, then the mortgagee cannot be prevented from exercising his right of sale under the mortgage-deed.

If a preliminary decree for redemption has been obtained, then the power cannot be exercised without the leave of the Court, as it prejudices the rights given to the mortgagor by the Court (3). The power, however, is not extinguished, but only suspended, and if exercised without the leave of the Court, the question whether the purchaser will get a good title or not will depend on the question whether the purchaser has taken it with notice of the want of leave (4).

The validity of a sale is not affected by an attachment of the property by a third party, whether such attachment is effected either before or after the mortgagee became entitled to the exercise of the power.(5)

26. Stopping of sale.

The mortgagor has got a right, which can be exercised up to the moment of sale, to pay up the mortgage amount and stop the sale (1). The mortgagee cannot refuse the payment and proceed to exercise the power.(2) A sale held notwithstanding a valid tender of the mortgage money will be set aside (3).

The mortgagor may also obtain an injunction from the Court restraining the mortgagee from holding the sale (4) provided, in cases where the mortgage amount has fallen due, he pays into Court the amount due to the mortgagee.(5)

Where a mortgagee is exercising his power under Cl. (b) of sub-s. (2) the mortgagor must pay all the interest that is due up to the date of sale. If he pays less the mortgagee is justified in refusing to accept it.(6)

In all cases the mortgagor must pay the costs of the sale also except where they cannot be ascertained(7).

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3. (1903) 1 Ch 857 (862) 51 WR (Eng) 585 88 LT 458 72 LJ Ch 764 19 TLR 334 *Stevens v. Theatres Ltd.*
4. (1903) 1 Ch 857 (864) 51 WR (Eng) 585 88 LT 458 72 LJ Ch 764 19 TLR 334 *Stevens v. Theatres Ltd.*
5. 1875 Pun Re N. 68, p. 171 (173)

Section 69 — Note 26

1. (1899) 23 Bom 348 (356) (DB).
2. (1852) 51 ER 759 (762) 16 Beav 212 16 Jur 1005 96 RR 105 *Rhodes v. Buckland*
3. (1860) 2 LT (NS) 128 (132) 2 Giff 99 29 LJ Ch 493 6 Jur (NS) 391 8 WR (Eng) 270 128 RR 41, *Jenkins v. Jones* (The purchaser had seen the tender by the mortgagor.)
4. AIR 1941 Bom 339 (341, 344) : ILR (1941) Bom 506.

   [See however AIR 1955 Mad 491 (494) ILR (1956) Mad 229 (DB) (Ordinarily where it is found that there are real and bona fide objections to the sale under S. 69, the plaintiffs would be entitled to an injunction — Amendment of S. 69 suggested.)]
5. (1883) 24 Ch D 289 (296) 32 WR (Eng) 43 53 LJ Ch 145 49 LT 321 *Macleod v. Jones* ** (1883) 23 Ch D 690 (694) 31 WR (Eng) 361 48 LT 449 *Hickson v. Darlow* ** (1850) 20 LJ Ch 105 (108) · 90 RR 743, *Whiteworth v. Rhodes* AIR 1942 Bom 46 (47, 48) ILR (1942) Bom 83.
6. (1899) 1 Bom LR 273 (276).
7. (1899) 1 Bom LR 273 (276) ** (1860) 2 LT (NS) 128 (130) · 2 Giff 99 29 LJ Ch 493 6 Jur (NS) 391 8 WR (Eng) 270 128 RR 41, *Jenkins v. Jones*

See also the undermentined case.(8)

26-A. Postponement of sale.

A power to sell necessarily includes the power to postpone the sale. Where the sale is by auction and it is found that the highest bid is very inadequate, the mortgagee may postpone the sale.(1)

Where the auction-purchaser makes a default in payment of the purchase money within the stipulated time, and time was of the essence of the contract according to the terms of the auction the mortgagee has a right to re-sell the property.(2)

27. Who can purchase.

A mortgagee exercising his power of sale cannot purchase the property in his own name or in the name of anybody else.(1) even though there is a provision in the mortgage-deed authorising him to purchase the property (2) Nor can he sell it to any one employed by him to conduct the sale.(3) The reason why the mortgagee cannot purchase it himself is that :

> "A sale by a person to himself is not really a sale at all, and a power of sale does not authorise the donee of the power to take the property subject to it at a price fixed by himself even though such price be the full value of the property Such a transaction is not an exercise of the power, and interposition of a trustee, although it gets over the difficulty, does not affect the substance of the transaction".(4)

In spite of a clause to 'buy-in' it cannot authorise the mortgagee Bank to buy mortgage property for themselves in exercise of the power to sell.(5)

A sale by a person to a corporation of which he is a member is not, either in form or in substance, a sale by a person to himself Hence a sale by a member of corporation to the corporation itself is in every sense a valid sale (6) Similarly, where property is sold at a fair and good price

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8. 1934 Mad WN 1146 (1151). (When the objector to the proposed sale formulated his objections in an affidavit which was not pressed and he gave a letter of consent to the sale, he must be deemed to be estoped from raising other objections)

Section 69 — Note 26-A

1. AIR 1942 Bom 46 (49) : ILR (1942) Bom 83.
2. AIR 1963 Mad 468 (470) : ILR (1963) Mad 376

Section 69 — Note 27

1. AIR 1943 Mad 301 (302) ** AIR 1929 Bom 24 (26) (Mortgagee purchasing the property in the name of another) * (1879) 4 App Cas 391 (404) 27 WR (Eng) 889 40 LT 697, *National Bank of Australasia v United Hand-in-Hand & Band of Hope, Co.* (Benami purchase) ** AIR 1942 Bom 46 (49) ILR (1942) Bom 83 ** (1817) 17 RR 62 (65, 66) 3 Mer 200 : 36 ER 77, *Downes v. Gruzebrook.*

   Also see Note 28 and S. 60, Note 25

2. AIR 1943 Mad 301 (302). (To allow such a contract would be to negative altogether the provision based on public policy that the equity of redemption should not be destroyed except by a decree of Court or in any manner known to law.)
3. AIR 1975 Mad 343 (344, 345) (1975) 2 Mad LJ 27 * (1888) 40 Ch D 395 (409) 37 WR Eng 196, Farrar v Farrars Ltd. ** (1903) 2 Ch 647 (653) 52 WR (Eng) 122 · 72 LJ Ch 751, *Hodson v. Deans.* ** (1882) 21 Ch D 857 (860) 30 WR (Eng) 795, *Martinson v Clowes*

   [See also (1849) 1 Mac & G 488 (494) 2 H & Tw 140 · 19 LJ Ch 89, *Re Blove's Trust* Solicitor appointed to conduct the sale is as disabled as the trustee himself.)]
4. (1888) 40 Ch D 395 (409) 37 WR (Eng) 196, *Farrar v Farrars Ltd*
5. AIR 1969 Mys 280 (288) : (1970) 40 Com Cas 466.
6. (1888) 40 Ch D 395 (409, 410) 37 WR (Eng) 196, *Farrar v. Farrars Ltd*

and the mortgagee himself advances to the purchaser the purchase-money on taking from him the same property as a security for such amount, it is not a sale by the mortgagee to himself and is therefore valid.(7)

A subsequent mortgagee can purchase the property when sold by the prior mortgagee.(8)

A mortgagee can sell the property to one of the co-mortgagors (9)

A receiver cannot purchase the property without getting a discharge from his position, as Receiver, or without obtaining the leave of the Court (10)

A mortgagor himself can purchase the property but in such a case the property in his hands will continue to be subject to subsequent encumbrances (11)

28. Effect of purchase by mortgagee himself.

A purchase by the mortgagee himself in the exercise of his power of sale is invalid (1) The mortgagee retains, notwithstanding the purchase, the character of a mortgagee, his power of sale is not extinguished and if he again sells the property in the exercise of his power, the purchaser gets a good title (2) In *Henderson v Astwood*(3), the mortgagee sold the property by auction in 1887 and purchased it himself through E In 1890, when he wanted to sell the property as an owner he found that the sale of 1887 was inoperative and he still retained the character of a mortgagee He, therefore, sold the property again in 1890 in the capacity of a mortgagee purporting to exercise the power of sale. When in appeal, it was contended that the power of sale was destroyed or exhausted by the ineffectual attempt to exercise it in 1887, it was held that the proposition on which the above contention was based was not founded on any principle and "after the case of *Topham v Duke of Portland*.(4) it was impossible to maintain that a power was extinguished by act done, apparently in execution of the power, but in reality in fraud of it."

29. Position of the purchaser.

Though it is the mortgagee who sells the property the purchaser does not get the rights of the

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7. (1857) 1 De G & J 535 (560) 26 LJ Ch 830, *Davey v Durrant* ** (1922) 2 Ch 449 (462) 91 LJ Ch 216, *Belton v Bass, Ratcliffe and Greton Ltd.* ** (1868) 4 QB 97 (108, 109) 17 WR (Eng) 20, *Thurlow v Mackeson.*

8. (1865) 12 LT (NS) 446 (447), *Kirkwood v Thompson.* (A subsequent mortgagee is not a trustee for mortgagor and hence the rule that a trustee cannot purchase the trust property does not apply to him Confirmed in appeal in (1865) 12 LT 811) ** **(1879) 5 Cal 198 (211, 212) : 6 Ind App 145 (PC).** *(Obiter)* ** (1992) 1 Mad LJ 627 ** (1865) 11 LT (NS) 645 (646) : 2 De GJ & Sm 468 11 Jur (NS) 99, *Shaw v Bunny* (Subsequent mortgagee gets an absolute title as any stranger would have got)

9. (1896) 1 Ch 762 (770) 44 WR (Eng) 454, *Kennedy v Detrafford* (Mortgagee is entitled to sell to anybody who can buy, provided, of course that he deals fairly and properly in the ordinary way.)

10. (1906) 1 Ch 292 (295) · 23 TLR 660, *Nugent v Nugent*

11. (1906) 3 Cal LJ 95 (98) (DB) ((1856) 25 LJ Ch 734 (736) 6 De GH & G 638, *Otter v (Lord) Vaux.*

Section 69 — Note 28

1. AIR 1943 Mad 301 (302) ** AIR 1929 Bom 24 (26) ** 1894 App Cas 150 (158) · 6 R 450 *Henderson v Astood.* * * AIR 1942 Bom 46 (49) ILR (1942) Bom 83

   Also see Note 27 and S. 60, Note 25.

2. 1890 App Cas 150 (162) · 6 R 450, *Henderson v Astwood*

3. 1890 App Cas 150 (162) : 6 R 450.

4. (1819) 5 Ch App 40 : 39 LJ Ch 259.

mortgagee only. He acquires such title as the mortgagor possessed at the date of mortgage.(1) His rights to the property come into existence for the first time on his purchase and his cannot be said to derive his title through the mortgagee.(2)

In an auction sale by the mortgagee the purchaser gets absolute title free from all encumbrances even though there was a prior attachment against a judgment debtor, without notice to mortgagee. Section 69 is one of those rare instances where a person who is not the owner of the property could convey the right title and interest of a third party mortgagor.(3)

30. Sub-section (4).

This sub-section provides that the sale proceeds shall, after the discharge of the prior encumbrances, if any, be held by the mortgagee "in trust to be applied by him," 'firstly,' to the payment of costs, etc., incident to the sale,(1) and 'secondly', to the satisfaction of mortgage-money, and costs, and other money due to the mortgagee, and that the residue shall be paid to the person entitled to the mortgaged property, etc (2) It has been held that the words "in trust to be applied by him" are not restricted to the cases referred to as firstly and secondly but also to the residue, and that such residue, therefore, bears the character of trust money in the hands of the mortgagee.(3)

In England, if such money remained in the hands of the mortgagee he is liable to pay interest on it.(4) If a mortgagee is in doubt or does not find a person who is entitled to it, it is his duty to deposit the money into Court.(5)

If the sale proceeds are found insufficient to satisfy the mortgage-debt the mortgagee can bring a suit against the mortgagor for recovery of the remaining amount.(6) But if the power has been improperly exercised, it has been held, following the rule of English law that it is not open to the mortgagee, who has put it out of his power to allow the mortgagor to redeem, to sue the mortgagor for recovering the balance of the mortgage-money.(7)

Section 69 — Note 29

1. (1816) 10 Bom 49 (56) (DB)
2. (1901) 26 Bom 82 (87) : 3 Bom LR 456 (DB).
3. AIR 1983 Mad 217 (220) : (1983) 96 Mad LW 1 (DB)

Section 69 — Note 30

1. See also 1913 App Cas 299 (312) 82 LJPC 65 108 LT 273 · 29 TLR 305, *Mc Hugh v Union Bank of Canada* (Case of mortgage of movables) ** (1827) 38 ER 647 (648) · 3 Russ 458 · 27 RR 108, *Ellison v Wright* (Mortgagee is entitled to be allowed all expenses properly incurred for recovery of mortgage-money.)
2. AIR 1942 Mad 232 (236) : ILR (1942) Mad 287 (DB).
3. AIR 1918 Mad 1111 (1113) 40 Mad 767 (DB). *This is so in England, see* (1939) 8 LJ Ch 139, *Gouthwaite v. Ripon.*

   [See also (1887) 35 Ch D 544 (549) · 35 WR (Eng) 645 56 LJ Ch 745 56 LT 848, *Charles v. Jones.*]
4. (1887) 35 Ch D 544 (550) · 35 WR (Eng) 645 56 LJ Ch 745 · 56 LT 848, *Charles v Jones*

   [See (1855) 25 LJ Ch 29 (30) . 3 Drew 3 . 4 WR (Eng) 30, *Matheson v Clark* (Under the particular circumstances it was not allowed.)]
5. (1886) 35 Ch D 544 (550) 35 WR (Eng) 645 56 LJ Ch 745 · 56 LT 848, *Charles v Jones*
6. See (1885) 11 Mad 201 (203) (DB) (Note — This point is not a decision of the Court — But the suit was for recovery of the remaining amount and no objection was taken to the suit on that ground.)
7. AIR 1926 Mad 841 (846, 848, 849) (DB)

69A. APPOINTMENT OF RECEIVER.— ^[(1) A mortgagee having the right to exercise a power of sale under Section 69 shall, subject to the provisions of sub-section (2), be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

(2) Any person who has been named in the mortgage-deed and is willing and able to act as receiver may be appointed by the mortgagee.

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing such agreement the mortgagee shall be entitled to apply to the Court for the appointment of a receiver, and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the Court on application made by either party and on due cause shown.

A vacancy in the office of receiver may be filled in accordance with the provisions of this sub-section.

(3) A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor, and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage-deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee.

(4) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee in accordance with the provisions of this section.

(5) A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding five per cent on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified, then at the rate of five per cent on that gross amount, or at such other rate as the Court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature

(8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows namely —

(i) in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property;

(ii) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver;

(iii) in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;

(iv) in payment of the interest falling due under the mortgage;

(v) in or towards discharge of the principal money, if so directed in writing by the mortgagee;

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-sections (3) to (8) inclusive may be varied or extended by the mortgage-deed, and as so varied or extended, shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the said sub-sections.

(10) Application may be made, without the institution of a suit, to the Court for its opinion, advice or direction on any present question respecting the management or administration of the mortgaged property, other than questions of difficulty or importance not proper in the opinion of the Court for summary disposal. A copy of such application shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court may think fit.

The costs of every application under this sub-section shall be in the discretion of the Court.

(11) In this section, "the Court" means the Court which would have jurisdiction in a suit to enforce the mortgage.]

[A] Inserted by the Transfer of Property (Amendment) Act, 1929 (20 of 1929), S 35

STATE AMENDMENT

Uttar Pradesh :—

In its application to the State of Uttar Pradesh, after S 69-A insert the following section 69-B

"69-B. Delivery of possession.— (1) Where in exercise of a power of a sale under Section 69 the mortgaged property or any part thereof has been sold, the Collector shall on an application being made to him in that behalf put the purchaser into possession of the property, and may for the purpose of removing any person who refuses to vacate the same, use or caused to be used such force as he may deem necessary

(2) The provisions of rules 95 to 103 of Order XXI contained in the First Schedule to the Code of Civil Procedure, 1908 as amended from time to time in its application to Uttar Pradesh, shall mutatis mutandis

apply to proceedings under this section with the substitution of references respectively to the Collector and the defaulting mortgagor

(3) In this section, 'Collector' means the Collector of the district in which the property is situate and includes any Assistant Collector empowered in that behalf by any general or special order by the Collector

—U P Act 14 of 1970, S 7 (8-4-1970)

Synopsis

1. **Analogous law.**
2. **History and scope of the section.**
3. **Section not retrospective.**
4. **Mortgage by company.**
5. **Procedure of appointment (sub-section (2)).**
6. **Receiver to be an agent of mortgagor (sub-section (3)).**
7. **Power to take legal proceedings (sub-section (4)).**
8. **Payer need not inquire (sub-section (5)).**
9. **Receiver's commission (sub-section (6)).**
10. **Right of insurance (sub-section (7)).**
11. **Mode of application of money (sub-section (8)).**
12. **Advice of Court (sub-section (10)).**
13. **"The Court" (sub-section (11)).**

1. Analogous law.

The provisions of sub-ss (1) and (3) to (8) correspond to Ss 101(1)(iii) and 109 of the English Law of Property Act, 1925 (15 Geo V Ch 20) which run as follows

"101 (1) A mortgagee, where the mortgage is made by deed, shall by virtue of this Act have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely) :

(iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or any part thereof, or, if the mortgaged property consists of an interest income, or of a rent-charge or an annual or other periodical sum, a receiver of that property or any part thereof."

"109 (1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act 'shall not appoint a receiver until' he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand appoint such person as he thinks fit to be receiver

(2) A receiver appointed under the powers conferred by this Act or any enactment replaced by this Act, shall be deemed to be the agent of the mortgagor and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides

(3) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by auction, distress, or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee pursuant to this Act.

(4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorise the receiver to act.

(5) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

(6) The receiver shall be entitled to retain out of any money received by him for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver a commission at such rate not exceeding five per centum on the gross amount of all money received, as is specified in his appointment and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such other rate as the Court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not being of an insurable nature.

(8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely :

(i) in discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property, and

(ii) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver, and

(iii) in payment of his commission, and of the premiums on fire life, or other insurances if any properly payable under the mortgage deed or under this Act and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv) in payment of the interest accruing due in regard of any principal money due under the mortgage, and

(v) in or towards discharge of the principal money if so directed in writing by the mortgagee'

and shall pay the residue, if any, of the money received by him to the person who but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property."

Sub-sections (2) with some variations corresponds to Ss 12 and 15 of the Trustees' and Mortgagees' Powers Act (XXVIII of 1866) which run as follows

"12 Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may, from time to time if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be receiver or if no person be so named then may, by writing delivered to the person by any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint fit and proper person as receiver, and if no such appointment be made within ten days after such requisition then may in writing appoint any person he may thinks fit.

No person shall be ineligible for the office of receiver merely because he is an officer of the High Court."

"15 Every receiver appointed as aforesaid may be removed by the like authority, or on the like requisition as before provided with respect to the original appointment of a receiver and new receivers may be appointed from time to time."

Sub-section (9) closely follows sub-ss (3) and (4) of S 101 of the English Law of Property Act, 1925 (15, Geo. V. Ch. 20), which are as follows :

"(3) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any other section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be operate in the like manner and with all the like incidents effects and consequences, as if such variations or extensions were contained in this Act

(4) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and has effect subject to the terms of the mortgage deed and to the provisions therein contained."

Sub-section (10) is analogous to S. 34 of the Indian Trust Act, II of 1882, which runs as follows :

"34 A trustee may without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust property other than questions of detail, difficulty or importance, not proper in the opinion of the Court for summary disposal.

A copy of such petition shall be served upon and the hearing thereof may be attended by such of the persons interested in the application as the Court thinks fit.

The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the Court shall be deemed so far as regards his own responsibility, to have discharged his duty as such trustee in the subject-matter of the application

The costs of every application under this section shall be in the discretion of the Court to which it is made."

2. History and scope of the section.

The notion that the mortgagee can appoint a private receiver of the mortgaged property who

is to act as the agent of the mortgagor is not familiar in this country, but has been borrowed from the English law.(1) where a mortgagee is the legal owner of the mortgaged property and is entitled to be in possession. The history of the rule in England was stated by Rigby L. J., in *Gaskell v. Gosling*(2) as follows :

> "He (i.e. the mortgagee in possession) did not come under any obligation to account to the mortgagor except in a suit for redemption. He was accordingly treated with exceptional severity in a suit for redemption and made to account not only for what he actually received but for what he might without wilful default have received. This was bad enough when there was only one mortgage but the position became much worse when the mortgage was a second mortgage since the second mortgagee could at any moment be turned out by the first. Still greater were the risks and less desirable the possession when the mortgaged property consisted of or included as it might do property embarked in trade and subject to the vicissitudes of commercial business. . The Courts also favoured any means which would enable the mortgagee to obtain the advantage of possession without its drawbacks. Mortgagees began to insist upon the appointment by the mortgagor of a receiver to receive the income keep down the interest on incumbrances and hold the surplus, if any for the mortgagor and to stipulate often that the receiver should have extensive powers of management. Presently mortgagees stipulated that they themselves should in place of the mortgagor appoint the receiver to act as the mortgagor's agent. So common did this practice of appointing receivers by agreement between the parties become that first by Lord Cranworth's Act (23 & 24 Vict., c. 145) to a limited extent and afterwards by the Conveyancing and Law of Property Act, 1881 in a more general manner, a power to the mortgagee to appoint a receiver who was to be agent of the mortgagor, was made a usual incident of mortgages when not excluded by agreement between the parties."

In this country the Trustees' and Mortgagees' Powers Act (28 of 1866) first introduced provisions corresponding to the English rule with certain restrictions. But the scope of that Act was confined to those cases only to which the 'English law' was applicable (3) In cases to which the English law was not applicable, the mortgagee had no power to appoint a private receiver of the mortgaged property but it was recognised that a 'mortgagor could by agreement of parties ap point a receiver, nominated by the mortgagee and that such receiver would be the agent of the mortgagor.(4)

The section closely follows S. 109 of the English Law of Property Act 1925. Its provisions are more extensive than those of the Trustees and 'Mortgagees' Powers Act, 1866, in that firstly a receiver may now be appointed in respect of all' mortgages where there is an express power of sale under S. 69 and not merely in the case of English mortgages.

The provisions of the Trustees' and Mortgagees' Powers Act, 1866, are now virtually repealed by this provision to the extent to which the provisions of this Act are applicable. But the former Act would still apply to cases arising in States to which this Act does not apply and to English mortgages executed before this section was introduced (5)

The power of private sale conferred by S. 69 and the power for appointment of a receiver under this section are concurrent powers. Hence the existence of a receiver under this section is no impediment to the exercise of the power of sale under S. 69 (6)

As to the power of the Court to appoint a receiver in mortgage suits. See A. I. R. Commentary

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Section 69-A — Note 2

1. AIR 1918 Cal 557 (569, 570) (DB) (Affirmed in AIR 1921 PC 118 47 Ind App 265.)
2. (1896) 65 LJ QB 435 (446, 447) (1896) 1 QB 669 (691, 692, 693) 74 LT 674
3. AIR 1938 Cal 507 (509) (Mortgage of 1928 and governed by English law — Decided under the Act of 1866.)
4. AIR 1918 Cal 557 (570, 571) (DB) (Affirmed in AIR 1921 PC 118 47 Ind App 265.)
5. See Note 3.
6. AIR 1956 Mad 385 (386) : ILR (1955) Mad 1310.

on Civil P C. 10th (1985) Edn., O. 40, R 1, Note 4 and the undermentioned cases.(7)

3. Section not retrospective.

This section is one of those sections referred to in S 63 of the amending Act of 1929, as not having a retrospective operation Consequently, a mortgagee under a mortgage executed before 1929 cannot, even if he has a right of private sale, get the benefit of this section. He will, however, have a right to appoint a receiver under the provisions of the Trustees' and Mortgagees' Powers Act, 1866.(1)

4. Mortgage by company.

Appointment of receiver by mortgagee after winding up of company — Effect — See the undermentioned cases.(1)

5. Procedure of appointment (sub-section (2)).

The mortgagee can appoint as receiver only —

(a) a person named in the mortgage-deed and who is able and willing to act as such, or

(b) if no person is so named or if all the persons named are unable or unwilling to act or are dead, then 'any person to whose appointment the mortgagor agrees.'

Failing such agreement the mortgagee 'can only apply to the Court' for the appointment of a receiver. In this respect, this section differs from the Trustees' and Mortgagees' Powers Act. 28 of 1866. and from the English Law of Property Act, 1925. Under the Act of 1866, if no person is named in the deed, the mortgagee has to ask the mortgagor in writing to appoint a fit and proper person as a receiver and if the mortgagor does not comply with this request within the time prescribed in the Act, the mortgagee can appoint any person whom he thinks fit. Under the English Act the mortgagee has got the sole power of appointment and need not even ascertain the wishes of the mortgagor.(1)

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7. AIR 1972 Pat 83 1971 BLJR 678 (By not filing a regular suit for realisation of its dues under Section 69 or by not getting a Receiver appointed under Sec 69-A the Industrial Finance Corporation does not lose its right to get a Receiver appointed under Order 40, Rule 1 Civil PC It can choose any one of the different modes or remedies prescribed by law.) ** AIR 1989 Bom 21 (24) (1989) 2 Bom CR 180 (The Court in a pending mortgage suit has power under O 40, R 1 Civil PC to appoint a receiver The fact that mortgagee is an equitable mortgagee without any right to possession is immaterial) ** AIR 1940 Cal 429 (432, 433) ILR (1940) 1 Cal 197 (Receiver in mortgage suit holds the property for the person who can eventually make out title thereto — His appointment is prima facie for the benefit of the mortgagee.)

Section 69-A — Note 3

1. AIR 1938 Cal 507 (509) ** AIR 1936 Cal 646 (649) · ILR (1937) 1 Cal 359

Section 69-A — Note 4

1. (1889) 37 WR (Eng) 726 (730), *In re Pound Henry Son & Hutchins.* (Petition to wind up company — Order to wind up passed thereon — Debenture-holders, acting under powers given by the debentures, appointing receiver and applying for possession of assets of the company — Application disallowed holding that Court had power to impose terms on debentures-holders — Official Liquidator appointed receiver also on behalf of the debenture-holders) ** (1891) 60 LJ Ch 190 (194) (1891) 1 Ch 475 (481) · 64 LT 306 39 WR (Eng) 617, *In re Stubs, Barney v. Stubbs* (Receiver appointed in debenture-holder's action after petition for winding up was presented but before order for winding up was made — Official Liquidator also appointed subsequently — **Held,** debenture-holders were at liberty to continue their action notwithstanding order for winding up)

Section 69-A — Note 5

1. See Section 109 sub-s (1) of the Law of Property Act, 1925 (15 Geo. V Ch 20) in Note 1

In a mortgage suit where the requirement of law as to appointment of receiver is satisfied, same being just and convenient having regards to the facts of the case, Court can appoint receiver in such a case. That plaintiff (even in case of equitable mortgage) is not in possession of the suit property is immaterial.(2)

The receiver can be removed at any time if both the mortgagor and the mortgagee join together for that purpose. The removal must be by writing signed by or on behalf of them both. If they do not so join, either of them can apply to the Court for the removal of the receiver.

The provisions of sub-section (2) would cover a case in which it is alleged by the mortgagor that there is no debt outstanding and therefore there should be no receiver. A mortgagor can make an application for the discharge of receiver on the ground that the debt due under the mortgage had been wiped out on an application of the provisions of S. 13-A of the Madras Agriculturists' Relief Act.(3)

For the filling up of a vacancy in the receivership the procedure would be the same as that for the appointment of a receiver.

6. Receiver to be an agent of mortgagor (sub-section (3)).

Though the appointment of the receiver under this section is made by the mortgagee, he is deemed to be an agent of the mortgagor(1) and it is the mortgagor who is responsible for the acts and defaults of the receiver unless the mortgage deed provides otherwise or unless the acts or defaults of the receiver are due to the improper intervention of the mortgagee. The words "shall be deemed to be the agent" make it clear that the receiver is only an agent by fiction. The fiction is created for the specific purpose of holding the mortgagor liable for the acts and defaults of the receiver.(2) As will be seen in Note 7 the power of sale has to be exercised by the mortgagee himself. He cannot apply to the Court for sale by the receiver. To enable him to do so would mean that the receiver is acting as the agent of the mortgagee.(3)

In the undermentioned English cases(4) a receiver appointed after the death of the mortgagor was held to be an agent of the executor of the mortgagor.

A receiver appointed under S. 69-A has no power to give out mortgage property on leave and licence basis though a Receiver is deemed to be the agent of the mortgagor. He has not been given all the powers of the mortgagor except those in recovering and receiving the income of the mortgaged property. The receiver may exercise powers which may be delegated to him by the mortgagee in accordance with the provision of Section 69-A. But the only powers which may be so delegated can be the powers in relation to the income of the mortgaged property and any variation or extension of power that may be so conferred can only be in relation to the income of the mortgaged property and no more. The Receiver is not given the power to manage or administer the mortgaged property.(5)

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2. AIR 1989 Bom 21 (24) : (1988) 2 Bom CR 189
3. AIR 1954 Mad 896 (897) : ILR (1954) Mad 1231 (DB)

Section 69-A — Note 6

1. AIR 1964 Mad 379 (380) : ILR (1964) 2 Mad 157 ** (1956) 2 All ER 378 (382) (Where therefore, mortgaged premises are let by the mortgagor, the receipt of rent by the receiver does not create a tenancy by estoppel as against the mortgagee.) ** AIR 1941 Cal 308 (311) (DB).
2. AIR 1963 Mad 449 (450) : ILR (1963) Mad 681.
3. See AIR 1964 Mad 379 (380) : ILR (1964) 2 Mad 157.
4. (1899) 68 LJ Ch 517 (519) : (1899) 2 Ch 107 (117) : 80 LT 827 : 47 WR (Eng) 579 : 15 TLR 389, *In re Hale; Lilley v. Foad*
5. AIR 1979 Bom 66 : 1979 Mah LJ 737

7. Power to take legal proceedings (sub-section (4)).

This sub-section gives the receiver authority to demand and recover the income of the mortgaged property by all legal means He can take legal proceedings either in the name of the mortgagor or the mortgagee When the mortgagor is dead, the receiver can file a suit in the name of the heir-at-law of the mortgagor.(1)

Where he sues to recover a sum of money on the basis of a new contract entered into by him, the defendant cannot seek to set off against the claim a debt incurred by the mortgagor prior to the date of the appointment of the plaintiff as receiver.(2)

The extent of the mortgagor's right in the property is the only measure of the receiver's power to gather the income A receiver appointed under this section is not bound by an agreement entered into by the mortgagor-landlord with the tenant in possession of the creation of the tenancy, regarding the repayment of a loan taken by the landlord from the tenant, by adjustment against the rent payable. The agreement does not diminish the extent of the interest which the mortgagor could dispose of in the property; and the receiver is entitled under this sub-section to sue for and recover all the income which the mortgagor was entitled to from the property (3)

The receiver appointed under S. 69A has not got the status or the powers of a receiver appointed under O 40, R. 1, Civil P. C., pending a regular suit and cannot sell the mortgaged property The power of sale has to be exercised by the mortgagee himself (4)

8. Payer need not inquire (sub-section (5)).

Sub-section (5) absolves a person paying money to the receiver from any duty to enquire about the validity or otherwise of the appointment of the receiver There is no provision in the Trustees' and Mortgagees' Powers Act, 1866 corresponding to this, but under Section 14 of that Act the receiver is entitled to give 'effectual receipts' for all rents issues and profits of the property of which he was a receiver.

9. Receiver's commission (sub-section (6)).

In the absence of an application made by the receiver for the purpose, the order appointing him cannot fix any commission exceeding five per cent , on the gross receipts But the Court is not prevented from fixing a higher rate of commission 'on an application' made by the receiver therefor. In the absence of any specification of the rate of commission in the order of appointment and in the absence of any application by the receiver, he is entitled to five per cent., on the gross amount

The commission allowed by this section to the receiver is intended to be in lieu of, not only his remuneration, but all costs, charges and expenses, incurred by him as receiver

The commission allowable under this section can be taken by the receiver after the payments, if any, referred to in sub-s (8), Cls. (i) and (ii), have been made

10. Right of insurance (sub-section (7)).

The receiver can insure the mortgaged property against loss or damage by fire, under this sub-section, if he is so authorised in writing by the mortgagee This power is allowed only to that extent to which it could have been exercised by the mortgagee himself The premium on such insurance is to be paid from out of the moneys received by the receiver

11. Mode of application of money (sub-section (8)).

The income of the property must be applied by the receiver in the order mentioned in this

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Section 69-A — Note 7

1. (1889) 38 WR (Eng) Dig 137 (137) 24 LR IR 498, *Fairhome v Kennedy.*
2. AIR 1941 Cal 308 (310) (DB).
3. AIR 1963 Mad 449 (450) : ILR (1963) Mad 681
4. AIR 1964 Mad 379 (380) ILR (1964) 2 Mad 157 ** AIR 1956 Mad 424 (425) ILR (1956) Mad 1174 (DB)

sub-section. The cost of necessary and proper repairs directed by the mortgagee must be paid in priority to the payment of interest on the mortgage-money.

No money is to be applied towards the satisfaction of the principal money due on the mortgage unless so directed by the mortgagee in writing The surplus money, if any, is to be paid to a person who would have been entitled to it if no receiver had been appointed

There is no such provision in the Trustees' and Mortgagees' Powers Act, 1866, but in the undermentioned case(1) governed by that Act, an expenditure by the receiver for necessary repairs, directed by the mortgagee, and before applying the money towards the payment of interest on the mortgage amount, was held legal and valid following the rule of English law in that respect

12. Advice of Court (sub-section (10)).

It is conceived that the application referred to in this sub-section may be made by the mortgagor, or the mortgagee or the receiver Sub-section (10) enables the Court only to give direction regarding the management or administration of the property mortgaged and not to sell the same (1) The sub-section does not confer any jurisdiction on the Court to adjudicate upon question of title The machinery provided under the section is purely of a summary nature and does not contemplate any decision or adjudication so as to attract the principles of S 11, Civil PC (2)

13. "The Court" (sub-section (11)).

The applications referred to in sub-sections (2) and (10) should, by virtue of this sub-section be made to that Court, which would have jurisdiction to entertain a suit to enforce the mortgage

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70. ACCESSION TO MORTGAGED PROPERTY.— If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Illustrations

(a) *A* mortgages to *B* a certain field bordering on a river The field is increased by alluvion For the purposes of his security, *B* is entitled to the increase

(b) *A* mortgages a certain plot of building land to *B* and afterwards erects a house on the plot For the purposes of his security, *B* is entitled to the house as well as the plot

Synopsis

1. Scope.
2. Accession.
2A. Mortgage of movables — Accession.
3. Accession by mortgagor's representatives.
3A. "For the purposes of the security."
4. "If, after the date of a mortgage."
5. "Contract to the contrary."

Section 69-A — Note 11

1. AIR 1938 Cal 507 (511)

Section 69-A — Note 12

1. AIR 1964 Mad 379 (380) : ILR (1964) 2 Mad 157.

[**See however** AIR 1955 Mad 455 (458) (It was held by Ramaswami, J that in appropriate cases the Court could authorise a private sale by the Receiver — **Note.**— This case was referred to in AIR 1964 Mad 379 but distinguished on the ground that it was a case where the mortgage suit was pending in the Court and the Court had jurisdiction over the property which was the subject-matter of the suit.)]

2. AIR 1965 Mad 185 (187) ILR (1965) 1 Mad 624 (DB) (Proceedings under S 69-A of Act do not operate as res judicata in subsequent suit in respect of title to property)

1. Scope.

As has been seen in Note 1 on S 63, this section also is based on the principle that the accessory follows the principal. As observed in the undermentioned case(1) this section enacts a "common rule of equity that accessions to the property mortgaged belong for the purpose of the security to the mortgagee." The distinction between this section and S. 63 is that under this section the mortgagee is entitled to the security of the accession, whether acquired by himself or by the mortgagor. In the latter case he is not bound to bear any portion of the expenses incurred by the mortgagor in acquiring such accession. Under S 63, however, the mortgagor is not entitled to certain accessions acquired at the expense of the mortgagee unless he pays the expenses.

2. Accession.

As to what constitutes an "accession," see Note 1 on section 63. The following are further illustrations of accessions to the mortgaged property within the meaning of this section :

(1) Where *A*, a Burman, mortgaged his interest in certain property to *X* and subsequently by the death of his wife *A*'s interest was increased to that of an absolute interest in the property, the increase was held to be an accession to the security of which the mortgagee would be entitled.(1)

(1A) If the share mortgaged by Hindu coparcener gets enlarged on account of death of another coparcener, it will enure to the benefit of the mortgagee and the mortgagee will be entitled to have recourse to the whole of the interest which was possessed by the mortgagor at the time the decree on the mortgage was passed.(2)

(2) Trees planted on the mortgaged property (grove) after the date of the mortgage (3)

(3) Where after the date of the mortgage of certain zamindari property of zamindar *chowkidari chakran* lands were released in favour of the zamindar by the Collector, it was held that such lands became an accession to the mortgaged property, to the security of which the mortgagee would be entitled.(4)

(4) *A*, who owned a portion of a *mouza* and was in adverse possession of another portion of it, mortgaged the whole of it to *X*. Subsequently, the *mouza* was diluviated by a river, and after some years a new *chur* was formed the area of which was larger than the old *mouza*. The mortgagor took possession of the new *chur* and perfected his title to it by 12 years' adverse possession. It was held that the *chur* must be considered an accession to the mortgaged property under this section.(5)

(5) Where a mortgagor acquires by inheritance, the rights of a prior mortgagee, the acquisition enures to the benefit of the subsequent mortgagee the value of whose security is thereby increased.(6)

See also the undermentioned cases.(7)

Section 70 — Note 1

1. AIR 1917 Pat 268 (273) : 2 Pat LJ 293 (DB).

Section 70 — Note 2

1. AIR 1938 Rang 108 (108).
2. AIR 1927 Cal 665 (668)
3. (1947) 52 Mys HCR 125 (130) (DB) (Casuarina plantation raised after mortgage.) ** (1930) 122 Ind Cas 333 (334) (Oudh).
4. (1910) 8 Ind Cas 828 (831) (DB) (Cal).
5. AIR 1939 Cal 275 (277) (DB).
6. AIR 1915 All 242 (243) : 37 All 309 (DB).
7. AIR 1966 Andh Pra 233 (236) (DB) (Buildings constructed or machinery or plant fixed to the land after mortgaging it constitute accession.) ** AIR 1965 Mad 185 (187) ILR

The following are not accessions within the meaning of this section :

(1) Acquisitions by purchase or by adverse possession by the mortgagor of property adjacent to the mortgaged property.(8)

(2) Where *X* leases his property first to *A*, then mortgages the same to *B* and thereafter sells his equity of redemption to *A*, it has been held by the High Court of Calcutta that the leasehold interest in the hands of *A* does not merge in the equity of redemption in his hands and that the leasehold interest cannot be considered an accession to the mortgaged property.(9)

(3) The accrual of *sir* rights in *Khudkast* land subsequent to the mortgage though ordinarily an accretion to the mortgaged property under this section, would not be so if there is a special enactment to the contrary, e g , section 49 of the C P Tenancy Act (10)

(4) Where after a mortgage of certain *warg* land and the *Kumaki* land adjoining it, the Government assigned the *Kumaki* lands on *Dharghast* to the wargdar it was held that the lands so assigned did not form an accession to the mortgaged property as they were at the absolute disposal of the Government at the time of the mortgage (11)

(5) Where a plot of land with cinema theatre building being built thereon was mortgaged it was held that the ceiling boards and exhaust fans did not pass to the mortgagee as an accession under the Court sale in execution of his mortgage decree because what was sold was the building and not the theatre.(12)

(1965) 1 Mad 624 (DB) (Mortgagor having only life interest in land constructing new structure after execution of mortgage deed — Mortgagee is entitled to mortgage decree in respect of new structure) ** (1961) 3 SCR 913 (920) (R owning 2/3rd share in village executing simple mortgage of half share in favour of S — A purchasing from other shareholders remaining 1/3rd share — Suit by A against R who was also lambardar for profits — Decree in favour of A and purchase by A of R s 2/3rd share also — R ejected by A from *sir* land and also from certain other lands — A also coming into possession of certain land as lambardar — S purchasing property under mortgage decree — Suit by S against A for partition claiming proportionate share also in lands which he got from R and as lambardar — **Held,** when land came into possession of A an accession was subsisting and was an accession to mortgage under S 70 T P Act and that S was entitled to proportionate share in all lands as claimed by him) ** AIR 1945 Bom 248 (251) ILR (1945) Bom 294 (DB) (If mortgagor of a house puts up new rooms, enlarges bathrooms and puts in sanitary appliances, etc , at great cost, all these would go as security to the mortgagee — Shop with site on which it was standing mortgaged — Shop destroyed by fire and new one constructed — New shop is accession to mortgaged property within S 70) ** AIR 1941 Pesh 49 (50) (DB) (The superstructure built on the mortgaged site is an accession to the mortgaged property) ** AIR 1935 Lah 350 (354) 16 Lah 881 (DB) (Improvement e g electric installations which are in nature of fixtures are accession) ** AIR 1933 Rang 195 (197) 11 Rang 322 (Machinery firmly fixed to building for permanent use) ** AIR 1919 Cal 908 (912) 45 Cal 653 (Fixtures attached by the mortgagor to the property after the date of the mortgage will also, except under an agreement to the contrary pass to the mortgagee) ** (1912) 8 Nag LR 123 (127) (DB) (Mortgagee is entitled to proceed against what is left of *sir* rights of the mortgagor, viz the expropriatory cultivating rights though the proprietary right may have passed to another person.)

8. AIR 1939 Cal 275 (277) (DB).

[**See also** AIR 1933 Rang 81 (82) (Considerable new land cleared by the mortgagor)]

9. AIR 1939 Cal 692 (698) : ILR (1939) 2 Cal 551 (DB).

10. AIR 1933 Nag 104 (106) : 19 Nag LR 142.

11. AIR 1919 Mad 121 (123) (DB).

12. AIR 1957 Mad 610 (612) (DB) (Confirming in appeal, 70 Mad LW 205)

See also the undermentioned case.(13)

2A. Mortgage of movables — Accession.

See the undermentioned cases.(1)

3. Accession by mortgagor's representatives.

The section does not say by whom the accession is made The accession may be made by natural causes, such as alluvion or by the mortgagor or any other person As has been seen in Note 3 on S 63, a building or other structure erected by the *owner* on his own land will be an accession as is shown by illustration (b) to this section The words "mortgagor" and "mortgagee" in this section as well as in S. 63 will include their representatives and the principles applicable to buildings erected on mortgaged land by a mortgagor or a mortgagee will apply equally to their representatives (1) Thus, the auction-purchaser in execution of a prior mortgage decree will be a representative of the mortgagor and a building erected by him on the land will be an accession to the property to the security of which the mortgagee would be entitled (2) A proprietary share in a village was mortgaged along with some *sir* fields "with reservation of occupancy rights of cultivating these *sir* fields" Later on the mortgagor sold his equity of redemption and then surrendered his tenancy rights in the *sir* fields to the transferee. In his suit on the mortgage, the mortgagee contended that with the possession of both proprietary and tenancy rights by the transferee the tenancy rights disappeared and that improved the security of the mortgagee and should be regarded as accession within the meaning of this section It was held that this was not a case of accession It was a case of construction of the mortgage deed. The mortgagee was taking as his security the proprietary right in certain indicated fields, i.e. the right to receive rent in respect of the land and not the land itself That subsequently his mortgagor transferred the land to another, did not make any dif

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13. ILR (1970) Cut 865 (1970) 36 Cut LT 137 (Where only Pattadari interest in suit land was granted and subsequently the mortgagor sold the remaining right to one of the sons of possessor of Dar Pattadari interest and the purchaser subsequently becomes jointly entitled with his brother to such interest by succession there is no merger of interest as he becomes the only owner of the moiety of Dar Pattadari The mortgagee in such a case obtaining a decree for foreclosure and sale is entitled to mortgagor's pattadari interest) ** AIR 1936 Rang 127 (127) (Government waste land adjoining mortgaged property brought under cultivation — Such land is not accession.)

Section 70 — Note 2-A

1. AIR 1915 All 257 (259) 37 All 390 (395) (DB) (Mortgage of goodwill and stock-in trade with clause that stock-in-trade was not to be transferred — Stock-in-trade, however, subsequently sold but replaced by another — **Held,** stock-in-trade acquired after mortgage was not affected by mortgage) ** AIR 1914 Lah 515 (516, 517) 1915 Pun Re No 10 (Rights of person in whose favour hypothecation is made are limited strictly to actual chattel hypothecated Offspring of hypothecated animal — Offspring cannot be treated as accession.)

Section 70 — Note 3

1. **AIR 1931 All 277 (286) : 53 All 334 (FB)** ** AIR 1935 Rang 420 (422) (DB) (Rule as to accession applies equally to representatives of mortgagor and mortgagee, it being immaterial whether they are merely heirs or subsequent transferees — AIR 1931 All 277, Rel on.) ** AIR 1933 Lah 771 (773) 14 Lah 749 (DB). (The improvements effected and new buildings constructed on the properties which have fallen to the share of the mortgagor on partition, by the mortgagor or his transferee must be treated as accession to the mortgaged property and as such available for satisfaction of the mortgage debt)
2. **AIR 1931 All 277 (286) : 53 All 334 (FB).**

ference.(3)

3-A. "For the purposes of the security."

The mortgagee is entitled under this section to the accession *only for the purposes of the security* and not for any other purpose. *X* mortgaged 22 items of property to *Y* in 1916. *Y* subsequently in 1925 purchased some of these items himself. At that time, the other items not purchased had increased in value owing to improvements. *Y* sued to enforce his mortgage against these latter items and claimed to apportion the mortgage amount thereon, according to the value of the property on the date of *his purchase*. It was held that the rule that the mortgagee was entitled to the benefit of accession to the property by reason of improvements, was not applicable for the purpose of apportioning the mortgage-money between the items purchased by him and the items not purchased (1).

Where after the mortgage of the site without any buildings thereon, the mortgagor erects buildings thereon and in execution of his mortgage decree, the mortgagee becomes the owner of the site, he is entitled to get the possession of the site after removal of the buildings by the mortgagor, he need pay the value of the building only if he wants it and the mortgagor is prepared to sell it (2).

4. "If, after the date of a mortgage".

Section 63 provides that the accession should be received during the *continuance of the mortgage*. This section while stating the fact that the accession should have been received "after the date of a mortgage" does not expressly state whether it should have been received during the continuance of the mortgage. It has been held by the High Court of Madras that even for the purposes of this section, the accession must have been received before the mortgage become extinguished, and that the acquisition by the mortgagor after the mortgaged property has been sold in execution of the mortgage decree cannot be considered an "accession" to the mortgaged property to the security of which the mortgagee is entitled.(1)

In the undermentioned case(2) it was held that an accession to the mortgaged property after the date of the mortgage and *before* the mortgage decree was passed, may be sold in execution of the decree even though such accession is not specifically mentioned in the decree. Under the present law a mortgage decree for sale does not extinguish the mortgage security. Therefore, under S. 70 the mortgagee decree-holder is entitled to have his decree satisfied by sale of an accession made to the mortgaged property after the passing of the decree (3).

5. "Contract to the contrary."

The rules as to accession in Ss. 63 and 70 are only applicable where there is no contract to the contrary. In other words the parties may contract that an accession is not liable to be redeemed or that the mortgagee is not entitled to the security thereof. The contract need not be express but may be implied. The view has been expressed in the undermentioned case(1) that the words "in the absence of a contract to the contrary" suggest that the parties contemplated by the section are those

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3. 1941 Nag LJ (35) (36) (DB). (**Overruling** AIR 1929 Nag 225 : 127 Ind Cas 349.)

Section 70 — Note 3-A

1. AIR 1942 Mad 44 (47) (DB).
2. AIR 1950 Trav-Co 78 (78) (DB).

Section 70 — Note 4

1. AIR 1921 Mad 627 (628, 629) (DB).
2. AIR 1935 Rang 522 (522, 523).
3. AIR 1965 All 193 (194) (DB). (AIR 1921 Pat 188, **Dissented from.**) ** AIR 1963 Pat 412 (421) (FB). (AIR 1921 Pat 188, **Held to be no longer good law.**) ** AIR 1945 Bom 248 (250) : ILR (1945) Bom 294 (DB).

Section 70 — Note 5

1. AIR 1931 All 277 (284, 285) : 53 All 334 (FB). (Per Sulaiman, J.)

who are bound by the contractual relations of mortgagor and mortgagee and not independent third parties, and that, therefore, this section and S. 63 apply only as between the mortgagor and the mortgagee and their representatives.

It has been held that there can be a contract to the contrary within the meaning of S 70 read with S 100 in the case of a charge created by a compromise decree as the parties are not prevented from contracting out of the rights created under such a decree (2)

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71. RENEWAL OF MORTGAGED LEASE.— When the mortgaged property is a lease [A][* * *], and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

[A] The words "for a term of years" were omitted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 36.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Renewal of the lease."
4. Fraudulent renewals.
5. Effect of surrender of lease on mortgage.
6. Renewal of lease rendered impossible — Effect.
7. "In the absence of a contract to the contrary."

1. Legislative changes.

The words "for a term of years" after the words "a lease" have been omitted from this section by S 36 of the Transfer of Property (Amendment) Act, 1929 (Act XX of 1929), as they were *unnecessary.*(1)

2. Scope of the section.

It is a well established principle of law that where a *trustee* or other person *in a fiduciary position* gains for himself any advantage by availing himself of his character as trustee or person in a fiduciary position, he must hold the advantage so gained for the benefit of the persons whose interests he was bound to protect (1) Thus, where a lease is renewable by cutom or contract, a renewal of the lease by a person who is a *trustee, an agent* or other person in a *fiduciary position,* enures to the benefit of the persons beneficially interested in the lease (2) The principle has been extended so as to apply to persons who cannot be said to occupy clearly a fiduciary position but *who are in a special position* with respect to other persons, by virtue of which they owe a duty to such persons (3) The persons in such special position may be said to be in a *quasi-fiduciary* posi-

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2. AIR 1946 Mad 293 (294) (Where there is a statutory charge or lien which springs into existence as soon as a certain thing is done, there is no right in the parties to alter or obliterate the charge.)

Section 71 — Note 1

1. See Special Committee's Report, clauses 27, 28 and 35 (Sections 64, 65 and 71)

Section 71 — Note 2

1. See Section 88 of the Indian Trusts Act, 1882.

2. Halsburys, Laws of England, Vol 28 pages 47, 48, compare Secion 90, Illustration (a), Indian Trusts Act, 1882 ** (1884) 26 Ch D 590 (599) 53 LJ Ch 689, In re, Lord Ranelagh's Will (Trustee.) ** (1804) 8 RR 178 (188) 15 Ves 236, James v Dean (Do) ** (1905) 53 WR (Eng) 651 (651) : 93 LT 298 (301), Bevan v. Webb, (Do.)

3. (1903) 51 WR (Eng) 504 (507) 88 LT 403 (406), Re, Biss Biss v Biss

tion (4) Thus, a tenant for life, co-owner, mortgagee or othe qualified owner of any property gaining, by availing himself of his position as such, an advantage in derogation of the rights of other persons interested in the property, will be in a *quasi fiduciary* position, and must hold the advantage for the benefit of the persons interested in the property (5) This has been recognised by S 90 of the Trusts Act, 1882, illustration (a) whereof runs as follows :

> "A the tenant for life of leasehold property renews the lease in his own name and for his own benefit A holds the renewed lease for the benefit of all those interested in the old lease."

The same principle has been recognised by S 64 and this section with regard to renewal of mortgaged leases The former provides that if a *mortgagee* obtains a renewal of a lease which is the subject-matter of the mortgage, the mortgagor will, on redemption, have the benefit of the new lease; while this section provides that if the *mortgagor* obtains a renewal of the mortgaged lease, the mortgagee will, for the purposes of the security, be entitled to the new lease The mortgagor and the mortgagee both occupy a special position in respect of the original lease that is mortgaged, and, as such, owe a duty to each other, and, consequently, the new lease is subject to th same equities as the original one (6) The theory on which the principle rests is that, in such cases the new lease is a *graft* upon the old lease and forms part of the original security (7) As was stated in *Rakestraw v Brewer*(8) "this additional term comes from the old root, and is of the same nature, subject to the same equity of redemption."(9)

The new lease cannot strictly be called an *accession* to the old lease within the meaning of S. 70 and has, therefore, been dealt with separately by this section

3. "Renewal of the lease."

It is not necessary for the application of this section that the renewal of the lease should have been in pursuance of any *covenant* for renewal (1) Now it is necessary that the renewal should take

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4. See Snell, Principles of Equity 11th Edn p 132 See Section 3 of the Specif Relief Act 1877, where the words "constructive fiduciary ownership" are used

   See also Illustration (d) to that section

5. (1768) 27 ER 433 (434 435) Amb 668 670) Taster v Marriott (Tenant for life — Renewal by) ** (1773) 27 ER 474 (476) Amb 734 737) Owen v Williams (Do) ** (1783) 28 ER 1080 (1081) 1 Bro CC 197 Pickering v Vowles (Do) ** (1857) 1 De G & J 598 (601) 118 RR 249 Yem v Edwards (Advantage received by tenant for life) ** (1823) 147 ER 697 (700 701) 12 Price 197 (210 211) Factor v Philpott (Renewal by mortgagee of lease) ** (1905) 53 WR (Eng) 651 (651) (1905) 1 Ch 620 (630) Bevan v Webb (Renewal by partner) ** (1808) 12 RR 1 (4) 1 Ball & B 29, Nesbitt v Tredennick (Renewal by mortgagee.)

   [See also (1815) 17 RR 95 (99) : 3 Mer 347. Hardman v. Johnson.]

6. (1903) 51 WR (Eng) 504 (507) (1903) 2 Ch 40 (62), Re, Biss Biss v Biss

   [See also 1943 Ch 59 112 LJ Ch 57 (1942) 2 All ER 680 Nelson v Hannam (Lease with option to purchase the freehold reversion — Mortgage of lease Assignment of option to mortgagee — Mortgagee exercising option and acquiring freehold interest — Redemption of mortgage - Mortgagor entitled to have freehold interest transferred to him)]

7. (1842) 59 RR 746 (750) 2 Dr & War 393, Smith v Chichester ** (1903) 51 WR (Eng) 504 (507) (1903) 2 Ch 40 (62), Re Biss, Biss v Biss ** (1905) 53 WR (Eng) 651 (651) (1905) 1 Ch 620 (625), Bevan v Webb ** (1921) 62 Ind Cas 692 (694) (DB) (Cal) (Mortgagee renewing a lease does only graft upon his stock) ** (1676) 22 ER 1026 (1026) 2 Freem Ch 13, Rushworth's case ** (1808) 12 RR 1 (4) 1 Ball & B 29 Nesbitt v Tredennick

8. (1729) 2 P Wms 511 (513) : 24 ER 839.

9. See also (1879) 5 Cal 198 (210, 211) : 6 Ind App 145 (PC).

Section 71 — Note 3

1. (1885) 33 WR (Eng) 578 (579) 29 Ch D 231 (234) 52 LT 458 54 LJ Ch 757, Leigh v Burnett.

place *before the expiry* of the old lease. A renewal, even *after* the expiry of the old lease, would enure to the benefit of the mortgagee (2) In *Villa v. Petley,*(3) V was a lessee of certain property and had mortgaged the leasehold right to D by deposit of title deeds in or about the year 1910 The lease expired in 1917, but V continued in possession and the landlord accepted rent from her. In 1919, D transferred the mortgage to one P In 1921, V obtained a renewal of the lease from the landlord. It was contended, *inter alia* that as the renewal was effected long after the expiry of the lease, the mortgagee could not get the benefit of the lease. It was held, firstly, that the mortgagee was entitled to the benefit of the lease by virtue of this section, and secondly, that under S 116 of the Transfer of Property Act, the acceptance of rent by the landlord from V operated as a continuance of the tenancy in favour of V till the date of its renewal. In *Sham Das v. Batul Bibi*(4) their Lordships of the Allahabad High Court observed as follows :

> "In the case of a mortgage or charge upon leaseholds, if a new lease be obtained by a mortgagor, either on a forfeitue of the original lease or by other means, the owner of the mortgage or charge will have the benefit of the new lease for the purpose of his security, and *yet the mortgagor could not, at the time of the mortgage, have transferred the new lease to the mortgagee as it was not in existence.*"

The mortgagee has a right only to preserve his security and to incur necessary expenses for that purpose but in law, he has right to make any improvements on demised property without consent of mortgagor.(5)

4. Fraudulent renewals.

The mortgagee would be entitled, under this section, to the new lease, though the lessee, in taking such new lease, did not intend to hold it for the benefit of the mortgagee A renewal of the lease procured *dishonestly* by the mortgagor would, with greater force, enure to the benefit of the mortgagee Where an assignee of a mortgaged lease, finding that the lease was subject to a very onerous charge, induced the lessor, who happened to be his friend, to take a advantage of a forfeiture, intentionally incurred for the purpose, and after the collusive proceedings for forfeiture were completed, got a new lease of the same property on the same terms, it was held that the renewed lease was subject to the mortgage.(1) In fact in such cases the old lease would not be deemed to have terminated at all to the prejudice of the mortgagee.(2)

5. Effect of surrender of lease on mortgage.

It is an important principle of law that a person shall not be allowed to derogate from his own

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[See also (1862) 1 Bom HCR 22 (27) (SB). (After the death of the mortgagor Inamdar, the lands were continued to his representatives subject to the payment of assessment, but the right to hold the land rent-free was ruled by Government to have ceased — **Held** that the lands continued chargeable in the hands of the representatives with any valid specific liens created upon the lands by the Inamdar.)]

2. (1802) 32 ER 71 (75), Moody v Mathews ** (1804) 8 RR 178 (188) · 11 Ves 383 15 Ves 236, James v. Dean. (Renewal by executor — Lease expired during lifetime of testator who held over till death)]

3. AIR 1934 Rang 51 (57).

4. (1902) 24 All 538 (540, 541) (DB).

5. 1978 Pun LJ 142 (143).

Section 71 — Note 4

1. (1858) 119 RR 548 (551) 25 Beav 575 53 ER 756, Hughes v Howard

2. (1842) 58 RR 249 (250, 251) · 1 Dr & War 134 1 Con & L 34 . 4 Ir Eq R 74, Jones v. Kearney.

grant (1) It follows that a lessee cannot voluntarily surrender his holding to the landlord so as to affect the interest of the mortgagee under a mortgage created by him previous to the surrender (2) A tenant by surrendering his interest in the property cannot derogate from his own grant and if the landlord accepts the surrender with notice of a mortgage on the leasehold interests, the mortgagee would be unaffected by the surrender and can enforce his claim on the right surrendered (3) The same principle will apply where the lessee collusively and fraudulently suffers a decree to be passed against him for eviction.(4)

6. Renewal of lease rendered impossible — Effect.

A lessee who has mortgaged his lease is not under any *obligation to renew the lease* at all and the mortgagee cannot compel him to renew the lease for his benefit Where the renewal of the lease becomes *impossible* as where the lessee purchases the reversion after the lease, it has been held that the mortgagee would take the whole reversion as his security (1)

7. "In the absence of a contract to the contrary."

The section applies only where there is no contract to the contrary between the parties Where there is a contract to the contrary the renewed lease will not be subject to the mortgage lien

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72. RIGHTS OF MORTGAGEE IN POSSESSION.— [A mortgagee] may spend such money as is necessary—

[B][* * * * * *];

(b) for [C][the preservation of the mortgaged property] from destruction, forfeiture or sale;

(c) for supporting the mortgagor's title to the property;

(d) for making his own title thereto good against the mortgagor; and,

(e) when the mortgaged property is a renewable lease-hold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent. per annum

[D][Provided that the expenditure of money by the mortgagee under clause (b) or clause (c) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.]

Section 71 — Note 5

1. See Broom, A Selection of Legal Maxims 10th Edn 1939 P 109 ** (1902) 24 All 538 (541) (DB).
2. (1902) 24 All 538 (541) (DB).
3. 1963 Ker LJ 1170 (1171)
4. (1905) 32 Cal 283 (286) (DB).

Section 71 — Note 6

1. (1872) 41 LJ Ch 673 (674) LR 14 Eq 295 (310 311) Trumper v Trumper (Affirmed in appeal in (1873) 42 LJ Ch 641) ** (1885) 33 WR (Eng) 578 (579) 29 Ch D 231 (233, 234), Leigh v. Burnell.

   [See also (1905) 53 WR (Eng) 651 (652, 653) ** (1905) 1 Ch 620 (630), Bevan v Webb]

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be [E][added to the principal money with interest at the same rate as is payable on the principal money or, where no such rate is fixed, at the rate of nine per cent. per annum].

But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

[A] Substituted for the words "when, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he" by the Transfer of Property (Amendment) Act, 1929 (20 of 1929), S 37.

[B] Clause (a) was omitted ibid

[C] Substituted for the words "its preservation", ibid.

[D] Inserted, ibid

[E] Substituted for certain original words, ibid.

Synopsis

1. **Legislative changes.**
2. **Scope of the section.**
3. **Preservation of property — Clause (b).**
   (A) **Preservation from destruction.**
   (B) **Preservation from forfeiture or sale.**
4. **Supporting mortgagor's title — Clause (c).**
5. **Costs of supporting the mortgagee's title — Clause (d).**
6. **Renewal of lease — Clause (e).**
7. **"In the absence of a contract to the contrary."**
8. **May add such money to the principal money.**
9. **Charge for expenses, if can be enforced independently of mortgage.**
10. **Expenditure must have been made in the capacity of mortgagee.**
11. **Interest on amount spent.**
12. **Premiums paid for the insurance of mortgaged property.**

1. Legislative changes.

The following changes were introduced in the section by S 37 of the Transfer of Property (Amendment) Act, 1929 :

(1) The words "When during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property," at the beginning of the section were omitted.

(2) The words "a mortgagee" were substituted for the word "he"

(3) Clause (a) of the old section was deleted.

(4) For the words "its preservation" in cl. (b), the words "the preservation of the mortgaged property" were substituted.

(5) The proviso to the first paragraph was newly added.

(6) In place of the words "a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate" in the second paragraph of the section, the following words were substituted :

"added to the principal money with interest at the same rate as payable on the principal money or, where no such rate is fixed, at the rate of nine per cent per annum."

2. Scope of the section.

The first paragraph of the section before its amendment in 1929 ran as follows :

"When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary—

(a) for the due management of the property and the collection of the rents and profits thereof

(b) for its prservation from destruction, forfeiture, or sale :

(c) for supporting the mortgagor's title to the property;

(d) for making his own title thereto good against the mortgagor, and,

(e) when the mortgaged property is a renewable leasehold for the renewal of the lease and may, in the absence of a contract to the contrary, add such money to the principal money at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent per annum

Thus, as the marginal note to the section still suggests the old section deals with the *rights of a mortgagee in possession*, while S 76 deals with his *liabilities*. It was however held in some cases that though this section dealt in terms with the rights of mortgagees in possession it did not raise an implication that other mortgagees had no such rights. Other kinds of mortgagees were also therefore, held entitled to the rights under this section (1) The amendment of the section in 1929 gives effect to this view. With reference to the amendment the Special Committee in their Report observed as follows :

"It is inequitable to confine this section to a mortgagee in possession. With the exception of the provision in clause (a) relating to the management of the property and the collection of rents and profits this section may apply to all mortgagees generally. A mortgagee whether he is in possession or not, is entitled to spend money for the purposes mentioned in clauses (b), (c), (d) and (e) subject as regards clauses (b) and (c), to the proviso that he should not be entitled to exercise that right unless the mortgagor is in default. Whether a mortgagee is in possession or not, it is to his interest to spend money to preserve his security and he should have a right to do so. We therefore propose that a mortgagee though not in possession should be entitled to spend such money as may be necessary for purposes mentioned in clauses (b), (c), (d) and (e) subject to the condition as to (b) and (c), that he should not be entitled to do so until the mortgagor is in default

Clause (a) was accordingly deleted from this section and inserted in section 76

The equitable principle underlying this section of reimbursing a mortgagee for the necessary expenses incurred by him in connection with the mortgaged security by giving him a charge on the property was applied even before the enactment of this Act (2) The rule was borrowed from the English law,(3) and was uniformly adopted and enforced by the Courts of Justice in India as a rule of justice, equity and good sconscience (4) It was applied by the Judicial Committee long before

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Section 72 — Note 2

1. (1901) 30 Cal 794 (800) (DB) ** AIR 1919 Low Bur 136 (137) ** AIR 1915 Mad 402 (403, 404) ** AIR 1924 Bom 264 (266).

   [**See also** (1902) 31 Cal 975 (978) (DB) ** (1899) 22 Mad 332 (336) (DB) (Per Subramania Iyer J : Usufructuary mortgagee who has not obtained possession making payment for preservation of property — As against mortgagor, he can add the amount to the principal money (11 Moo Ind App 241, Relied on) But under S 68 mortgagee in such cases gets only a personal right and has no charge as regards the original debt So he cannot have a charge in regard to the amount added also.)]

2. AIR 1916 All 85 (86) : 38 All 530 (DB).

3. AIR 1915 Mad 402 (403) ** AIR 1924 Bom 264 (266).

4. (1865) 3 Suth WR 6 (7) (DB) ** (1865) 3 Suth WR 174 (175) (SB) ** 1864 Suth WR Gap No. 209 (210) (DB) ** (1866-67) 3 Bom HCR (AC) 11 (22) (DB)

the Act came into force in *Nugendur Chunder v. Shreemutty Dossee*,(5) where their Lordships observed as follows :

> "Considering that the payment of the revenue by the mortgagee will prevent the *talook* from being sold their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the *talook as* entitled him to pay the revenue due to the Government and did actually pay it, was thereby entitled to a charge on the *talook* as against all persons interested therein for the amount of money so paid."

The present section is thus an enactment of old law(6) and, in the States where the section does not apply the equitable principle embodied in it is still applied (7)

The proviso to this section which was introduced by the Amendment Act of 1929 is not retrospective in operation.(8)

This section should be read with S 63-A which provides for the mortgagee's right to recover the cost of *improvements* to the mortgaged property in certain cases Where a case falls both under S 63-A and this section the former will apply as being the more special provision.

Either section applies only to the rights of a *mortgagee* to recover money spent on the mortgaged property As to the liability of a person against whom the mortgage is *voidable* and who elects to avoid the mortgage, see S. 63-A, Note 5.

This section gives the mortgagee a *right* to spend money in certain cases. There is no obligation on him to do so.(9)

Though under certain Revenue Laws, a person making a deposit of Government land revenue or rent to save the property from being sold has a lien over the property in the nature of a mortgage lien,(10) the holder of such lien cannot claim to be "a mortgagee" so as to claim rights under this section.(11)

3. Preservation of property — Clause (b).

A mortgagee is entitled under this clause to spend the necessary money for the purpose of preserving his security from destruction, forfeiture or sale and he can unless there is a contract to the contrary add such an amount to the principal amount Under the proviso added to the section in 1929 the expenditure under this clause will not be deemed "necessary" unless the mortgagee has called upon the mortgagor to take proper and timely steps to preserve the property and the latter has

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5. **(1867) 11 Moo Ind App 241 (258) : 8 Suth WR 17 (PC).**

6. (1888) 10 All 611 (614, 615) 1888 All WN 238 (DB) ** (1906) 28 All 593 (597) (DB) (Reversed on another point in 32 All 612) ** (1898) 22 Bom 440 (445) (DB) ** AIR 1919 Oudh 50 (51) : 22 Oudh Cas 270 (DB).

7. AIR 1929 Lah 509 (509) (DB) (Improvements by mortgagee — He can get only the reasonable and necessary expenditure incurred by him — Necessary means for preservation of property) ** AIR 1924 Lah 154 (155) (DB) (Payment made in satisfaction of a decree on a prior mortgage to save property from being sold in execution) ** AIR 1919 Lah 354 (355) (Cost of repairs) ** AIR 1927 Lah 815 (817) (DB) (Expenses of rebuilding a house which was in a dangerous condition under the notice of Municipal Committee allowed to mortgagee.)

8. AIR 1953 Mad 720 (722) : ILR (1953) Mad 1200 (DB).

9. AIR 1953 Nag 259 (260) ILR (1952) Nag 366. (AIR 1938 Nag 459, Relied on)

10. (1894) 17 Mad 247 (250) (DB) (Section 35 of the Madras Revenue Recovery Act (Madras Act 2 of 1864) ** (1886) 8 All 384 (386) (DB) (NWFP Rent Act (12 of 1811)) ** AIR 1930 Cal 151 (153) 57 Cal 29 (DB) (Section 9, Bengal Land Revenue Sales Act (Act 11 of 1859) ** AIR 1915 Cal 498 (499) (Section 171 of the Bengal Tenancy Act, 1885)

11. AIR 1918 Cal 750 (751) (DB) (Payment made under S 13, Patni Regulation, 1819)

failed to take them.(1) The proviso, however, is not retrospective in operation. Hence a mortgagee who has paid prior to 1929 the municipal taxes on the property which the mortgagor was bound to pay under the contract is entitled to add that amount to the principal even if he had not given notice to the mortgagor as required by the proviso (2). See also, mortgagee who had paid rent of mortgaged land is entitled to be reimbursed at the time of redemption of mortgage (3). What constitutes a proper and necessary expenditure is a question of fact depending upon the circumstances of each case(4) and in allowing such expenses the Court must naturally be on its guard against extravagant and unfounded claims and should enquire strictly into the facts and fairness of the claim in each case.(5)

(A) Preservation from destruction.

This head will include the costs of *repairs* of the mortgaged property (6). An *improvement* of the property may be made for the preservation of the mortgaged property from destruction. The cost of such improvement, however, can now be claimed by the mortgagee under S. 63-A, as being the more special provision. (See Note 2 on this section and Notes on S. 63-A). Where, however the improvements are not necessary for the *preservation* of the property, the mortgagee will not be entitled to recover the cost of those improvements either under this section(7) or under S. 63-A. Thus, a mortgagee cannot claim the expenses either of an addition to or new construction upon the

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Section 72 — Note 3

1. AIR 1956 Bom 575 (576, 577) ** AIR 1955 Pepsu 87 (90). ILR (1955) Patiala 161 (DB) ** AIR 1950 Mad 333 (334). (Mortgagee paying up charge decree to prevent sale — Proviso not complied with — Mortgagee cannot add amount to principal — The words "add such money to the principal" in S. 72 however do not exclude the personal right of suit of the mortgagee under S. 69 Contract Act.) ** AIR 1944 Oudh 208 (208, 209). (Where a usufructuary mortgagee though dispossessed by the mortgagor continues to pay the land revenue, in the absence of any evidence to show that he called upon the mortgagor to pay the land revenue, it cannot be presumed that he made the payment after notice to the mortgagor. His claim can only be to recover it by virtue of S. 69 Contract Act but he would not be entitled to interest.) ** AIR 1935 Rang 473 (479, 480).

   [See also AIR 1923 Mad 71 (72) (DB).]

2. AIR 1953 Mad 720 (722) : ILR (1953) Mad 1200 (DB).

3. AIR 1972 Pat 183 (185).

4. (1910) 6 Ind Cas 47 (50) (DB) (Cal).

5. AIR 1930 Oudh 337 (338, 339) (DB) ** AIR 1918 Bom 84 (85). 43 Bom 69 (DB).

6. (1912) 16 Ind Cas 635 (636) (All) ** (1896) 19 Mad 327, 329) (DB) ** AIR 1916 Mad 859 (862). 38 Mad 18 (DB) ** AIR 1923 Lah 587 (588) (DB) ** (1869) 5 Bom HCR (AC) 116 (117) (DB). (Case before the Act — Costs of proper and necessary repairs allowed with interest.) ** (1895) 17 All 282 (284). (Outlay on the well in agricultural land regarded as money necessarily spent in the management or *preservation* of the mortgaged property.) ** 1881 Bom PJ 195 (DB). (Repairing a well on the mortgaged land.) ** (1842) 49 ER 820 (821). 6 Beav 246 (248). 12 LJ Ch 309. Sandon v. Hooper.

   [See also (1864) 2 Bom HCR 220 (221) (DB). (Expenses of revenue survey of the mortgaged land allowed to be added to the claim.) ** (1867) 2 Agra 187 (187) (DB). (Case before the Act — Costs of necessary repairs allowed.) ** AIR 1929 All 777 (778) (DB). (But not the necessary repairs which come under clause (d) of S. 76.) ** (1909) 4 Ind Cas 1019 (1019) (DB) (Lah).]

7. **(1864) 1 Bom HCR 199 (203, 204) (FB).** (Case before Transfer of Property Act.) ** (1896) 19 Mad 327 (329) (DB) ** AIR 1915 All 99 (100). 37 All 81 (DB) ** AIR 1939 Lah 129 (135) (DB) * 1903 Pun LR No. 33 ** 1900 Pun LR No. 30. P. 135 (136). (But there is nothing to prevent his improving the property, if he does not claim the cost of it.) ** (1842) 49 ER 820 (821). 6 Beav 246. 12 LJ Ch 309, Sandon v. Hooper.

   [See also (1877) 7 Ch D 192 (195). 47 LJ Ch 152. 26 WR (Eng) 34. Tiptom Green

mortgaged property under this clause.**(8)** But where the mortgaged property was a dilapidated house and the mortgagee reconstructed it after pulling it down, or an original *kachcha* house was built into a *pucca* one of the same pattern, and the amount spent was reasonable such expenses were allowed to the motgagee under this clause before the introduction of S 63-A**(9)**. Similarly, where the mortgaged property is totally destroyed by a "calamity from heaven," such as an accidental fire and the mortgagee builds it again, it has been held that he is entitled to the costs of such reconstruction.**(10)**

Where the mortgagee in possession carried out major repairs to the mortgaged property but without notifying the mortgagor under the terms of the mortgage deed, he could not refuse to deliver possession of the property to the mortgagor on his satisfying the mortgage debt The possession of the mortgagee thereafter became that of an unauthorised occupant **(11)**

See also the undermentioned cases**(12)** and Notes on sections 66a and 76 (c).

Colliery Co v Tipton Moat Colliery Co ** (1729) 25 ER 362 (363) Mos 225, Knowles v Spence ** (1836) 1 Jo Ex Ir 620, Murphy v. Meade]

Also see S. 63A, Note 3.

8. AIR 1955 Pepsu 87 (90) ILR (1955) Patiala 161 (DB) ** AIR 1915 Oudh 177 (180) (DB) (Construction of new two wells) ** AIR 1915 All 99 (100) 37 All 81 (DB) (Upper storey and staircase built by mortgagee for his own convenience and comfort, without necessity or mortgagor's consent) ** AIR 1929 Lah 509 (509) (DB) (Mortgagee putting up building of quite a different nature — Costs not allowed.)

[See also AIR 1924 All 47 (48) (DB) (Putting iron bars into a window of a house usufructuarily mortgaged in order to suit a particular tenant)]

9. (1868) 9 Suth WR 488 (488) (DB) ** AIR 1927 Lah 815 (817) (DB) ** AIR 1923 Lah 587 (589) (DB) (Extension of old house allowed as improvement on the ground that costs were reasonable and value of property increased thereby AIR 1915 All 99 37 All 81. Distinguished) * AIR 1930 Oudh 337 (338) (DB) ** AIR 1915 All 99 (99) 37 All 81 (DB) (Mortgagee onstructing new room in place of old one which had fallen in *pucca* material — Cost allowed under S 72(b)) ** 1890 Pun Re No 55, P 144 (145)

[See also (1912) 16 Ind Cas 635 (637) (All) (Cost of rebuilding a fallen portion of a house is for its preservation and, therefore, allowed under this section) ** AIR 1921 Lah 53 (55) (DB). **(Interest on the costs of reconstruction not allowed.)]**

10. (1869) 5 Bom HCR (AC) 109 (115) (DB) ** (1890) 14 Bom 28 (30) (DB)

11. 1995 (2) Cur CC 246 (250) (HP).

12. **AIR 1951 Mad 187 (189) : ILR (1952) Mad 92 (FB).** (In the absence of a contract to the contrary a kanomdar is entitled to be paid the value of improvements effected by him unfettered by the restrictions imposed by S 72, T P Act, and has a right to remain in possession for the period of 12 years and even thereafter, until he is paid the kanom amount together with the value of improvements) ** AIR 1956 Bom 575 (576, 577) (Where the mortgagee had not claimed that he improved the property in the circumstances mentioned in sub-section (2) of S 3A, nor was it his case that the mortgagor was ever called upon to preserve the property and he failed to take proper and timely steps to preserve the property, it was held, that the mortgagee was not entitled to be credited for the amount spent by him) ** AIR 1925 Oudh 685 (686) (Mortgagee of Kutcha structure cannot convert it into pucca building without clear consent of mortgagor) ** AIR 1946 Oudh 101 (102) 21 Luck 43 (DB) (Under the Transfer of Property Act the possessory mortgagee has a right to construct on the land independently of covenant, provided that it did not amount to waste) ** **AIR 1924 PC 133 (135) : 35 Ind App 236.** (A, a Mahomedan widow selling property to B for herself and as guardian for her minor son C — On attaining majority C challenging the sale — Decree passed against B for delivery of possession to C on his depositing certain amount within six months into Court otherwise suit to stand dismissed — On failure of C his mortgagee D depositing the money into Court — **Held,** D was entitled to deposit money

(B) Preservation from forfeiture or sale.

This head will include a payment by the mortgagee of Government land revenue.(13) the rent of the morgaged property(14) *payable by the mortgagor* and the amount necessary to be deposited in order to set a sale of morgaged property in execution of a decree obtained by a prior mortgagee in a suit to which the mortgagee making such payment was a party (15)

The word "sale" referred to in this clause is to be constructed *ejusdem generis* with the words "destruction" and "forfeiture" which precede it and, therefore the clause applies only to those sales which endanger the mortgage security and not to the sale of merely the equity of redemption (16) After a mortgage is made the property is comprised of two parcels the equity of redemption and the mortgagee rights If a person puts to sale the equity of redemption in execution of a simple money decree, the rights of the mortgagee under the mortgage and the mortgage security remain unaffected Section 72 would not cover the case of the mortgagee paying the money-decree amount to

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and to protect the property mortgaged to him and to prevent the security from being value less) ** AIR 1919 Lah 354 (354) (Mortgagee is not entitled to be reimbursed for ordinary annual repairs) ** AIR 1917 Bom 149 (150) 42 Bom 159 (DB) Forced payment of the call by the registered holder of shares who held them as security is not an expenditure for the preservation of the security.)

13 **AIR 1931 PC 226 (228) , 59 Cal 463 : 58 Ind App 341** (Payment of land revenue after final decree for sale on a mortgage and before the sale Mortgagee is entitled to first charge for the payment on sale proceeds) ** **AIR 1929 PC 243 (245) : 56 Ind App 339 ** (1867) 11 Moo Ind App 241 (258) (PC)** ** AIR 1955 Andh 274 (276) (Payment to avoid sale of portion of mortgaged properties for realisation of penal assessment levied on mortgagor) ** **(1907) 7 Cal LJ 215 (232) (PC)** (Payment of advanced assessment by mortgagee) ** (1906) 8 Bom LR 350 (354) (DB) Do) ** (1898) 22 Bom 440 (446) (DB) (Do ** (1879) 2 All 193 (195) (DB) (Do) ** 1881 All W N 66 (67) (DB) ** 1931 Mad W N 595 (598) ** AIR 1922 Oudh 91 (92) 25 Oudh Cas 2 (DB) (Payment by mortgagee of land revenue newly assessed during the continuance of mortgage) ** (1888) 10 All 611 (614) (DB) (Payment of arrears of land revenue for the period before the mortgage though falling due after mortgage.)

[**See also** AIR 1953 Nag 259 (260) : ILR (1952) Nag 366 (370) (DB) (Right of mortgagee not in possession, to pay land revenue cannot be converted to obligation) ** (1907) 17 Mad LJ 517 (518) (Payment of advanced assessment by mortgagee) ** 1879 Bom PJ 407 (DB) ** (1864) 1 Suth WR 296 (297) (DB) (Claim for rent by the mortgagor cannot be pleaded as a set-off in a suit for money paid by the mortgagee on account of resence to protect a lease in the nature of a mortgage held by him) ** (1887) 11 Bom 313 (319) (DB) (A co-sharer paying assessment)]

14. AIR 1934 Pat 433 (435) ** AIR 1931 Pat 325 (326) 10 Pat 210 (DB) ** AIR 1924 Pat 372 (372) * (1903) 30 Cal 794 (799) (DB) (Mortgagee not in possession paying rent to save property S 72 held not applicable in terms Mortgagee allowed lien under general principles of equity, etc) ** (1902) 31 Cal 975 (976) (DB) (Mortgagee satisfying a decree for rent — Section 72 not being applicable in terms lien allowed on general principles) ** **(1907) 7 Cal 215 (232) (PC)** ** (1879) 4 Cal 539 (542) (DB)

[**See also** (1845) 2 Jo & Lat 521 4 Ir Eq R 482 69 RR 358 Barrowes v Molloy (Payment of head rent.) ** **AIR 1919 Cal 46 (47) : 46 Cal 448 (DB).**]

15. (1907) 4 All LJ 176 (179) (DB) ** AIR 1924 Lah 154 (155) (DB) ** AIR 1921 Mad 480 (481) (DB) (Property mortgaged while under attachment — Mortgagee paying to avert sale — Section 72(b) applies) ** (1905) 27 All 403 (405) (DB)

16. AIR 1959 Ker 294 (296) ** AIR 1950 Pat 13 (16) 28 Pat 531 (Anomalous mortgagee paying mortgage decree in favour of prior mortgagee) ** AIR 1921 Mad 480 (481) (DB) (Per Ramesam, J — Spencer, J , contra) ** AIR 1926 Oudh 281 (286) 1 Luck 367 29 Oudh Cas 336 (DB) (Case law discussed) ** AIR 1919 Oudh 370 (372) 22 Oudh Cas 32

save the property from sale in execution of the money-decree.**(17)** Even if the property is sold for recovery of income-tax due from the mortgagor, the mortgagee's security is not impaired in any manner and the payment made by the mortgagee to avert the sale will not be covered by this section **(18)** Though the amount deposited by the mortgagee to set aside sale in execution of a prior encumbrancer's decree is recoverable under this clause, the amount of compensation to be paid to the auction-purchaser under O 21, R 89 of the Code of Civil Procedure, will not be allowed to him as it is unnecessarily expended due to his own laches in not making the payment earlier **(19)**

The mortgagee is duty bound to safeguard the security mortgaged. If the arrears of taxes due on the property mortgaged related to the period prior to his coming into possession of the property and if he has paid the arrears due, to save the property, he may claim the repayment of that amount at the time of redemption.**(20)**

A darpatnidar who has made a deposit and obtained possession of a patni under S 13 of the Bengal Patni Regulation, 1819 is entitled under S 72 to add the subsequent payments made by him towards rents of Patni to the Zamindar to his original deposit **(21)**

Unless the mortgagor has contracted to pay the land revenue himself, a mortgagee in possession has to pay it under S 76, clause (c), and therefore, where there is no express agreement making the mortgagor liable for its payment, a mortgagee in possession is bound to pay the same, even if it is newly assessed or advanced during the continuance of his mortgage. He cannot recover it from the mortgagor under this clause **(22)** However, where a deed of mortgage is silent on the point as to who is liable for the payment of land revenue, it has been held that a mortgagee in possession contracts for the payment of the assessment existing on the date of mortgage only and not the newly assessed or advanced amount The liability to pay the same is fixed upon the mortgagor **(23)** The

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(Payment by puisne mortgagee of a decree on a prior mortgage — Puisne mortgagee not party to the suit — Payment is not covered by S 72) ** AIR 1916 Pat 96 (96) 1 Pat LJ 589 (DB) (Payment of cess — Property not in danger — Mortgagee cannot claim charge under this section) ** (1899) 22 Mad 332 (336) (DB) ** (1903) 30 Cal 794 (800) 7 Cal WN 609 (DB) (Mortgagee not liable to pay the public cess — Sale not endangering the mortgage security — **Held,** mortgagee cannot add the same to his debt.)

[**See also** (1913) 16 Oudh Cas 48 (50) (Usufructuary mortgagee paying a simple money decree under which property was attached and ordered to be sold — Sale held imperilled mortgage security.) ** 1882 All WN 210 (210) (DB).]

17. AIR 1954 All 420 (421)

18. AIR 1959 Ker 294 (296).

19. **AIR 1932 PC 99 (101).**

[**See also** AIR 1921 Oudh 55 (56) (Mortgagee paying excess due to his laches — He cannot recover the same from mortgagor.)]

20. AIR 1953 Mys 114 (120) : ILR (1951) Mys 503 (DB).

21. AIR 1948 Cal 250 (255) (DB).

22. **AIR 1924 PC 102 (106) : 46 All 269 : 51 Ind App 157 : 27 Oudh Cas 72.** (Law was the same even before the enactment of this Act) ** (1908) 18 Mad LJ 31 (33) (DB)

[**But** see AIR 1923 All 433 (434) 45 All 388 (DB) (Submitted the reasoning on the basis of an implied covenant does not appear to be sound.)]

23. **(1865) 3 Suth WR 174 (175) (SB)** ** 1896 Bom PJ 710 (DB) ** (1865) 3 Suth WR 6 (7) (DB) ** (1904) 14 Mad LJ 488 (489) (DB) ** 1886 Bom PJ 68 (DB)

[**See also** AIR 1925 Lah 76 (77) (DB).]

[**But** see (1909) 2 Ind Cas 469 (470) (DB) (Bom) (Mortgagee is not entitled to recover the settlement expenses and the Judi paid by him to Government as the payment was for his own benefit and under his own agreement with Government)]

real effect of clause (c) of S 76, however, is to make the mortgagee in possession liable to pay the land revenue and other charges of public nature *out of the rents and profits of the property only*, and not otherwise. Where, therefore, the income of the property is insufficient to cover the expenditure over these heads and the mortgagee in possession has to make them out of his own pocket, he is entitled under this clause to be reimbursed in respect of such payments. If the income is sufficient to meet these payments, the mortgagee cannot take advantage of this clause to recover it again from the mortgagor at the time of redemption. In this sense this clause may be said to be subject to the obligation imposed by clause (c) of S. 76.(**24**)

Also see Note 8 on section 76.

4. Supporting mortgagor's title — Clause (c).

This clause enjoins the mortgagee to support the mortgagor's title (**1**) A mortgagee may incur expenditure for supporting the mortgagor's title to the mortgaged property where such title has been impeached, and add such expenses to the principal amount of the morgage-money (**2**) The principle on which this right is based is that the mortgagor, so long as the equity of redemption remains with him, is bound under the general law of mortgage, to indemnify the estate against the expenses of protecting his title (**3**) This obligation on the mortgagor exists, independent of any contract between the parties to the mortgage (**4**)

The expenses incurred by the mortgagee must, however, be necessary and reasonable The mortgagee, while spending in this respect, must act as a prudent owner The question whether he has so acted is a question of fact (**5**) Thus in respect of tenancy of urban property or premises, the mortgagee in possession has no right to jeopardise the right of mortgagor by giving a tenancy which will continue even after the redemption of mortgage (**6**) It is the duty of the mortgage to prove the exact amount of expenses incurred In the absence of any evidence to show what these expenses actually are, he is not entitled to be given credit for any amount, even though it may appear from the facts of the case that he was put to some expense (**7**) Where the mortgagee obtains a decree for costs of the suit incurred in defending the title of the mortgaged property but makes no attempt to recover the same from the other party he is not entitled to debit the mortgagor in his accounts with these costs (**8**) After the amendment of the section in 1929, no expenditure under this

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24. AIR 1919 Oudh 50 (53) : 22 Oudh Cas 270 (DB)

Section 72 — NOte 4

1. AIR 1925 Nag 101 (103) (A mortgagee is not entitled to dispose of the mortgagor's interest in the property.)
2. 1974 Ker LT 501 ** AIR 1951 Bom 19 (22) ILR (1951) Bom 209 (DB) ** (1912) 16 Ind Cas 217 (219) (DB) (Mad) ** AIR 1919 Mad 1102 (1103) (DB) (Quaere — Whether the mortgagee is justified in conducting an expensive criminal litigation) ** (1898) 21 Mad 32 (34) (DB) * (1747) 26 ER 1098 (1099) 3 Atk 517 (518), *Godfrey v Watson*

   [**See also** (1891) 15 Bom 625 (539) (DB) (**Overruled** in 20 Bom 721 (FB) on a different point)]
3. **(1885) 9 Bom 435 (437) (SB)** ** AIR 1924 Bom 264 (266, 267).

   Also see S 65, Note 5.
4. **AIR 1931 PC 143 (148) : 58 Ind App 254** ** AIR 1924 Bom 264 (266 267) ** **(1885) 9 Bom 433 (437) (SB).** (An express stipulation to indemnify does not create any fresh obligation.) ** Halsbury, Laws of England Vol 21, P 231 (1938) 1 Dr & Wal 618, *Barry v Stawell*.
5. AIR 1919 Mad 1102 (1103) (DB).
6. **AIR 1985 Raj 11 : 1984 Rajasthan LR 709 (FB).**
7. AIR 1915 Mad 945 (947) (DB).
8. AIR 1951 Bom 19 (22) · ILR (1951) Bom 209 (DB) ** AIR 1926 Bom 567 (571) (After entry by a mortgagee of land his right of possession relates back to the time at which his

clause will be deemed "necessary" unless the mortgagee has, before incurring the expenditure called upon the mortgagor to support his title and the latter has failed to do it.

5. Costs of supporting the mortgagee's title — Clause (d).

Under the English law a mortgagee is entitled to all that his contract or the legal or equitable consequences of it, entitles him to recover, and all the costs of properly incurred in ascertaining or defending such rights whether at law or in equity **(1)** Thus, he is entitled not only to the costs incurred by him in a *suit for foreclosure or redemption* but also to the costs incurred by him to support his title, *apart* from any suit for foreclosure or redemption.**(2)** This clause is based upon the same principle A mortgagee will, therefore, be entitled to costs in a suit for foreclosure or redemption unless he has forfeited his rights by some improper defence or other misconduct.**(3)** He will also be entitled to the costs incurred by him in making good his title, otherwise than in a suit for foreclosure or redemption.**(4)** Thus, where the mortgagee had to spend money in removing the obstruction to his enjoyment created by the mortgagor, in a suit for that purpose, it was held that the costs of that suit could be claimed by the mortagee as a charge on the property.**(5)** So also where, by reason of the default of the mortgagor to deliver possession to the mortgagee under the terms of the

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legal right to enter accrued, so as to enable him to support an action against a wrong-doer for a trespass committed at a time antecedent to the entry.)

Section 72 — Note 5

1. (1886) 31 Ch D 582 (593) 55 LJ Ch 576 (578), National Provincial Bank of England v Games, (Detillin v. Gale, (1802) 7 Ves 583, Rel on) ** (1838) 40 ER 1084 (1086) 8 LJ Ch 235, Dryden v Frost (But even as to costs in equity, the Court exercises a discretion, and refuses to mortgagee his costs if his conduct has been improper and in some cases orders him to pay them.)

2. (1886) 31 Ch D 582 (592, (593) 55 LJ Ch 576 (578), National Provincial Bank of England v Games (Costs of preparation of mortgage deed and correspondence with mortgagor and his surety allowed) ** (1705) 23 ER 947 (947) 2 Vern 536, Ramsden v Langley (Costs of takng out administration to the mortgagor as the principal creditor, allowed) ** (1889) 41 Ch D 537 (540) 58 LJ Ch 622, Eardley v Knight (Costs of defending suit to set aside the mortgage allowed) ** (1827) 38 ER 647 (647) 27 RR 108 Ellison v Wright (Costs of suit against surety of mortgagor, for recovery of the mortgage-money, the fruits of the action being lost by the bankruptcy of the surety) ** 1859 Johns 133 (137) 123 RR 51 (51), Parker v Watkins (But where mortgagee's title to the mortgage only is disputed, the cost of the litigation cannot be allowed against parties interested in equity of redemption unless they can be shown to have concurred in or assisted the litigation.)

3. AIR 1964 Punj 365 (367) (Redemption suit — Costs incurred by mortgagee for supporting his title - Mortgagor bound to pay actual costs.) ** AIR 1915 Mad 402 (403, 404), (Costs of defending unsuccessful suit for redemption) ** AIR 1919 All 297 (299) · 41 All 473 (DB) (Costs of defending an unsuccessful appeal by mortgagor against a decree for sale, allowed) ** (1898) 21 All 4 (9) (DB), (Do.) ** (1884) 8 Bom 190 (193) (DB) (Costs in a redemption suit) ** 1884 Bom PJ 44 (DB) (No special circumstance to deprive the mortgagee of his costs in the redemption suit — Costs allowed) ** (1802) 32 ER 234 (235) 7 Ves 583 6 RR 192, Detillin v Gale (Mortgagee deprived of costs by reason of improper conduct) See also Note 49 on Section 60 and Note 16 on Section 84

4. AIR 1942 Mad 592 (594) ILR (1943) Mad 205 (DB) (Mortgagee A depositing money to redeem prior mortgagee B — Prior mortgagee B refusing to accept deposit, as mortgagor disputed rights of A — A compelled to file suit to redeem B, which was really for making good his title against mortgagor A allowed to add costs of the litigation to the principal money under Cl. (d) and recover it under this section.)

5. (1904) 28 Bom 181 (188) (DB) (The mere fat that mortgagee has not given the details of the sums either in the course of the trial or in his written statement is not sufficient to deprive him of his right to costs.)

contract, the latter has to sue for possession, the costs of the suit can be claimed by him.(6) Similarly, where a third person sued both the mortgagor and the mortgagee for recovery of a sum of money, and the mortgagee in that suit successfully defended the suit by setting up his rights of priority in respect of amounts paid by him for prior mortgages, it was held that the costs of such defence could be claimed by the mortgagee in a subsequent suit for redemption by the mortgagor.(7) But the costs of litigation concerning the mortgaged property arising out of the wrongful act of a third person will not be allowed to the mortgagee unless they were incurred in protecting the title to the estate (8) Thus the mortgagee is not entitled to the expenses incurred by him in regard to certain criminal proceedings which had taken place between the parties in regard to the mortgaged land as it cannot be said in such a case that they were incurred by him for the purpose of making his own title good against the mortgagor (9) In the undermentioned case(10) where a mortgagee had taken a mortgagee with full knowledge of a third person's interest in the property, it was held that he was not entitled, as against the mortgagor, to add the costs incurred by him in opposing the claim of such third person.

The mortgagee paid monies to the Government to avert a sale of a portion of the hypotheca for realisation of the penal assessment levied by the Government on the mortgagor on the land not comprised in the mortgage The mortgagor thereafter filed a suit against the Government for refund of the monies so paid on the ground that the Government had no right to bring to sale the hypotheca, and for injunction restraining the Government from such sales in future It was held that as the Government had a paramount right to realise the amount of penal assessment levied by them on the mortgagor there was no question of protecting the title of the mortgagor or the mortgagee in the suit and the expenses of such suit could not, therefore, be added to the mortgage amount (11)

Where the mortgagee is awarded costs he is entitled to recover them, not as an independent claim irrespective of his rights under the mortgage but as part of the mortgage amount realisable from the mortgaged property (12) But there is nothing to prevent the Court, in proper cases from awarding the costs *personally* against the mortgagor (13) Where the decree is ambiguous it should not be construed in such a manner as to enable the mortgagee to recover the costs personally against

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6. AIR 1953 Mys 114 (120) ILR (1951) Mys 503 (Right of mortgagee to possession resisted and challenged — Mortgagee filing suit — Suit decreed and mesne profits and costs awarded — Mortgagee can only claim actual costs incurred by him in his sit — He is not entitled to add amount of mesne profits to mortgage debt) ** AIR 1941 Oudh 498 (501) 16 Luck 812 (DB) ** (1843) 49 ER 820 (822) 6 Beav 246 12 LJ Ch 309 Sandon v Hooper

7. AIR 1926 Oudh 281 (287) 1 Luck 367 29 Oudh Cas 336 (DB)

   [**See also** AIR 1924 Bom 264 (267, 268) (An encumbrancer is always entitled to add to his security the costs of proceedings to which he is properly made party in respect of his incumbrance.)]

8. (1931) 108 LJ Ch 276 (277) (1931) 2 Ch 168 145 LT 441 In re Smith v Mortgage Harrison v Edwards ** AIR 1924 Bom 264 (267) 87 Ind Cas 129 (Third person held to have justifiable ground to proceed against mortgaged estate — Mortgagee allowed costs of defending the litigation.)

9. AIR 1955 Mad 245 (246) ILR (1955) Mad 570 (**Overruled** on another point in AIR 1962 Mad 21 (FB).)

10. (1912) 17 Ind Cas 243 (244) (Lah).

11. AIR 1955 Andhra 274 (276).

12. AIR 1925 Cal 1135 (1135, 1136) (DB) ** AIR 1926 All 424 (425) 48 All 425 (DB)

13. AIR 1926 All 424 (425) 48 All 425 (DB) ** AIR 1935 Mad 101 (105) 58 Mad 418 (DB) (Costs directed to be paid personally by defendant disputing right of mortgagee)

    [**See also** (1912) 15 Ind Cas 23 (24) (DB) (Cal).]

the mortgagor.(14)

Ordinarily a puisne mortgagee is not ordered to pay the costs of a mortgage suit. He is impleaded as a defendant because in a mortgage suit it is incumbent upon the mortgagee to implead as defendants all persons who would be entitled to redeem the property. In certain cases, however, the defendant mortgagee may conduct himself in such a way as to make it right and proper that he should be ordered to pay the costs of the suit. Such a case naturally turns upon its own facts and if it is sought to make a puisne mortgagee liable for the costs, the plaintiff should take care that such an order is passed by the Court and inserted in the decree.(15)

6. Renewal of lease — Clause (e).

Where the mortgaged property is a renewable leasehold property, the mortgagee may spend the amount necessaryfor the renewal of the lease and, unless there is a contract to the contrary, he may add the amount to the mortgage-debt under this clause. It is to be noted in this connection that a mortgagor of leasehold property is not, under S 65, bound to renew the lease. A mortgagee may incur expenditure for the renewal in order to preserve his security

Under the English law also, a mortgagee is entitled to add the cost of the renewal of the lease, to the mortgage debt and to recover the same with interest along with it (1)

7. "In the absence of a contract to the contrary."

Under this section the expenses incurred for the purposes mentioned therein can be added to the principal of the mortgage-money only "in the absence of a contract to the contrary" and not otherwise. Thus, where *a malkanamdar* stipulated in the deed of mortgage that he would meet at the expenses of litigation to support the mortgagor's title and he had to incur that expenditure in a suit by a rival *jenmi*, it was held that he could not add the amount spent to the mortgage-debt as the above stipulation was "a contract to the contrary".(1) Similarly, where a mortgagor undertook to effect all the repairs on the mortgaged property, the mortgagee was held not entitled to make them himself and add the amount to the mortgage-debt (2) See also the undermentioned cases (3)

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14. **(1898) 20 All 523 (527) (FB)** ** AIR 1926 All 424 (425) 48 All 425 (DB) ** AIR 1925 Cal 1135 (1136) (DB) ** AIR 1918 All 366 (366, 367) 40 All 109 (DB)

15. AIR 1932 Rang 153 (153) 10 Rang 308 (DB) ** (1872) 7 Ch App 507 (512) 41 LJ Ch 798 26 LT 717 20 WR (Eng) 665, Liverpool Marine Credit Co v Wilson

[See also (1857) 5 WR (Eng) 744 (745) 3 Jur (NS) 630 : 108 RR 937, Sclater v Cottam]

Section 72 — Note 6

1. (1688) 23 ER 664 (664) 2 Vern 84, Manlove v Bale and Bruton ** (1743) 26 ER 803 (805) : 3 Atk 1 at P. 4, Lacon v. Mertins.

Section 72 — Note 7

1. AIR 1915 Mad 1215 (1219) (DB).
2. AIR 1919 Lah 354 (354, 355).
3. AIR 1960 Mad 24 (25, 27) (House in ruined condition mortgaged for Rs 272 — Covenant by mortgagor to pay costs of repairs carried out by mortgagee — Mortgagee spending Rs 1,000 in repairs greatly enhancing value of property — Mortgagee entitled to cost of works along with mortgage money) ** AIR 1956 Orissa 61 (62, 63) ILR (1955) Cut 697 (DB) (Under a mortgage, the initial responsibility of payment of rent was on the mortgagor but a further clause provided that if the mortgagor did not pay the rent and hence the landlord brought a suit for sale of the mortgaged property, the mortgagee would pay or deposit the arrears of rent in the Court, **Held**, that the wording of the mortgage bond cast a duty on the mortgagee to pay rent and that the right of redemption was not lost on the purchaser, at the court sale, of the property by the mortgagee) ** AIR 1950 Kutch 74 (74) (Where a mortgagor of a house has made provision for the payment to the mortgagee of the costs of repairs and maintenance charges, in a suit for redemption, the mortgagee will be entitled

8. May add such money to the principal money.

A mortgagee may, under the present section, add the amount of money, expended by him for the necessary purposes mentioned in the section, to the principal money and recover it with interest along with the mortgage-debt But can he, independently of the mortgage claim bring a suit to recover such amount? Under the English law he can claim the money expended by him only at the time of redemption and no action on a debt lies for its recovery (1) The reason is that *at law* the mortgagee is the owner of the property and the sum spent can be recovered only *in equity* as a condition of redemption at the time of redemption In this country, the mortgagor is the owner, and the mortgagee has only a security The English rule can, therefore, have no application in India (2)

A mortgagee in India has two separate remedies open to him, namely to sue on his mortgage adding to it the claim for monies expended for necessary purposes or to bring a separate suit to recovery only the expenses.(3)

The expression "the mortgage may, in the absence of a contract to the contrary, add such money to the principal money," clearly shows that the remedy under this section is only an *additional* remedy and not the *sole* remedy(4) and the mortgagee is, therefore, not barred from suing to recover such amounts under S 69 of the Contract Act (5) The contrary view in the undermentioned cases(6) does not appear to be correct

On the other hand, the mere fact that there is an agreement between the parties allowing the mortgagee to recover his expenses by an independent suit against the mortgagor personally does not take away the right of the mortgagee under this section to add the amount to the principal

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to the costs of the repairs, etc , made by him) ** AIR 1932 Oudh 255 (259) 8 Luck 40 (DB) (To see whether there is a contract to the contrary, the document must be considered as a whole)

Section 72 — Note 8

1. (1884) 25 Ch D 338 (352) 53 LJ Ch 545 50 LT 109 32 WR (Eng) 352 In re Sneyd Ex parte fewings

2. AIR 1919 Mad 1102 (1104) (DB)

3. (1867) 11 Moo Ind App 241 (259) 8 Such WR 17 (PC) ** AIR 1955 Andhra 274 (277) ** (1866) 5 Suth WR 126 (128) (DB) ** (1879) 2 All 193 (195) (DB) (Suit to recover additional land revenue paid by mortgagee is maintainable while the mortgagee subsists)

   [But see (1852) 8 SDAR 1063 (1065) (SB). Mt Bebee Wuheedum v H Abdul Hossein]

4. AIR 1919 Mad 1102 (1103, 1104) (DB) ** AIR 1936 Rang 47 (48) ** AIR 1935 Rang 438 (439) ** (1898) 20 All 401 (408) (DB) ** AIR 1919 Mad 59 (61 62) 41 Mad 1043 (DB)

   [See also (1907) 34 Cal 92 (95) (DB)]

5. AIR 1963 Pat 185 (188) 43 Pat 755 (DB) ** 1890 All WN 90(90) (DB) ** AIR 1933 Rang 112 (112) ** AIR 1935 Rang 438 (439) ** AIR 1936 Rang 47 (48) ** AIR 1923 All 127 (127).

   [See also AIR 1950 Mad 333 (334) (Mortgagee paying up charge decree to prevent sale — Proviso not complied with — Mortgagee cannot add amount to principal — Words "add such money to the principal" do not, however, exclude personal right of suit of mortgagee under S. 69, Contract Act.)]

6. (1913) 16 Oudh Cas 48 (50) (Mortgaee in possession paying simple money decree to a avert sale of property in its execution — Suit by mortgagee against mortgagor to recover the amount — **Held**, mortgagee having exercised his right under S 72 (b) could not obtain personal decree — His only remedy was to remain in possession for a further period) ** (1899) 9 Mad LJ 177 (179) (DB) (Where a usufructuary mortgagee paid off a prior mortgage decree and suffered a decree for redemption without insisting on the payment of the amount so paid to the prior mortgagee and brought a regular suit for its recovery, it was held that mortgagee's remedy was only to insist on being paid in full before the could be

money and recover it as such.(7) Similarly where a usufructuary mortgagee leases back the mortgaged property to the mortgagor, the mortgagee's right to file a suit for accounts based on his right to interest on the mortgage amount is not merged in or substituted for his rights to rent arising from the tenancy.(8)

Suppose now that the mortgagee adopts one of the two remedies. The question arises whether he forfeits the other remedy. According to the High Court of Allahabad, he does so. In *Imdad Hasan v Badri Prasad,*(9) *a mortgagee in possession paid the* Government land revenue payable by the mortgagor to avert the sale of the property He then sued the mortgagor and obtained a money decree for the amount spent by him. In a subsequent suit for redemption by the mortgagor, the mortgagee claimed a charge under this section for the decretal amount which remained unpaid It was held that as he had elected to pursue one remedy to recover his expenditure, he was no longer entitled to a relief under this Section. The debt was held to have been merged in the decree and, therefore, was recoverable only under that decree. A contrary view was expressed by the High Court of Madras in *Mangeswar Naraina v S Shiva Rao,*(10) in which case the money decrees obtained by the mortgagee were, however, barred by limitation at the time when a charge under this section was claimed by the mortgagee in a suit for redemption. Their Lordships disallowed the claim of the mortgagee for the decretal amounts because the claim was no longer subsisting, being statute-barred In their opinion, the Allahabad view that even if the decree is alive and enforceable, the relief under this section cannot be allowed "goes too far" It is submitted that the Madras view is correct on principle. A mortgagee does not lose his charge for the expenditure given by this section by merely obtaining a personal decree for the same He can plead it and claim to be paid for it on redemption, provided the claim under the decree is not otherwise barred or does not become unenforceable.(11)

9. Charge for expenses, if can be enforced independently of mortgage.

The section allows a mortgagee to *add* to the principal of the mortgage-money the sum expended by him over the purposes mentiond therein. In other words, the mortgagee is entitled to a charge over the mortgage security even for the amount spent But can such charge be enforced independently of the mortgage? The High Court of Allahabad has held in the undermentioned case(1) that a charge for expenses cannot be enforced apart from the claim under the mortgage. The facts of the case were that a mortgagee in possession paid certain arrears of land revenue payable by

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turned out of the lands and a separate suit for recovery of money could not be sustained *Note.* — Section 69, Contract Act, not referred to.)

[See also AIR 1925 Oudh 429 (431) 28 Oudh Cas 221 (DB) (Decision on the facts of the case.) ** AIR 1920 Pat 521 (522) 5 Pat LJ 248. (Separate suit brought in Small Cause Court not allowed)]

7. AIR 1933 PC 136 (139) ** AIR 1934 All 888 (889) ** AIR 1935 Pat 157 (159)

[But see AIR 1919 Oudh 50 (53) · 22 Oudh Cas 270 (DB) (Claim for excess revenue and cesses paid by mortgagee disallowed in a redemption suit)]

8. AIR 1917 Mad 190 (190).

9. (1898) 20 All 401 (408) (DB)

10. AIR 1919 Mad 59 (61, 62) : 41 Mad 1043 (DB).

[See also 1955 Mad WN 613 (614) (Usufructuary mortgage and lease back to mortgagor — Mortgagee obtaining decree for rent due by mortgagor — Decree barred — Redemption suit — Mortgagee cannot claim any arrears of rent which had merged in decree, in the redemption suit — AIR 1919 mad 59, Applied.)]

11. (1886) 1 CPLR 66 (67)

Section 72 — Note 9

1. (1890) 13 All 195 (199) (DB).

the mortgagor to avert the sale of the property The mortgagor deposited the principal and the interest thereon in Court which was accepted by the mortgagee and the deed and possession were delivered to the mortgagagor The mortgagee subsequently brought a suit to recover the amount of land revenue by sale of the mortgaged property. Their Lordships disallowed the suit and observed as follows :

> "In our opinion, whatever may be the position or right of a person paying money under such circumstances, who is not a mortgagee, the position of a mortgagee making such payments is this — if he makes such payments and wishes to seek a direct remedy against the mortgaged property in respect of them by a suit for sale of that mortgaged property, he must do so in his character and position as mortgagee, for it was in that character and position, and that only he paid the money He must, if he desires to bring the property to sale in respect of such payments, add on those payments to the principal money due under the mortgage In other words, in our opinion, a mortgagee making such payments as mortgagee, does not, by reason of making those payments obtain a lien independently of that under his mortgagee In this case, (plaintiffs' mortgagees) having abandoned their lien and rights as mortgagees, it appears to us that the plaintiffs cannot revive them in order to sustain a suit for money which they could have added to the original mortgage debt and in respect of which they were entitled to continue in their character as mortgagees and to hold on the deed of mortgage"

In *Ambika Charan v Ramgati Guha*(2), *a mortgagee*, after obtaining a preliminary decree on his mortgage, deposited a certain amount to set aside a sale of the mortgaged property in execution of a rent decree The property was thereafter sold privately by the mortgagor who satisfied the preliminary decree completely Thereafter the mortgagee brought a suit to establish his right to the lien on the mortgaged property in respect of the deposit that had been made by him It was held by the High Court of Calcutta that the suit was maintainable for the reason that the lien acquired by the mortgagee in respect of the deposit was not discharged by the payment and satisfaction of the preliminary decree. It is submitted that this last view is not correct A *lieu* for expenses under this section is enforceable only along with the claim under the mortgage and so long as the latter is subsisting, if the latter claim is no longer subsisting, the mortgagee cannot have any remedy under this section. He will be entitled, however to recover the amount under S 69 of the Contract Act (3)

See also the undermetioned case.(4)

10. Expenditure must have been made in the capacity of mortgagee.

A mortgagee, whether in possession or not, has, under the present section, a right to spend the necessary amount for the preservation of the mortgaged property, if occasion arises, until the sale of the mortgaged property, in execution of the decree for sale, is confirmed or a final decree foreclos-

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2. AIR 1915 Cal 369 (370) (DB).

   [**See also** (1912) 16 Cal WN 717 (719).]

3. AIR 1937 Nag 225 (226). (Mortgagor bound under the contract to pay land revenue — Mortgagees paying the arrears of land revenue to save property after foreclosure decree — Mortgagees are entitled to be recouped) ** AIR 1938 Nag 459 (461) ILR (1939) Nag 246 (Payment by mortgagee after decree for foreclosure of arrears of land revenue to avert sale — Case falls under S 69, Contract Act) ** AIR 1940 Nag 285 (286) (AIR 1938 Nag 459, Foll.) ** AIR 1926 Cal 765 (767) (DB) ** (1898) 25 Cal 305 (311) (DB)

   Also see S. 65, Note 10.

   [**But see** (1899) 9 Mad LJ 177 (179) (DB) (Where a usufructuary mortgagee paid off a prior mortgage decree and suffered a decree for redemption without insisting on the payment of the amount so paid to the prior mortgagee, held, that a separate suit for recovery of money could not be sustained Note — S 69, Contract Act, not referred)]

4. AIR 1920 Mad 746 (747) (DB) (Costs of defending mortgagor's title incurred during prior mortgage — The mortgage renewed and suit to enforce the latter mortgage brought — The claim for costs cannot be added to the debt under the latter mortgage)

ure is passed, and to add the amount so expended to the mortgage-debt (1) In other words, the section requires that the money expended should be expended by the mortgagee in the capacity of a mortgagee, and so long only as the relationship of mortgagor and mortgagee subsists between the parties. The relationship of mortgagor and mortgagee is not put an end to by the mere passing of a preliminary decree for foreclosure(2) or of a final decree for sale, the execution of which is still pending(3) and, therefore, a mortgaee spending amounts for the purposes mentioned in the section even after the passing of such decrees, has a right to add the amount so expended to the principal of the mortgage-money under this section. Where a mortgagee spends monies, not as a mortgagee, but as owner under a defective purchase which is subsequently declared void by the Court, the expenditure must be held to have been made only in his capacity as mortgagee.(4) The reason is that as soon as the conveyance is declared void, the mortgage revives and the mortgagee must be deemed to have had only that capacity all along. Where, however, a mortgagee purchased a tenure mortgaged to him in execution of his own decree for sale on the mortgage and thereafter paid the arrears of rent which had accrued *before* his purchase, the payment by him was held not to be in the capacity of a mortgagee but in the capacity of an owner and purchaser, in which capacity he was bound by law to make that payment himself. He was, therefore, held not entitled to a relief under this section (5)

See also the cases noted below.(6)

11. Interest on amount spent.

A mortgagee is entitled under this section to claim interest also, on expenses incurred by him for the purposes mentioned therein, unless, of course, there is a contract to the contrary (1) Whether there is a contract to the contrary must, in each case,depend upon its own facts (2) In the undermen-

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Section 72 — Note 10

1. **See Special Committee's Report, 1927.**
2. AIR 1915 Cal 369 (369) (DB) (Payment by mortgagee of a rent decree to avert sale, after preliminary foreclosure decree — Mortgagee acquires lien under this section which is not discharged by mere payment of foreclosure decree — Lien held enforceable in a separate suit.) ** (1912) 16 Cal WN 717.
3. **AIR 1931 PC 226 (228) : 59 Cal 463 : 58 Ind App 341. (Reversing** AIR 1930 Cal 151 : 57 Cal 298) ** AIR 1919 Low Bur 136 (138) (Payment of land revenue by mortgagee after preliminary decree for sale creates a charge under this section in favour of mortgagee which subsists even after the mortgage decree is satisfied)
4. **AIR 1931 Pat 325 (326) : 10 Pat 210 (DB).**
5. **See also** AIR 1924 Pat 235 (236) 2 Pat 890 (DB) (The purchaser purchases the property with the liability of a prior rent charge and hence in paying prior rent a purchaser discharges his own liability)
6. (1865) 3 Suth WR 162 (162) (DB) (Mortgagee who was also the proprietor of the mortgaged tenure making payment of land revenue, purporting to act in capacity of mortgagee **Held,** he cannot recover it.) ** AIR 1916 Mad 859 (862) 38 Mad 18 (DB) (Sale of equity of redemption in favour of prior mortgagee after creation of second mortgage — Prior mortgagee spending over repairs after purchase — Suit for redemption of prior mortgage — **Held,** prior mortgage still subsisted — Repairs were as a mortgagee and the amounts spent for it were recoverable with mortgage-debt)

Section 72 — Note 11

1. AIR 1925 Oudh 678 (681) ** AIR 1922 Nag 262 (263) ** (1907) 4 All LJ 176 (180) (DB) ** (1743) 26 ER 803 (805) 3 Atk 1, Lacon v Mertins ** (1688) 23 ER 664 (664) · 2 Vern 84, Manlove v. Bale & Burton ** (1795) 145 ER 964 (964) 2 Anst 551, Woolley v. Drage.

   [See also AIR 1924 All 881 (883) : 46 All 897 (DB).]
2. (1912) 16 Ind Cas 635 (636) (All) (The mere circumstance that it is not specifically mentioned in the deed that interest would be paid on cost of repairs is not a contract to the contrary) ** AIR 1929 All 777 (778) (DB). (Provision in the deed that particular expendi-

tioned case(3) of the Lahore High Court, interest on costs was disallowed even though parties had specifically stipulated for interest. The case, however, is not under the Act and does not give any reasons for its decision.

The *rate* of interest to be allowed on expenses is the same as that payable on the principal money and where no such rate is fixed by the deed, the section prescribes nine per cent per annum (4) Compound interest is not allowed on expenses.(5)

In a complete usufructuary mortgage or partially complete usufructuary mortgage, cost of improvement does not bear interest as the usufruct is supposed to wipe out all interest and the principal sum does not bear interest either But where the mortgagee is in possession but the mortgage is not of the above kind, interest on the cost of improvement has to be calculated (6)

12. Premiums paid for the insurance of mortgaged property.

Under the second and the third paragraphs of the section a mortgagee is entitled to incur expenditure to insure and keep insured against loss or damage by fire, the property mortgaged him, when such property is, by its nature, insurable, and he may add the premiums paid by him to the principal amount of the mortgage-debt Insurance premium paid by the mortgagee of equitable mortgage for preserving the mortgaged property can be added to the principal money in absence of a contract to the contrary.(1)

This provision was originally taken from the Conveyancing and Law of Property Act, 1881(2) the corresponding sections of which ran as follows

"*Section 19* (1) A mortgagee, where the mortgage is made by deed shall by virtue of this Act have the following powers, to the like extent as if they had been in terms conferred by the mortgage-deed but not further (namely) :

(i) * * * * * * * * * * * * *

(ii) A power at any time after the date of mortgage deed to insure and keep insured against loss or damage, by fire any building, or any effects or property of an insurable nature whether affixed to the freehold or not, being or forming part of the mortgaged property and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage-money and with the same priority, and with interest at the same rate, as the mortgage money.

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"*Section 23* (1) The amount of an insurance effected by a mortgagee against losss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage-deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured

(2) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely) :

(i) Where there is a declaration in the mortgage-deed that no insurance is required

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ture incurred by mortgagee to be added to the principal money — No provision made for payment of interest thereon — **Held,** that there was a contract to the contrary)

3. AIR 1921 Lah 53 (55) (DB).

4. AIR 1925 Oudh 678 (681).

5. AIR 1950 Kutch 90 (92) (Mortgageein possession but mortgage not usufructuary — Interest on costs of improvement has to be calculated but interest on interest is not to be taken in any form) ** **(1896) 23 Cal 228 (247) : 22 Ind App 183 (PC).**

6. AIR 1950 Kutch 90 (92) (Cost of improvement first has to be deducted from gross produce and balance only applied to reduction of interest.)

Section 72 — Note 12

1. 1974 Ker LT 853 (DB)

2. 44 and 45 Vict., Ch. 41.

(ii) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage-deed :

(iii) Where the mortgage deed contains no stipulation respecting insurance and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure."(3)

There was a difference of wording in this section between the first paragraph and the second The expenses under the former were to be added to the principal of the mortgage-money while those under the latter were "a charge on the mortgaged property." The reason for such a distinction was not clear and, therefore, the amending Act of 1929 changed the wording of the second paragraph, thus bringing it in line with that of the first paragraph. The Special Committee state their reason for this change as follows :

"In the penultimate paragraph of S 72 it is stated that a sum paid as insurance premium shall be a charge on the mortgaged property, while the second paragraph provides that sums mentioned in clauses (a) to (e) should be added to the principal money. It is not clear whether any distinction is really intended between insurance premia and other necessary costs and charges The sums payable for insurance ought to treated on the samefooting as those spent for necessary costs and charges We are, therefore, of opinion that such sums should be added to the principal money and should carry the same rate of interest".(4)

The right of the mortgagee under this provision is, however, subject to "a contract to the contrary" A mortgagor can stipulate that there should be no insurance of mortgaged property and a mortgagee insuring the property in spite of such a stipulation is not entitled to his costs Similarly, where the mortgagor himself undertakes to insure the property, a mortgagee is not entitled to incur costs in that respect, even if the mortgagor has failed to keep up his part of the agreement(5) Further, the right is subject to the proviso contained in the last paragraph, under which a mortgagee cannot incur expenditure over insurance where the mortgagor himself has keep up the insurance.

The section also prescribes a limit to the amount for which a mortgagee can insure the property. If the amount has been fixed by the parties themselves, that limit cannot be exceeded But where no such amount is fixed by the parties, the section provides that the amount of insurance should not exceed two-thirds of the amount which would be required to restore the property in case of total destruction.

Where the plaintiff had insrued the lorry hypothecated to him, for payment of loan, and had also insured it, it was held that plaintiff's claim for insurance premium was proper by extending the scope of section 72 — paragraph 2 — to mortgages of moveables on grounds of justice, equity and good conscience.(6)

For the application of the money received under the insurance policy taken by a mortagee in possession. See Notes on S. 76.

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3. These Sections are now replaced by Ss 101(1)(ii) and 108(1) and (2) of the Law of Property Act, 1925, (15 Geo. V. Ch. 20).

4. See the Report of the Special Committee.

5. (1850) 68 ER 337 (339) 8 Hare 216, Dobson v Land ** (1861) 70 ER 1002 (1003) . 2 J & H 137, Bellamy v. Brickenden ** (1865) 12 LT (NS) 114 (114) : 34 LJ Ch 251 Brooke v. Stone.

[But see (1863) 8 LT 409 (411) 9 Jur (NS) 738, Scholefield v Lockwood. (Mortgagee is entitled to money property expended for insurances under the direction for all just allowances.)]

6. 1981 Ker LT 678 (682).

[A][73. **RIGHT TO PROCEEDS OF REVENUE SALE OR COMPENSATION ON ACQUISITION.**—(1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.

(3) Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithtanding that the principal money on the mortgage has not become due.]

[A] Substituted for the original section by the Transfer of Property (Amendment) Act 1929 (20 of 1929), S. 38.

Synopsis

1. **Scope of the section.**
2. **Section, whether retrospective.**
3. **"Is sold owing to failure to pay arrears of revenue", etc.**
4. **"Arrears".**
5. **"Other charges of a public nature."**
6. **Sale by reason of mortgagee's default — Effect.**
7. **"Shall be entitled to claim payment of the mortgage-money."**
8. **"In whole or in part."**
9. **"All charges and deductions directed by law."**
10. **Sub-section (2).**
11. **Sub-section (3).**
12. **Mortgagees claiming surplus proceeds if entitled to proceed against the property also.**
13. **Revenue sale set aside — Right of mortgagee to proceed against the property.**
14. **Surplus proceeds or compensation money withdrawn by mortgagor or other person — Remedy of mortgagee.**

1. Scope of the section.

This section is a particular application of what has been called the doctrine of substituted securities.(1) According to that doctrine a mortgagee is entitled to a charge upon property which through no fault of the mortgagee, has taken the place of the mortgaged property (2)

When the property upon which the charge is created gets converted into another form the buyer will be entitled to proced against the substituted security This is a general principle of law

Section 73 - Note 1

1. **AIR 1938 All 221 (224, 225) : ILR (1938) All 513 (FB).** (Doctrine of substituted securities is a doctrine of wide application) ** AIR 1916 Mad 323 (325) 39 Mad 283 (DB)

   [See also (1910) 33 Mad 429 (434) DB).]

2. (1910) 33 Mad 429 (434) (DB) (Mortgage of a decree — Decretal amount deposited in Court — Mortgagee has a charge on amount deposited) ** (1871) 16 Suth WR 222 (223) (DB) (Sale for arrears of revenue) ** (1880) 6 Cal 142 (147, 148) (DB) (Do)

   [See also (1866) 10 Moo Ind App 540 (558) : 5 Suth WRPC 83 (PC).]

and S 73 is only an example of the said principle.(3)

The doctrine is of wide application. Thus, where the subject of a mortgagee is an undivided share in property and the joint sharers effect a partition, the security of the mortgagee will attach to the share allotted in serveralty to his mortgagor.(4)

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3. **AIR 2000 SC 573 (578, 579) : 2000 AIR SCW 113 (119) : 1999 (10) JT 223.**

4. **AIR 1914 PC 95 (96).** (Share of property mortgaged — Clause in mortgage bond that, after partition, whole of share allotted to mortgagor shall be substituted Effect was to quadruple amount of mortgaged property — **Held**, clause would object whole of mortgagor s share) ** **AIR 1940 PC 11 (14) : 67 Ind App 11.** (Partition suit — Mortgagee of undivided share though not necessary party should be allowed to attend and be heard at the stage of making allotment) ** **AIR 1932 PC 235 (236, 237) : 50 Ind App 405 : 13 Lah 702** ** **(1874) 1 Ind App 106 (120, 122) : 21 Suth WR PC 233 (PC)** ** **AIR 1948 Mad 1 (4) : ILR (1948) Mad 454 (FB)** (AIR 1935 Mad 1011, **Overruled**) (Mortgage of specific item of joint property by one co-sharer — Subsequent partition — Mortgagee can only proceed against substituted item in the hands of mortgagor and of alienee from him and not against original item allotted to another coparcener) ** **AIR 1938 All 221 (225) : ILR (1938) All 513 (FB)** ** **(1907) 35 Cal 388 (391, 392) (SB).** (Co-sharers awarded certain sums of money as owelty in partition are entitled to priority over mortgagee) ** AIR 1973 Andh Pra 162 (168) , (1972) 2 Andh WR 355 (Where a specific item of joint property is mortgaged by one co-sharer comes to be allotted to another co-sharer in the partition the mortgagee can proceed against the item substituted in the hands of the mortgagor) ** AIR 1971 Ker 154 1971 Ker LJ 162 (This rule also applies to a purchaser at a Court sale) ** AIR 1933 Lah 771 (772, 73) 14 Lah 749 (DB) (The fact that the property allotted to the mortgagor in the partition has been subsequently transferred by him to third parties makes no difference) ** AIR 1915 Lah 75 (76) (DB) (1894 Pun Re No 101 Foll) ** (1937) 179 Ind Cas 748 (748, 749) (Lah) (Partition effected after mortgage decree — Principle of substitued security extended to execution proceedings also) ** (1911) 34 Mad 175 (176 177) (DB) ** 1937 Mad WN 1340 (1342) (DB) ** (1895) 18 Mad 316 (318 319) · 5 Mad LJ 148 (DB) ** (1910) 6 Ind Cas 829 (830) (DB) (Cal) ** (1910) 6 Ind Cas 196 (198) (Cal) (The same principle applies when mortgage is created during the pendency of a partition suit.) ** (1907) 6 Cal LJ 46 (49) DB) (Question as to how the substituted security is to be ascertained explained with illustrations) ** (1910) 33 Mad 429 (435) (DB) ** AIR 1960 Cal 351 (355) ** AIR 1956 Orissa 165 (169) (DB) ** AIR 1951 All 654 (654, 655) ** AIR 1945 Pat 400 (403) 24 Pat 268 (DB) ** AIR 1930 Nag 139 (142) 26 Nag LR 312 ** AIR 1938 Pat 199 (200) (DB) (Mortgage of part of properties — Mortgagee can follow proportionate part in properties substituted on partition) ** AIR 1937 Pat 563 (566) 16 Pat 622 (DB) ** AIR 1937 Pat 345 (346 347) (Abnomalous mortgage) ** AIR 1917 Pat 325 (327, 328) (The fact that the mortgage is usufructuary makes no difference) ** AIR 1926 Oudh 509 (511) , 1 Luck 210 (DB) (If on partition the property falls to the share of other co-sharers, the remedy of mortgagee is to call upon the mortgagor to give another property in security or to sue for damages) ** AIR 1924 Oudh 307 (308) (Mortgagee is not necessary party to partition proceedings) ** AIR 1919 Oudh 329 (330) ** AIR 1917 Oudh 1 (6) (In partition property sold and sale proceeds distributed among mortgagor and the co-sharers No security taken from mortgagor Purchaser taking with full knowledge of mortgage Mortgagee was given decree against the undivided shares) ** AIR 1914 Oudh 426 (429, 430). (The right is not a mere charge or equitable right which can be defeated by a plea of *bona fide* purchase without notice) ** (1926) 98 Ind Cas 1039 (1041) (DB) (Oudh) ** (1913) 16 Oudh Cas 161 (162) (The same rule applies where the mortgagor is allotted a cash payment in lieu of his share in the property) ** AIR 1940 Nag 149 (154) · ILR (1941) Nag 677 (DB) (Non-mortgaging branch of the family as part of partition agreement undertaking to pay mortgage-debt takes only an equity of redemption) ** AIR 1935 Lah 936 (936, 937) (DB) (Where one of joint owners mortgages a part of the joint undivided property the mortgagee is entitled to recover the debt from the whole of the property which may eventually fall to the mortgagor on partition.) ** AIR 1934 Lah 809 (812) : 16 Lah 392 (DB) ** AIR 1934 Lah 660 (661)

The doctrine, however, cannot be applied to cases where altogether different and distinct items are allotted. Thus where, notwithstanding the acquisition by the Municipality of a portion of the property and its substitution by a distinct plot as a compensation to the owner, a decree was passed purporting to create a charge over the entire old property making no mention of the substituted property and the entire property was proclaimed for sale and purchased in execution by the decree holder, the sale certificate making no reference to the substituted property, it was held that neither S. 73, in terms nor the principle of substituted security was applicable and the decree-holder auction-purchaser was not entitled to claim any title of the substituted property (5).

The right which the mortgagee obtains to realise the amount due to him from out of the item allotted to the mortgagor is not in the nature of a *mortgage*. It is a right to a security and would come within the definition of a charge in S. 100. Consequently, a *bona fide* transferee pursne *chattels due*

(DB) ** (1893) 20 Cal 533 (535, 536) (DB) ** (1934) 149 Ind Cas 229 (230, 231) (DB) (Bom) ** AIR 1936 All 456 (458) ** AIR 1920 All 34 (35, 37); 42 All 596 : 58 Ind Cas 171 (DB) (It makes no difference that before the partition is made the mortgagee obtains a decree for sale of the share mortgaged to him and it is immaterial whether the partition is effected through Court or privately.) ** (1902) 24 All 483 (486) : 1902 All WN 137 (DB) ** AIR 1936 Nag 125 (127) : ILR (1936) Nag 22 (DB) (Principle of substituted security applies even when mortgagor transfers specific items of joint property.) ** AIR 1933 Lah 682 (685) (DB) (Mortgagor's share on partition is liable even in hands of his transferee.) ** 1894 Pun Re No. 101, P. 374 (375) (DB) ** AIR 1938 Mad 767 (769) (The amount awarded to co-sharers as owelty has precedence over mortgage.) ** AIR 1942 Cal 153 (160) : ILR (1942) 1 Cal 326 (DB) (Partition must be fair and proper one.) ** AIR 1941 Pat 399 (400) (DB) ** AIR 1941 Rang 79 (80) : 1940 Rang LR 826 (DB) ** AIR 1936 Mad 473 476) (DB) (But a partition between the mortgagor, a Hindu father and his son on whom the mortgage is binding will not restrict the mortgagee's rights on the principle of substituted security, to the share allotted to the father.) ** (1906 Pun Re No. 2 at P. 4, 5) : 1906 Pun LR No. 10 (DB) ** 1883 Pun Re No. 81, P. 260 (261) (DB) ** (1909) 4 Ind Cas 92 (94) (Cal)

[**See** AIR 1920 All 15 16) (DB) (Partition between mortgagor and his co-sharers fraudulent and bogus — It does not affect mortgagee's right to undivided share.)]

[**See also** 1900 Pun Re No. 32, P. 112 (114) : 1900 Pun LR P. 337 (DB) ** AIR 1915 Cal 749 (750) (DB) ** AIR 1938 Mad 547 (550) (After partition, rights in substituted security of two rival claimants should be proportionate to value of original security standing on date of partition.) ** (1899) 26 Cal. 434 (440) (DB) ** AIR 1942 All 267 (267) (DB) (Where subsequent to the mortgage of his share of a house by a joint owner a specific portion of it is given to him on a partition between joint owners, when the mortgagee obtains a decree and purchases his mortgagor's share in execution of the decree he is entitled to possession of the share specifically given to his mortgagor at the partition — As the mortgage had merged in the decree and so ceased to exist, the principle of substituted security may not be applicable — But what the mortgagee wants is really in substance what was given by the decree for sale and what was purchased by him in execution.) ** AIR 1924 All. 65 (66) : 45 All. 653 (DB) (The doctrine of substituted security only applies where possession of a particular property has been awarded to the mortgagor in lieu of an undivided share in the whole property which was the subject of partition — It does not apply when the entire property mortgaged belonged to the mortgagor, and a person with no title subsequently obtained possession of a portion of it behind the back of the mortgagee.) ** 1903 Pun Re No. 89, page 390 (394) (DB) (When a portion of a common holding allotted to a person as security by a co-sharer is found to be already heavily encumbered, the mortgagee can claim to have his security made good out of the remainder of the common holding forming part of the mortgagor's share.)]

Also see S. 144, Note 7.

5. AIR 1952 Mad 263 (264)

in of the charge lost his mortgage right such a charge. The same result is reached if the right of the mortgagee is considered an equitable right The right of a puisne mortgagee to the surplus proceeds on a sale under the first mortgage is also based on the doctrine of substituted security.**(6)** A suit by the first mortgagee was decreed and the mortgaged property was being put to sale when puisne mortgagee intervened and at his instance the property was sold subject to the puisne mortgage and after satisfaction of the decree-holder's claim there remained a surplus which was attached by a creditor it was held that the puisne mortgagee had no right to the surplus as against the attaching creditor because Section 73 merely protects the mortgagee's interest in the secured property but does not give a preferential right **(7)** So also where a mortgaged house was pulled down by the mortgagor and the materials were utilised by him for building another house, it was held that the mortgage lien attached, on the principle of substituted securities, to the new building **(8)** It has been held that a hypothecatee of *chattles* cannot recover the proceeds of the sale of the chattel in the hands of the hypothecator, or claim a lien on the property substituted in place of the hypothecated property on the principle of substituted security in the absence of a contract to that effect.**(9)** See also the undermentioned cases.**(10)**

The doctrine of substituted security which applies to the case of a mortgage by a co-sharer of a specific item of joint property is equally applicableto the case of a transfer by a cosharer of a specific item of property.**(11)** In other words, the fact that a cosharer mortgaged specific fields as

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6. **AIR 1938 All 221 (225) : ILR (1938) All 513 (FB) ** (1914) 41 Cal 654 (660) : 41 Ind App 45 (PC).** (Suit by a subsequent mortgagee for surplus sale proceeds) ** (1910) 33 Mad 429 (435) (DB) ** AIR 1930 Nag 139 (142) 26 Nag LR 312 ** (1905) 33 Cal 92 (110, 111) (Do Affirmed in appeal in 41 Cal 654 41 Ind App 45 (PC)) ** (1907) 4 All LJ 492 (493) 1907 All WN 201 ** AIR 1921 All 312 (313, 314) 43 All 268 (DB) ** AIR 1926 Mad 101 (104, 108) · 90 Ind Cas 410 (A subsequent mortgagee not a party to suit by prior mortgagee — He can proceed either against property or against surplus sale proceeds — He has priority over other unsecured creditors) ** AIR 1928 Lah 593 (594, 596) (Do)

   [See also AIR 1915 Cal 380 (381) · 19 Ind Cas 226 (DB) (Property sold by second mortgagee in execution of mortgage decree — Surplus sale proceeds in deposit withdrawn by fourth mortgagee in execution of his own decree — Third mortgagee no party — Third mortgagee suing for recovery of money withdrawn on ground that it was his own and not as part of his mortgage security - Claim held was not tenable) ** (1885) 54 LJ Ch 1081 (1083) 29 Ch D 954 53 LT 442 33 WR (Eng) 916, West London Commercial Bank v **Reliance Permanent Building Society)]**

7. **AIR 1969 Guj 222 (225, 231, 232) : (1969) 10 Guj LR 754**

8. AIR 1958 Cal 453 (456) (DB) (Where property subject to mortgage or charge undergoes transformation, the mortgage or charge attaches to the form it takes after the transformation.) ****AIR 1926 Mad 343 (345). (AIR 1926 Mad 101, Rel. on.)**

9. **AIR 1925 Mad 275 (278).**

10. ILR (1957) Punj 79 (84) (DB) ** AIR 1953 All 147 (148) (DB) (Usufructuary mortgage of zamindari rights and sir land Loss of zamindari rights — Mortgage attaches to exproprietary tenancy — But when the exproprietary tenancy is not transferable under the approppriate Rent Act, no valid mortgage can be created by the application of the doctrine of substituted security and the mortgagor zamindar can claim back possession of the property from the mortgagee) ** AIR 1916 Nag 84 (85, 86) 12 Nag LR 90 (Pre-emption sale free of mortgage — Mortgagee was allowed to claim the sale proceeds.) ** AIR 1918 Cal 265 (270, 271) (DB) (Previous decree for rent is charge enforceable against surplus sale proceeds of patni at sale in execution of decree for rent under Bengal Tenancy Act — The principle of S 73 applies) ** AIR 1915 Cal 24 (27) (DB). (Sale of patni tenure in execution of decree for arrears of rent — Mortgagee has charge on the surplus sale proceeds.) ** AIR 1930 Nag 139 (142) 26 Nag LR 312 (Principle of substitued security applies to pre-emption price obtained on sale of the mortgaged holding under the provisions of C.P. Tenancy Act.)

11. AIR 1957 Andh Pra 572 (582, 583, 584) (DB) (There are only two limitations to the application of this doctrine of equity (i) that the alienee's rights are subject to the rights of a *bona fide* purchaser for value of the substituted property without notice of such right, and

distinct from his share in the holdings does not affect the applicability of the doctrine if the partition is not challenged on the ground of unfairness or fraud.**(12)**

The old section, before its amendment in 1929, applied only to cases where the mortgaged property had been sold for failure to pay *arrears of revenue on rent due in respect of the property* and further provided that the mortgagee had merely a charge on such proceeds. The use of the word "charge" was not quite correct as, under S. 100 a "charge" related only to the immovable property and did not apply to a claim against the fund into which the property was converted. As was stated in the report of the Special Committee "the procedure for enforcing a simple mortgage obviously does not apply to the enforcement of a claim against a fund. The use of the word also leaves the remedy of the mortgagee uncertain." The section was, therefore, recast omitting the word "charge" and by inserting a provision entitling the mortgagee to claim payment of his amount from out of the surplus proceeds. Its scope has further been widened by making it applicable not only to the revenue and rent sales but also to sales for the recovery of arrears of all charges of a public nature and to the compulsory acquisition under law of the mortgaged property.

Principle of Section 73 has been extended in practice to judicial sales. Where by process sanctioned by law the security given to a creditor metamorphoses and changes into something other than the property which constituted the original security the mortgagee or the charge holder over the quondam propety is not helpless but could trace his right to such metamorphosed security, under the doctrine of substituted security.**(13)**

It may be noted that the doctrine of substituted security rests on the fact that the mortgagee has *lost his mortgage right* on the property sold or acquired, through no fault of his own and has, therefore, to be given a right to proceed against the substituted property.**(14)** It follows that the doctrine and, therefore, this section applies where the property has been sold or acquired *free* of the mortgage**(15)** but not where the mortgage has not been extinguished by the sale or acquisition or other transaction.**(16)** Thus, where mortgaged property is sold for arrears of revenue or rent but the

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(ii) that the alienee is entitled only to recover properties of the value equal to the specific items transferred in his favour and out of the substituted properties.)

12. ILR (1957) Punj 79 (83) (DB) ** AIR 1919 Cal 61 (62).

13. AIR 1977 (NOC) 343 : (1977) 1 Mad LJ 76.

14. AIR 1960 Andh Pra 555 (556) (Decree against motor transport company creating charge in respect of buses for payment of decree amount — Company wound up and buses sold by Official Liquidator pursuant to order of Court — Doctrine of substituted security applies — Charge in favour of decree-holder can be enforced against sale proceeds of buses.) * 1960 Andh LT 460 (462).

[See (1897) 24 Cal 746 (749) (DB).]

[See also AIR 1964 All 558 (560, 561).]

15. (1959) 63 Cal WN 751 (755) ** AIR 1928 Oudh 442 (448) (3 Luck 719 (DB)) ** (1897) 24 Cal 746 (749) (DB) ** AIR 1925 Cal 1145 (1145, 1146) (Sale for revenue.) ** (1907) 6 Cal LJ 74 (83) (11 Cal WN 732 (DB)) (Do.) ** (1910) 5 Ind Cas 524 (525) (DB) (Cal) (Do.) ** (1904) 31 Cal 745 (751) (DB) (Do.) ** (1900) 27 Cal 180 (183, 184) (DB) (Do.) ** (1904) 3 Cal LJ 52 (56) (DB) (Do.) ** (1904) 8 Cal WN 332 (336, 337) (DB) (Sale for arrears of rent.) ** (1893) 20 Cal 241 (244) (DB) (Do.) ** (1911) 9 Ind Cas 489 (491) (DB) (Cal) (Do.) ** AIR 1935 Rang 409 (411) (DB) (Sale for arrears of land revenue.) ** AIR 1915 Cal 24 (27) (DB) ** AIR 1934 Pat 209 (209) (DB) (Sale for arrears of revenue.) ** (1911) 34 Mad 493 (494) (DB) ** (1909) 1 Ind Cas 45 (47) (DB) (Cal) ** (1879) 5 Cal LR 227 (228, 230) (DB) (Acquisition under S. 16 of the Land Acquisition Act.)

16. AIR 1938 Pat 179 (180) (16 Pat 299 (DB)) (AIR 1937 Pat 307, **Held not good law**.) ** AIR 1928 Oudh 442 (448) (3 Luck 719 (DB)) ** AIR 1940 Nag 149 (154) (ILR (1941) Nag 677) (Mortgage by undivided coparcener of share — Partition — Mortgaged property falling to share of another coparcener, but latter undertaking to pay the mortgage — Mortga-

sale does not, by virtue of special provisions of law, extinghish the encumbrance, the mortgagee will not be entitled to the surplus sale proceeds under this section **(17)** But where the mortgaged property is sold for arrears of rent and the sale is subject to the encumbrance, but such encumbrance could, by virtue of S. 167 of the Bengal Tenancy Act, 1885, be annulled by the purchaser of the property, it has been held by the Calcutta High Court that though the mortgage lien is not destroyed *ipso facto* by reason of the sale, it is "in jeopardy" and is liable to be destroyed, and that therefore, the mortgagee can, *by giving up his lien on the property*, claim the sale proceeds under this section **(18)** The purchaser could not, however, *compel* the mortgagee to give up his lien and claim the surplus proceeds.**(19)** It has been held that when a partible estate, on which a charge is made for payment of a maintenance decree passed before the coming into force of Orissa Act I of 1952, vests in the State Government by virtue of the provisions of Orissa Act I of 1952, the decree-holder can apply for execution of his decree by proceeding against the compensation money awarded to the judgment-debtor under the Orissa Act on the principle laid down in S. 73(2) of the T P. Act though there is no express reference anywhere in the Orissa Act to that section**(20)**

A person having a charge of maintenance decree against certain property has the same right as a simple mortgagee to enforce the charge against substituted security such as compensation money payable in respect of Zamindari properties**(21)**.

An executory charged decree for maintenance becomes executable again and again as future maintenance becomes due The charge created on the immovable property by the Court is not covered by Section 100 Where the property of the J.D is sold by the Court in execution of a charged decree for arrears of maintenance and there is a surplus left after full satisfaction of the decree for arrears the charge-holder is not entitled to the surplus as Section 73 does not apply to charged decrees Maintenance decree is not only declaratory decree but also an executory decree**(22)**

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gee is not restricted to the property substituted in the hands of the mortgagor but can proceed against the property originally mortgaged.)

[**See also** (1911) 9 Ind Cas 248 (249) (Cal) (The purchaser of a holding at a sale in execution of a rent decree must annul any mortgage created by tenant and the mortgage is not *ipso facto* annulled by the sale.) ** (1902) 6 Cal WN 834 (835) (DB) ** (1911) 38 Cal 923 (932) (DB).]

17. AIR 1938 Pat 179 (180) · 16 Pat 299 (DB) (AIR 1937 Pat 307 **Held not good law**) ** AIR 1943 Mad 138 (138) (Sale of mortgaged house for arrears of property tax in enforcement of first charge given to Corporation under S 103, Madras City Municipalities Act (IV of 1918) — Sale is not free of incumbrances — Mortgagee auction-purchaser cannot claim balance of sale proceeds under this section) ** (1888) 15 Cal 546 (552, 553) (DB) (Sale under S 54 of Act XI of 1859) ** (1899) 26 Cal 966 (968) 4 Cal WN 317 (DB) (Sale under Ss 13 and 54 of Act XI of 1859) ** AIR 1929 Pat 209 (210) 8 Pat 569 (DB) (Sale under S 54 of Act XI of 1859) ** **(1883) 7 Mad 31 (36) (FB)**. (5 Mad 371, **Overruled**.) ** (1886) 10 Mad 266 (269) (DB) ** AIR 1928 Oudh 442 (447, 448) 3 Luck 719 (DB) (Sale under S. 152, Oudh Rent Act.)

[**But see** AIR 1934 Pat 209 (209, 210) (DB) (Revenue sale of portion of mortgaged property — Encumbrances not extinguished under S 54 of Bengal Revenue Sales Act — Mortgagee can proceed against the mortgaged property at the same time claiming the surplus proceeds.) ** AIR 1929 Cal 392 (394) (DB) (Property sold for arrears of rent — Mortgagee is not confined to surplus sale proceeds but can follow mortgaged property)]

18. (1904) 9 Cal WN 117 (118, 119) (DB).

19. (1897) 24 Cal 746 (748, 749) (DB) (Section 73 is not intended to enlarge the interest of the purchaser.) ** (1911) 9 Ind Cas 248 (250) (Cal).

20. ILR (1963) Cut 85 (86).

21. AIR 1969 Pat 162 (164).

The effect of sub-sections (2) and (3) of this section is that where mortgaged property is compulsorily acquired, the compensation payable by the acquiring authority becomes the substituted security in respect of the mortgage-debt and a statutory charge is created by the operation of sub-sec. (2) on the compensation money in respect of the dues of the mortgagee **(23)** It has been held that S. 73(3) is contrary to the scheme and provisions of West Bengal Estates Acquisition Act 1953 (1 of 1954) and that section 73(2) comes into conflict with the provisions of S 26 of that Act**(24)**.

It is not necessary that *all* the incumbrances on the property which the mortgagee or any other person may have on the property should be extinguished It is enough if the particular mortgage in respect of which a claim under this section is made, has been extinguished**(25)**

The right under this section to claim surplus proceeds or the compensation money, as the case may be, is over and above the rights which the mortgagee may have under the law to enforce payment of the mortgage-money, e g , under S 68 of the Transfer of Property Act, or under any personal covenant to pay the money**(26)**.

The undermentioned case**(27)** holds that the mortgagee is not required to bring a suit to enforce his claim under this section.

2. Section, whether retrospective.

It has been held by the High Court of Allahabad that this section is retrospective, at least when no action was pending on the 1st of April 1930 when the amendments came into force Accordingly where a portion of the mortgaged property was acquired under the Land Acquisition Act before the amendment and the compensation amount was received by the mortgagor, the mortgagee was held entitled to a personal decree for that amount against the mortgagor by virtue of the provisions of this section**(1)**.

3. "Is sold owing to failure to pay arrears of revenue," etc.

Sub-section (1) of the section applies only where mortgaged property is sold owing to failure *to pay arrears of revenue, etc* When property is sold for failure to pay dues which are not arrears of revenue or other public charges, but which are under the law to be recovered *as if* they are arrears of revenue, the purchaser does not take it free of incumbrances **(1)** Consequently the question of applicability of this section cannot arise in such cases

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22. (1978) 1 Andh WR 37 : (1977) 2 APLJ 136

23. (1958) 62 Cal WN 911 (915)

24. (1958) 62 Cal WN 911 (915, 916)

25. (1906) 3 Cal LJ 52 (55, 56) (DB).

[**See however** AIR 1943 Mad 138 (138) (Section 73 from its very language can apply only to sales in which property is sold free of all mortgages)]

26. AIR 1963 Pat 185 (188) (DB) (Mortgagee entitled to reimbursement under S 69 Contract Act — Separate suit for such reimbursement not barred by S 72) ** **AIR 1938 All 221 (225, 226) : ILR (1938) All 513 (FB).** (Section 68, T P Act does not provide for the case of a withdrawal of compensation money by the mortgagor) ** AIR 1924 Pat 586 (589) 3 Pat 581 (DB) (Covenant) ** (1900) 28 Cal 12 (16, 17) 4 Cal WN 735 (DB) (Do)

27. (1948) 52 Cal WN 446 (446) (The fact that there has been an award which has not only determined the amount due under the mortgage but also provided for payment in instalments, will not affect the mortgagee's right to be paid out of the surplus sale proceeds)

Section 73 — Note 2

1. AIR 1938 All 221 (223, 227) : ILR (1938) All 513 (FB).

Section 73 — Note 3

1. AIR 1927 Rang 289 (293) : 5 Rang 458 : 105 Ind Cas 258 (DB) (Municipal dues in the nature of land revenue purchaser takes free of incumbrances) ** (1905) 28 Mad 420

4. "Arrears."

The word "arrears" must be read not only with the word "revenue" but also with the words "charges of a public nature or rent"(1).

5. "Other charges of a public nature."

The words "charges of a public nature" must be taken to mean charges of a public nature of a kind similar to revenue Arrears of loan advanced by the Government under the Agriculturists' Loans Act, 12 of 1884, cannot be said to be arrears of charges of a *public nature* within the meaning of this section(1).

6. Sale by reason of mortgagee's default — Effect.

When the mortgagee is himself bound to pay the revenue, rent or other public charges on the mortgageed property and the property is sold for failure to pay such amount, the mortgagee cannot obtain the benefit of this section and cannot claim any amount from out of the surplus sale proceeds Nor can the mortgagee, in such a case, by purchasing the property himself or in some other person's name on his behalf, extinguish the right of redemption of the mortgagor.(1) If the mortgagee is not bound to pay such arrears and the sale is held owing to the mortgagor's default in payment of the arrears, this section will apply and the mortgagee will be entitled to claim, in whole or in part, the surplus sale proceeds. If the mortgagee purchases the property himself at such a sale, the mortgagor will not be entitled to redeem it.(2) Further, if the *mortgagor* purchases the property in such a sale in his own name or in the name of another, the mortgagee can, in addition to his right to claim surplus sale proceeds under this section, proceed against the mortgaged property for any balance due on the mortgage. The reason is that it is a general principle that a mortgagor cannot set up against his own incumbrancer any other incumbrance created by himself(3).

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(422) (DB) (Sale for arrears of Abkari revenue under S 28 of Act I of 1886 (Madras)) ** AIR 1933 Mad 649 (650, 651). (Sale for arrears of Abkari rent.) ** (1900) 22 All 321 (322) · 1900 All WN 87 (DB) (Sale of a mortgaged house by Government for arrears of takavi loan which is to be recovered as arrears of revenue — Mortgage lien on the house is not extinguished.)

[See also AIR 1959 Mad 407 (408) ILR (1958) Mad 995 (Property sold in execution of a mortgage decree and proceeds of sale deposited in Court — Government's right to recover court-fees, in respect of another suit, from the mortgagor, held not first charge) ** (1896) 24 Cal 27 (29) (DB). (Property sold for road Cess) ** (1886) 12 Cal 430 (435) (DB). (Do.)]

Section 73 — Note 4

1. AIR 1935 Rang 409 (411) : 160 Ind Cas 130 (DB).

Section 73 — Note 5

1. AIR 1935 Rang 409 (411) : 160 Ind Cas 130 (DB).

Section 73 — Note 6

1. AIR 1957 Trav-Co 222 (222, 223) ** AIR 1951 Pat 566 (567) . 30 Pat 391 (DB)

   See Section 60, Note 23.

2. AIR 1916 Mad 1069 (1070) (DB) (Mortgagee in possession Contract that mortgagee was not to pay the arrears of revenue — S. 76(c) does not apply — Sale for such arrears and purchase by mortgagee — Mortgagor cannot redeem.) ** AIR 1927 Bom 540 (541, 542) (DB). (Mortgagee in possession — Income insufficient to meet revenue demands — S 76(c) will not apply — Sale for arears of revenue and purchase by mortgagee — Mortgagor cannot redeem.)

3. (1903) 25 All 371 (374) 1903 All WN 75 (DB) (Purchase by mortgagor benami in the name of a third person) ** AIR 1927 Rang 289 (293, 294) 5 Rang 458 (DB) (Deliberate default in the payment of revenue with the intention that the property may be sold free of incumbrance Presumption is that the purchaser represented the defaulter) **AIR 1920

7. "Shall be entitled to claim payment of the mortgage-money."

The old section provided that the mortgagee had merely a *charge on the surplus* sale proceeds. It has now been recast by omitting the word "charge" and providing that the mortgagee shall be entitled to claim payment out of the fund.

The change in the language does not warrant an inference that the Legislature intended to depart from the principle of substituted security(1).

The reason for the change in the language of the section has been stated by the Special Committee in their Report as follows :

> "The use of the word 'charge' appears to us to be unhappy inasmuch as a charge under S. 100 relates to immovable property and is enforced as a simple mortgage. The procedure for enforcing a simple mortgage obviously does not apply to the enforcement of a claim against a fund. The use of the word also leaves the remedy of the mortgagee uncertain. We, therefore, propose to avoid its use and to provide that the mortgagee shall be entitled to claim payment out of the surplus fund or compensation money payable to the mortgagor, as the case may be"(2).

The amendment of the section by the introduction of the word 'claim' instead of 'charge' shows that a *suit* is not now necessary to enforce the claim under the section(3).

Where the loan from a co-operative bank is taken by an agriculturist for agricultural purpose and his land is mortgaged with the bank and in later point of time, the land is acquired on a whole or in part, the bank has first and foremost claim to the total exclusion of the claim of mortgagor on the amount of compensation. However, the claim shall be to the extent of outstanding amount of loan. The circular dt. 17-7-1985 issued by the Govt. of Gujarat directing that proportionate compensation can be given to mortgagee bank is in total contravention of the provisions of S. 73 and is liable to be quashed(4).

8. "In whole or in part."

In *Susilabala Dasi v. Dinabandhu Nandi*(1) a landlord first created a mortgage on his land and then a *patni* interest therein. The mortgagee obtained a decree upon his mortgage binding even the *patni* interest, and, subsequent thereto, the property was sold for arrears of revenue *subject to the patni interest*. The mortgagee took the surplus sale proceeds and claimed to proceed against the *patni* interest also for the balance. It was contended that the effect of S. 73 was to transfer the *whole of the charge* to the sale proceeds leaving the mortgaged property thereafter absolutely free from the charge. In other words the contention was that under S. 73 the sale proceeds must be accepted in full satisfaction of the mortgage-debt and not in part satisfaction thereof. The High Court, however, rejected the contention and allowed the mortgagee to proceed for the balance.

The insertion of the words "in whole or in part" only serves to state the above law in clear terms.

Cal 26 (33) (DB) ** AIR 1915 Mad 760 (762) (DB) (Prior benami purchaser in revenue sale on behalf of mortgagor gets no title against purchaser in mortgage decree.) ** AIR 1919 Low Bur 119 (120).

[See (1902) 26 Mad 385 (386) : 13 Mad LJ 129 (DB) (Mortgagor repurchasing property from purchaser at revenue sale — Mortgage is not extinguished.)]

Section 73 — Note 7

1. **AIR 1938 All 221 (224) : ILR (1938) All 513 (FB).**
2. **See the Report of the Special Committee Cl. 37.**
3. AIR 1955 Cal 560 (560) (Existence of award providing for payment in instalments does not affect mortgagee's right.) ** (1948) 52 Cal WN 446 (446).
4. 2000 AIHC 538 (540) : 2000 (1) Guj LR 862.

Section 73 — Note 8

1. **(1910) 5 Ind Cas 70 (72) (DB) (Cal).**

9. "All charges and deductions directed by law."

These words were added by the amending Act of 1929. The amount that the mortgagee would be entitled to claim is the amount which remains after payment of the arrears and of "all charges and deductions directed by law."

The word "charges" in this expression means "costs"(1).

When the property is sold under a rent decree under the Bengal Tenancy Act, 1885, the landlord decree-holder is entitled under S 169 of that Act to recover from the total sale proceeds not only the decretal amount but also the amount of rent that has accrued due, in respect of that tenure, from the date of suit till the date of confirmation of sale, and the mortgagee can take the proceeds only after his amount also is deducted therefrom.(2) Before the amending Act of 1929, the landlord's right to this amount was only under S 169 of the Bengal Tenancy Act, 1885, but now it is conceived he will be entitled to claim this amount under this section also as a 'deduction directed of law."

10. Sub-section (2).

Property acquired under the provisions of the Land Acquisition Act is free of all incumbrances So also will be property which is compulsorily acquired under any other enactment for the time being in force providing for the compulsory acquisition of immovable property. The principle of substituted security will *Prima facie* apply to such cases (1) But there was a conflict of opinion on the point, due to the fact that the section as it stood before the Amending Act of 1929, did not specifically deal with land acquisition cases According to the High Court of Allahabad(2) and the undermentioned cases of the Judicial Commissioner's Court of Oudh,(3) the mortgagee had no charge on the compensation amount awarded. A contrary view was taken by the High Courts of Calcutta,(4) Madras(5) and Patna,(6) the Chief Court of the Punjab(7) and the undermentioned case(8) of the Chief Court of Oudh The above conflict has now been set at rest by the introduction of sub-sec (2) giving the mortgagee rights with respect to the compensation money similar to those

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Section 73 — Note 9

1. AIR 1935 Rang 409 (411) (DB).
2. (1907) 34 Cal 724 (727, 728) 6 Cal LJ 26 (DB) ** AIR 1933 Pat 257 (258).

Section 73 — Note 10

1. (1906) 75 LJ Ch 556 (559) · (1906) 2 Ch 98 94 LT 809 54 WR (Eng) 551 · 22 TLR 499, Law Guarantee & Trust Society Ltd v Mitcham & Cheam Brewery Co Ltd ** (1907) 1 Ch 64 (66) 76 LJ Ch 151 95 LT606 · 71 JP 130 23 TLR 16 14 Mans 28, Nookes v Nookes & Co. Ltd.

   [See (1853) 22 LJ Ch (NS) 369 (370) : 1 Sm & G 32 . 16 Jur 1063 1 WR (Eng) 17, In re Stewart's Trusts.]
2. (1893) 16 All 78 (79) : 1983 All WN 223
3. AIR 1919 Oudh 26 (26) 22 Oudh Cas 342. (Mortgagee can sue for proceeds) ** AIR 1917 Oudh 233 (234) 20 Oudh Cas 256 (Mortgagee can claim for another sufficient security.)
4. (1909) 13 Cal WN 350 (352) ** (1904) 6 Cal LJ 745 (747, 748) (DB) ** (1909) 1 Ind Cas 45 (47) (DB) (Cal) ** (1909) 1 Ind Cas 264 (278, 279) (DB) (Cal).

   [See AIR 1923 Cal 681 (682) (DB).]
5. (1883) 6 Mad 344 (347) (DB) ** (1890) 13 Mad 321 (322) (DB) ** AIR 1925 Mad 245 (245) (DB) ** AIR 1925 Mad 275 (276)

   [See also AIR 1924 Mad 521 (521, 522) (DB).]
6. AIR 1921 Pat 372 (372) 5 Pat LJ 650 (DB) (16 All 78, Not foll.)
7. 1907 Pun Re No. 17 p. 81 (84) : 1908 Pun LR No. 2. (Part of the mortgaged property acquired — Mortgagee held entitled to the whole compensation.)
8. AIR 1930 Oudh 292 (293, 294) : 5 Luck 702 (DB).

given to him with respect to the surplus sale proceeds under sub-section (1) (9) Such right cannot, however, be sold.(10) If before the final decree is passed mortgaged property is substituted by another security in the form of compensation money, a final decree directing payment of this fund may be justified and on an application made on behalf of the plaintiff mortgagee the original Court can award final decree against the substituted security But where final decree is already passed as against the original property it has been held that the directions pertaining to the mortgaged property can appropriately be read as those pertaining to the substituted security by reason of S 73(2), and the Court executing the decree can secure realization and application of the fund standing as substituted security(11).

When only a portion of the mortgaged property is acquired, the mortgagee is entitled to claim the whole of the compensation money awarded if such amount is less than the amount due under the mortgage (12) The expression "in whole or in part" merely means that where the mortgagor creates a mortgage over two properties and one of it is acquired the mortgagee can take the entire amount due to the mortgagor as a compensation and recover the balance, if any against the other property (13) Where in a suit on the mortgage, the Court passed a composite decree clearly and unambiguously providing that the mortgage-decree-holders would be justified in executing the personal decree against the mortgagor judgment-debtor only if any after they had exhausted their remedy against the mortgaged properties and had not been able to recover the whole of the decretal amount by that process, and before the mortgagee decree-holders could realise the decretal amount by sale of the mortgaged zamindari properties, the mortgaged properties had vested in the State of Bihar under the provisions of the Bihar Land Reforms Act (30 of 1950), it was held that the amount due to the decree holders having been already determined by the claims officer the mortgagee decre-holders must first seek to recover that amount as provided by the relevant provisions of the Act before they could proceed to execute the personal decree(14)

Where under the terms of the mortgage decree, the decree holder is entitled to proceed against other property of the judgment-debtor if the property mortgaged is not found sufficient to pay off the decretal amount and the mortgaged property is subsequently acquired by the State the right to proceed against other property of the judgment-debtor guaranteed under the decree cannot be taken away merely because of the fact that for acquisition of the property, the State would pay some compensation and that the mortgagee decree-holder would, under this sub section, be entitled to claim payment of the mortgagee money out of that compensation money(15)

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9. AIR 1963 All 398 (407 408) (So long as decree-holder does not take recourse to S 73 T P Act under S 6(b) of the U P Abolition of Zamindari and Land Reforms Act he cannot proceed against property of judgment debtor other than one which has been mortgaged). ** AIR 1963 Mad 73 (73, 74) (Remedy of mortgagee is to execute his mortgage decree and not fresh suit — Where fresh suit is filed Court can convert it into execution petition.) **** AIR 1938 All 221 (224) : ILR (1938) All 513 (FB).**

   [See AIR 1935 All 497 (498) (Usufructuary mortgage)]

10. (1965) 78 Mad LW 44(48)

    [See AIR 1967 Cal 56 (58 59 60 61) (Mortgage decree Right to compensation under West Bengal Estates Acquisition Act cannot be sold under it West Bengal Estates Acquisition Act (1 of 1954), Ss. 26, 23.)]

11. **AIR 1954 Madh B 181 (183) (FB).** (The doctrine of substituted security can be applied in execution.)

12. (1940) 42 Pun LR 40 (40) ** 1907 Pun Rc No 17 P 81 (84) 1908 PunLR No 2

13. ILR (1968) 47 Pat 623.

14. **AIR 1962 SC 1464 (1469, 1470) : 42 Pat 93.**

    [See also AIR 1963 All 398 (407, 408).]

15. AIR 1955 All 566 (567) (DB).

Where a mortgaged security was acquired the amount representing the interest in the property out of the amount of compensation awarded to the mortgagor can be claimed by the mortgagee Such a right is not taken away by sub-section (2) of Sec. 73 but he cannot claim damages for loss of security(**16**).

The section gives a right to the mortgagee to receive comepensation but does not affect his rights and liabilties under the Land Acquisition Act Thus where a mortgage has been effected before the acquisition is made, it is open to the mortgagee to make a claim before the Collector If he does not, he cannot claim payment of compensation to him under S 31(1) and (2) of that Act(**17**)

On acquisition of the mortgaged property the mortgagee is entitled to claim payment due to mortgagor as compensation and the claim can be enforced notwithstanding that the principal money on the mortgage has not become due(**18**).

Where the entire estate of the mortgagor landlord in the estate did not vest in the State, but by virtue of S 6 read with S 4 of the Bihar Land Reforms Act (30 of 1950), some interests in the bakasht land were left with the mortgagor landlord, it was held that the mortgagor is entitled to follow that property, viz , bakasht lands, and enforce the mortgage security against that property, on the ground of accession to the mortgaged property, if not on the ground of substituted security (**19**) The Supreme Court has held that bhumidari rights created under S. 18 of U P. Act 1 of 1951 are not compensation and cannot be followed by the mortgagee as substituted security(**20**).

A decree-holder who has a charge over property which has since been acquired under the West Bengal Esates Acquisition Act, 1953, and in respect of which compensation is payable under the Act is entitled to an order directing the receiver to obtain payment of the compensation money and to apply the same towards satisfaction of the dues of the decree-holder(**21**).

Where a buyer has a charge on the property acquired by Government he is entitled to apportionment of compensation and is a person interested in maintaining the writ in respect of the acquisition(**22**).

Even in case of a charge, the charge holder has the same rights as a mortgagee has under S 73 to claim payment out of the amount paid for the compulsory acquisition of the rights of the lessee(**23**).

11. Sub-section (3).

The claim of the mortgagee under the section is subject only to the rights of *prior* incumbrances,(**1**) it prevails over all other claims Thus, if the amount is taken away by a *subse-*

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16. (1969) 2 Mys LJ 473.

17. AIR 1983 (NOC) 40 (All) ** AIR 1963 Mad 73 (73, 74) (Mortgagee would not lose his rights only for the reason that he had failed to exercise his right to claim compensation before the Land Acquisition Officer) ** ILR (1955) Punj 15 (19) (This section has no effect on the interpretation of Ss 11, 18 and 31 of the Land Acquisition Act)

18. 1990 BLT (Rep) 31 (44).

19. **AIR 1963 Pat 412 (415, 417, 418, 419, 420, 421, 422, 423) (FB).** (AIR 1958 Pat 630 FB) **Overruled** on another point by AIR 1967 SC 801.)

20. **AIR 1961 SC 1790 (1793, 1794) : (1962) 2 SCR 441.** (AIR 1959 All 179. **Reversed**)

21. (1959) 63 Cal WN 869 (872, 877) (DB).

22. (1969) 10 Guj LR 635.

23. 1990 BLT (Rep) 31 (39)

Section 73 — Note 11

1. (1909) 9 Cal LJ 234 (235). (Purchaser in execution of a rent decree has priority over purchaser in execution of a mortgage-decree as rent is a prior charge to that of a mortgagee.)

quent mortgagee(2) or a creditor having a personal remedy against the mortgagor,(3) the mortgagee can sue them for recovery of the amount. Similarly, by virtue of this provision, a claim for payment of monies charged on the property acquired under the West Bengal Estates Acquisition Act, 1953, must prevail against all claims other than those of prior incumbrancers(4).

The Government in the position of a subsequent mortgagee is in no better position than any other person who has taken a subsequent mortgage(5).

This sub-section also allows a mortgagee to claim the surplus sale proceeds or the compensation money even before the mortgage-money has become due. The object is to protect the mortgagee from the loss that may accrue to him by the withdrawal of money by the mortgagor in case the sale or acquisition, as the case may be, takes place before the mortgage-debt becomes due (6). Moreover, the mortgage security being converted into money, there is no reason why the mortgagee should not wait until the due date(7).

Land was given on lease by Government with the right of resumption reserved. Lessee constructed a building thereon and mortgaged the property to bank, with permission of Government. Bank obtained final decree for sale. Therefore the land was resumed by State. Suit by bank challenging quantum of compensation fixed and for declaration that bank has first charge on amount of compensation is maintainable(8).

In the case mentioned below,(9) decided under the old section, the mortgagee was allowed to take the compensation money even before the mortgagee-debt had become due, with the consent of the mortgagor :

See also undermentioned case(10).

12. Mortgagee claiming surplus proceeds if entitled to proceed against the property also.

It has been seen in Note 1 that the section applies only where the property has been sold free of the incumbrance in respect of which the claim for surplus proceeds is made. Where properties r

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2. AIR 1935 All 497 (498) ** (1911) 9 Ind Cas 489 (491) (DB) (Cal).

   [But see (1898) 21 All 137 (139, 140) : 1898 All WN 210 (DB). (Estate mortgaged separately to two different mortgagees sold for default in payment of Government revenue — Collector instead of paying surplus to defaulter paid therewith subsequent mortgagee in full and the prior mortgagee in part — Suit by prior mortgagee for payment in full on ground of priority held did not lie.)]

3. AIR 1937 Pat 307 (311) ** (1906) 33 Cal 878 (880) (DB) ** (1901) 5 Cal WN 356 (360) (DB).

4. (1959) 63 Cal WN 869 (872) (DB).

5. AIR 1935 Rang 409 (412) (DB). (Crown was a mortgagee under Agricultural Loans Act, 1884.)

6. AIR 1938 All 221 (225) : ILR (1938) All 513 (FB).

7. See the Report of the Special Committee, Cl. 37.

8. AIR 1984 (NOC) 224 (Cal).

9. AIR 1915 Cal 699 (700) : 42 Cal 1146 (DB).

10. AIR 1984 (NOC) 224 (Cal). (Substituted security — Lease of Govt. land — Lease deed providing that Govt. may resume land any time and in event of resumption before expiry of lease, lessee will be entitled to compensation for buildings constructed by him on land and for improvements etc. — Mortgage of leased property by lessee in favour of bank with permission of Govt. — Final decree obtained by bank for sale — During execution land resumed by Govt. — Suit by bank challenging quantum of compensation fixed and for declaration that it had first charge on amount of compensation — Suit held, was maintainable.)

and *y* were mortgaged to *A* and property *x* was sold for arrears of Government revenue but the sale did not, by virtue of section 54 of the Bengal Land Revenue Sales Act, 11 of 1859, extinguish the incumbrance, it was held by the Patna High Court in the undermentioned case(1) that the mortgagee *A* could not only claim the surplus sale proceeds but could also proceed to enforce his mortgage against even the portion of the mortgaged property sold. A similar view was taken in the cases noted below,(2) where the property was sold for for arrears of rent, but the incumbrances were not annulled. A contrary view has been taken in *Krishna Chandra Dhar v Bipin Behari Padhi*(3) that the mortgagee, in such a case, is not entitled to the surplus sale proceeds The Court observed

> "To accede to the proposition that he can also proceed against the sale proceeds would mean that by reason of the revenue sale the security held by the mortgagee was increased This was clearly not the intention of the Legislature The only reason for S 73 was to protect a mortgagee whose security has in fact been disminished."

The previous case was sought to be explained on the ground that the effect of the sale in the said case was "to diminish the security to a certain extent without extinguishing it altogether." The explanation is not clear It is submitted that the first mentioned view is not correct.

Where a *part* of the mortgaged property or a particular interest in such property is sold and the sale is, in respect of that part, free from the mortgagee, the mortgagee can claim the surplus sale proceeds and for the balance due on the mortgage he can proceed against the remaining property not sold(4)

13. Revenue sale set aside — Right of mortgagee to proceed against the property.

Where the sale for arrears of revenue is set aside and the property revests in the mortgagor, the mortgagee cannot claim the sale proceeds but can enforce his mortgage against the property(1)

14. Surplus proceeds or compensation money withdrawn by mortgagor or other person — Remedy of mortgagee.

Where the mortgaged property has been sold for arrears of revenue, etc. or has been compulsorily acquired, and the surplus proceeds or the compensation amount, as the case may be, has been withdrawan by the mortgagor or other person, there are several remedies open to the mortgagee :

(1) He can sue the person who has withdrawn the amount, for recovery thereof on the basis that the money belonged by virtue of this section to the mortgagee and has wrongfully been received by such person. Such a suit would, it is conceived, fall under Art 24 of the Limitation Act, 1963, the starting point of time being the date of the withdrawal of the amount.

(2) (a) *In the case of sales for arrears of revenue, etc*

He can under S 68 clause (c) sue for the recovery of the mortgage-money(1) and the

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Section 73 — Note 12

1. AIR 1934 Pat 209 (209, 210) (DB).
2. AIR 1937 Pat 307 (309) ** 1906) 3 Cal 878 (880) (DB).

   [See however AIR 1969 Guj 222 (AIR 1937 Pat 307, **Held no longer good law** in view of AIR 1938 Pat 179.)]
3. AIR 1938 Pat 179 (180) : 16 Pat 299 (DB).
4. (1910) 5 Ind Cas 70 (72) (DB) (Cal) ** (1880) 6 Cal 142 (147, 148) 7 Cal LR 396 (DB)

Section 73 — Note 13

1. AIR 1925 Cal 1145 (1146) (The fact that by the order of attachment the surplus sale proceeds had already become available to the mortgagee makes no difference)

Section 73 — Note 14

1. See Section 68, Note 4.

suit would be governed for purposes of limitation by Art 55 or Art 113 of the Limitation Act, 1963. The difference between the first remedy and this is that the letter is available only against the *mortgagor* But the whole of the *mortgage money* can be recovered and not merely the *surplus sale proceeds taken away*, as in the former case

(b) *In the case of compulsory acquisition of the property.*

Where the mortgaged property has been compulsorily acquired the mortgagee can sue under S 68 only if clause (b) thereof applies There is a difference of opinion as to whether acquisition would amount to a "destruction" of the property within the meaning of that clause (See S 68, Note 3) Assuming that that clause applies to a suit by the mortgagee for the mortgage-money would be governed by Art 55 or Art 113 of the **Limitation Act, 1963(2).**

(3) Under the old section he could, according to the undermentioned decisions **(3)** sue to enforce his *charge* against the fund, and such a suit was governed by Art 132 of the Limitation Act, 1908 Even under the present section he may, according to the undermentioned cases,**(4)** enforce by a suit his *mortgage security* against the fund withdrawn by the mortgagor or other person.

As has been seen already the fund is really a substituted security and the mortgagee can enforce his mortgage against such security by a suit on the mortgage The only advantage of this remedy over the others will be that if the fund is not sufficient to pay the mortgage-money the mortgagee will be entitled to claim a personal decree against the mortgagor (in case where such personal remedy is not barred) for the balance under O 34, R 6 of the Code of Civil Procedure**(5)**

It may be pointed out that the mortgagee who takes advantage of the first mentioned remedy is not barred from resorting to the second remedy for the recovery of remedy he cannot thereafter resort to the third remedy. The reason is that the second remedy is available only if the mortgagee *gives up his security*, whereas the third remedy involves the *enforcement of the security***(6)**

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74. RIGHT OF SUBSEQUENT MORTGAGEE TO PAY OFF PRIOR MORTGAGEE.— [*Repealed by S 39 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).*]

The omitted S. 74 ran as follows :

"74 Any second or other subsequent mortgagee may at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee and such mortgagee is bound to accept such tender and to give a receipt for such amount and (subject to the

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2. See the AIR Commentaries on the Limitation Act 7th (1997) Edition, Notes on Articles 55 and 113.

3. AIR 1919 Cal 61 (62) ** (1904) 31 Cal 745 (751) (DB) ** (1904) 3 Cal LJ 52 (57 58) (DB) ** AIR 1916 Nag 84 (86) 12 Nag LR 90 ** (1905) 33 Cal 92 (112) 9 Cal WN 989 (DB) ** (1901) 5 Cal WN 356 (358, 359) (DB) ** (1900) 27 Cal 180 (183 184) (DB)

   Also see Note 10.

   [But see AIR 1917 Oudh 233 (234) 20 Oudh Cas 256 (When mortgaged property is acquired under the Land Acquisition Act the mortgagee has no charge on the purchase money.) ** **(1893) 16 All 78 (79) : 1893 All WN 223.]**

4. **AIR 1938 All 221 (226): ILR (1938) All 513 (FB)** ** AIR 1942 Pat 185 (187) (Mortgaged property sold for arrears of revenue Money decree holders withdrawing money after preliminary decree can be impleaded and final decree passed against them)

5. AIR 1963 All 398 (407, 408) (Article 181 of the Limitation Act (1908) would apply)

6. **AIR 1938 All 221 (226) : ILR (1938) All 513 (FB).**

provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee as such, to whom he has made such tender."

The section dealing with doctrine of subrogation is re-enacted with certain changes in section 92 by section 47 of the Transfer of Property (Amendment) Act (XX of 1929). The Special Committee, in omitting the section, observed as follows :

"These sections (Ss 74 and 75) are based on what is known as the principles of "subrogation". For reasons stated in the notes in the proposed new Ss 92 and 94, we propose to delete these sections."

For a discussion on the law of subrogation, see Notes on section 92. [Ed.]

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75. RIGHTS OF MESNE MORTGAGEE AGAINST PRIOR AND SUBSEQUENT MORTGAGEES.— [*Repealed by S. 39 of the Transfer of Property (Amendment), Act, 1929 (XX of 1929).*]

The repealed section 75 ran as follows :

"75 Every second or other subsequent mortgagee has so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee and *the same rights against the subsequent mortgagees (if any) as he has against his mortgagor.*"

The first portion of the section is now found re-enacted in Ss. 91 and 92 and the second portion printed in italics has been re-enacted as section 94. See Notes on section 94. [Ed.]

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76. LIABILITIES OF MORTGAGEE IN POSSESSION.— When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

(a) he must manage the property as a person of ordinary prudence would manage it if it were his own;

(b) he must use his best endeavours to collect the rents and profits thereof;

(c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature ^[and all rent] accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold;

(d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money;

(e) he must not commit any act which is destructive or permanently injurious to the property;

(f) where he has insured the whole or any part of the property against loss or damage by fire, he must in case of such loss or damage, apply any money

which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money;

(g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported;

(h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses [A][properly incurred for the management of the property and the collection of rents and profits and the other expenses] mentioned in clauses (c) and (d), and interests thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest [B][* * *] and, so far as such receipts exceed any interest due in reduction or discharge of the mortgage money; the surplus, if any, shall be paid to the mortgagor;

(i) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his [C][*] receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be [A][and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property.]

Loss occasioned by his default.

If the mortgagee fails to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occassioned by such failure.

[A] *Inserted* by the Transfer of Property (Amendment) Act 1929 (XX of 1929), S 40

[B] The words "on the mortgage-money" were *omitted ibid*

[C] The word "gross" was *omitted, ibid.*

Synopsis

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17. "Receipts from the mortgaged property."
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19. Expenses of management and collection of rents and profits.
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22. Last paragraph.

1. Scope of the section.

This section enumerates the duties of a mortgagee who takes possession of the mortgaged property during the continuance of the mortgage (1) Such duties are, however, between *himself and the mortgagor* and not as between himself and third parties(2)

The section deals mainly with the debit side of the mortgagee's account, while S 72 deals with the credit side(3)

The section does not lay down any new principles, the rules laid down in the section were recognised even before the passing of the Transfer of Property Act,(4) and the provisions of the section are a mere codification of the law in existence before the passing of the Act.(5) The principles of the clauses have been, therefore, applied to cases arising out of mortgages executed prior to the Act(6)

A mortgagee in possession may spend the income in any way agreed upon between him and the mortgagor, provided that the security of prior mortgages is not thereby imperilled(7).

Section 76 — Note 1

1. **AIR 1929 PC 256 (259)** ** AIR 1924 All 881 (883) 46 All 897 (DB).
2. ILR (1938) 1 Cal 21 (24) (DB) ** AIR 1941 Mad 401 (401).
   [See AIR 1925 Bom 330 (330).]
3. ILR (1938) 1 Cal 21 (24) (DB) ** AIR 1923 Mad 533 (535) 47 Mad 7 (DB)
   [See also 1950 Bur LR (HC) 163 (177) (DB) This section deals with the liabilities of a mortgagee in possession, and there is no reason why the power of management of an executor should be so limited as that of mortgagee.)]
4. **AIR 1924 PC 102 (104) : 46 All 269 : 51 Ind App 157** (Clauses (a) and (c)) ** **(1867-69) 12 Moo Ind App 157 (195) (PC).** (Clause (h)) ** AIR 1936 Pat 583 (586) (DB) (Clause (h) — Liability to account) ** AIR 1935 Pat 148 (149) (DB) (Clause (g) and (h)) ** AIR 1940 Pat 627 (629) (DB) (Clauses a) and (c)) ** (1868) 10 Suth WR 367 (368) (DB) (Clauses (g) and (h)) ** (1868) 9 Suth WR 275 (275) (DB) (Do) ** (1868) 9 Suth WR 488 (488) (DB) (Clause (d)) ** (1867) 7 Suth WR 30 (30) (DB) (Clause (g)) ** (1865) 3 Suth WR 6 (7) (DB) (Clause (c).) ** (1867) 3 Bom HCR (AC) 11 (21, 22) (DB) (Clause (h)) ** (1869) 5 Bom HCR (AC) 109 (115) (DB) (Clause (d)) ** (1868) 5 Bom HCR (AC) 116 (117) (DB) (Do) ** AIR 1926 Mad 405 (405) (Clause (c) — Liability to pay enhanced assessment) ** (1880) 4 Bom 584 (589) (DB) (Clauses (d), (g) and (h)) (1884) 6 All 303 (309) (DB). (Clauses (c) and (h).)
5. AIR 1936 Pat 583 (584) (DB) ** AIR 1919 Oudh 50 (51) 22 Oudh Cas 270 (DB) (Clause (c).) ** (1884) 6 All 303 (309) (DB) (Clauses (c) and (h).) ** AIR 1924 Mad 736 (741) (Clause (h).)
6. AIR 1957 Raj 250 (251, 252) (Mortgage executed before application of Act to Bharatpur — Principles apply — Duty of mortgagee — Faulure to keep accounts — Interest disallowed) ** AIR 1919 Oudh 50 (51) 22 Oudh Cas 270 (DB) (Clause (c).) ** AIR 1926 Mad 405 (405, 406) (Do) ** AIR 1924 Mad 736 (741) (Clause (h)) ** AIR 1940 Pat 627 (629) (DB) (Clauses (a) and (c)) ** AIR 1935 Pat 148 (149) (DB) (Clauses (g) and (h)) ** AIR 1936 Pat 583 (584) (DB) (Clause (h)) ** **(1899) 26 Cal 1 (6, 7) : 25 Ind App 241 (PC).** (Do) ** AIR 1917 Low Bur 122 (123) 9 Low Bur Rul 18 (Clause (i)) ** AIR 1925 Rang 13 (14, 15) : 2 Rang 382. (Do.)
7. AIR 1948 Cal 250 (255) ILR (1948) 2 Cal 342 (DB). (A darpatnidar in possession of patni under S 13, Bengal Patni Regulation, 1819, is entitled at the request of the mortgagor, i e , the patnidar, to devote the income of any year to the purchase of subordinate tenures, thus enhancing the value of the security.)

Where the mortgage deed clearly provided that the rent and profits from the mortgaged property were to be appropriated by the mortgagees in lieu of interest, the mortgagor was not required to pay any interest and could not recover any rent from the mortgagee and the mortgagor was made responsible to carry out the repairs and in case he failed to do so the mortgagee could require him to carry them out by two weeks notice and in default carry them out by himself and add the amount spent to the mortgage money, the applicability of clauses (b), (d) and (g) and (h) of S 76 of T P Act would clearly be ruled out by S. 77 **(8)** Thus, S. 77 is an exception to the liabilities of the mortgagee as mandated by Cls. (b), (d), (g), (h) of S 76. That means that when there is a contract between the mortgagor and the mortgagee that the mortgagee shall appropriate the income from the mortgage property in lieu of interest or in lieu of interest and certain portion of the principal amount of loan, there shall be no application of **S. 76(9)**.

The right and liabilities of the parties in an anomalous mortgage have to be determined as warranted by S 98, with reference to the terms of the contract between the parties in instant case certain fixed sum was to be paid every month, which was be levied by the parties to be a "fair occupation rent". The document did not provide for payment of interest The amount was to be paid irrespective of any profit from the property what was agreed was payment of fixed sum every month irrespective of any profit and not a division of profits between the mortgagor and mortgagee.**(10)**

The mortgagees were in possession of the mortgaged property for more than fifty years The decree for redemption of mortgage had become final against them and during the execution proceedings S 4A of the Kerala Land Reform Act came into force The decree-holder mortgagor deposited the mortgage amount and value of improvements and the Executing Court ordered delivery of property to mortgagor, on such payment Thereafter the mortgagees continued to remain in possession only as judgment debtors illegally sticking to the land The relationship of mortgagor and mortgagee between the parties got snapped If the mortgage money has been received by the mortgagee and thereafter he refuses to perform the acts which he is bound to do under S 60 the mortgagor can enforce his right to get back the mortgaged documents, the possession of mortgaged property and the reconveyance of that property through Court Thus the mortgagee in the instant case could not invoke S. 4A of the Kerala Land Reforms Act for claiming to be deemed tenant**(11)**

2. Law in the Punjab.

The Act does not apply to the Punjab This section cannot, therefore, in terms apply to it But the rules embodied in the section enact only the general law and, therefore, the principles underlying the section have been applied to cases arising in the Punjab**(1)**.

3. Section not applicable to cases governed by Dekkhan Agriculturists' Relief Act, 1879.

This section did not apply to cases governed by the Dekkhan Agriculturists' Relief Act**(1)** for the reason that that Act was a special Act which regulated the relations between impoverished and indebted agriculturists and their creditors, while the Transfer of Property Act regulates the relations

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8. 1983 All LJ (NOC) 23.

9. 2001 (4) Pat LJR 716 (720).

10. (1988) 1 Ker LT 50 (53)

11. AIR 1997 SC 208 (212 to 214) : 1996 AIR SCW 437 : 1997 (1) ICC 311.

Section 76 — Note 2

1. AIR 1940 Lah 333 (334) ILR (1940) Lah 658 (DB) (Section 76(b))

Section 76 — Note 3

1. This Act is now repealed by S 85 of the Bombay Agricultural Debtors' Relief Act XXVIII of 1939 Act XXVIII of 1939 has itself been repealed by S 56 of Bombay Agricultural Debtors' Relief Act XXVIII of 1947.

between mortgagor and mortgagees generally. Under the Dekkhan Agriculturists' Relief Act, the relations between the mortgagor and the mortgagee as settled by themselves were practically set aside and the Court was directed to go into the history of the transactions between them and to calculate the debits and credits according to the rules in the special Act This complete setting aside of the original contractual relations between the parties cannot be reconciled with the rules of the general law(2).

4. "During the continuance of the mortgage."

The section does not apply unless possession is taken by the mortgagee during the continuance of the mortgage The expression "during the continuance of the mortgage" means "from the time the contract establishing the relationship of mortgagor and mortgagee has been entered into and till the time the mortgage comes to an end or is extinguished" (1) Thus, it applies to usufructuary mortgages (2) The undermentioned cases.(3) which holds that it does not apply to a usufructuary mortgage, as possession under it is taken at the inception of the mortgage and not during the mortgage, must be held to be no longer good law in view of the Supreme Court decision in *Manhar Prasad v. Deonaravan Prasad* (4) In a suit by a simple mortgagee for money on default in payment, the Court instead of ordering the proper relief, made a decree for possession after the expiry of the period of grace. The mortgagee entered into possession under it. The decree became final. The Privy Council deciding that the decree was not according to law, held that as it did not purport to put an end to the bond and to the relation of mortgagor and mortgagee, the mortgagee became a mortgagee in possession (5) The section, however, will not apply to a case where the mortgagee enters into possession at a time when the mortgage has in fact become extinct.(6) Mortgagee's possession after the discharge of possessory mortgage is permissive and not adverse (7) Possession of the mortgagee will not be wrongful he will not be liable for mesne profits even in a case where under the provisions of the moneylenders Act the mortgage debt is discharged by operation of law(8).

See also the undermentioned case(9).

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2. AIR 1934 Bom 321 (322) : 58 Bom 472 (DB).

Section 76 — Note 4

1. AIR 1958 Andh Pra 593 (595) ILR (1957) Andh Pra 477 (DB) (Mortgagee getting possession before mortgage was redeemed and before the Court gave a decree for redemption — *Held*, his possession was qua mortgagee — Under S 76 he was liable to account — *Held*, further that amount realised by mortgagee subsequent to the fixing of redemption amount by Court could not form an item in the accounting under S 76) ** AIR 1932 Oudh 123 (132) 7 Luck 454 (DB) ** AIR 1949 All 189 (190) ILR (1949) All 302 (Mortgagee failing to keep accounts cannot claim interest as agreed in mortgage deed)

2. AIR 1929 PC 256 (259) ** AIR 1932 Oudh 123 (132) : 7 Luck 454 (DB) ** AIR 1926 Sind 145 (148) : 20 Sind LR 277.

3. AIR 1929 All 348 (349).

4. AIR 1956 SC 305 (312) : 1956 SCR 1 : 35 Pat 221.

5. (1896) 19 Mad 249 (254) : 23 Ind App 32 (PC).

[See also (1911) 35 Bom 204 (211, 212) (DB) (Suit for possession by mortgagee — Decree On construction of its terms, held that relation of mortgagor and mortgagee was not extinguished and mortgagee who took possession under terms of decree held liable to account. 19 Mad 249 (PC), Foll)]

Also see S 58, Note 30 and S. 67, Note 13.

6. AIR 1918 Pat 421 (422) (DB)

7. AIR 1974 Orissa 173 (178) (ILR (1954) Cut 435 (1954) 20 Cut LT 467, Overruled.)

8. (1971) 2 Cut WR 151.

9. AIR 1956 Bom 630 (631) ILR (1956) Bom 497 (Possessory mortgage — Application for

5. "Takes possession."

In order to charge a mortgagor with the liabilities under this section—

(i) the *possession* of the mortgaged property must be with the mortgagee, and

(ii) such possession must have been taken *in his character as mortgagee*

A mortgagee, like any other person, may hold possession through an agent(1) and will be liable for the acts of the agent (2) Where the mortgagor had, asa condition of the mortgage, to appoint the mortgagee's nominee as manager, it was held that the possession of the manager was as an agent of the mortgagor and not of the mortgagee (3) But where in pursuance of the stipulation in the mortgage-deed the mortgagee was at liberty to place a *mehta* or clerk of his own to receive the collections but who was to be paid a weekly salary by the mortgagor, and such *mehta* received the collections and paid them over to the mortgagee, the possession was held to be that of the mortgagee (4) Where the mortgagee instead of himself entering into possession to which he was entitled under the mortgage, leases the property back to the mortgagor, it is the *mortgagee* who is in possession(5) though, in case of default by the mortgagor in such cases, the mortgagee has been held not liable. This, however, is on a different principle(6).

Where the mortgage deed contained an attornment clause but no possession was taken under it, it was held that the mortgagee was not placed in the position of a mortgagee in possession and thus liable to account merely on the ground that the deed contained an attornment clause (7) Where the mortgagee entitled to possession calls on the tenant of the mortgagor to pay the rent to him but the tenant states that the rent has been spent on repairs and the mortgagee keeps quiet, he cannot be deemed to be a mortgagee in possession, if the tenant has not attorned to him(8)

Normally in cases of usufructuary mortgages over land in possession of tenants, the tenants attorn to the mortgagee and his possession as against the tenant is that of an attorney of the mortgagor having authority to receive rent and profits In such cases the tenant remains the tenant of the mortgagor even though he may also be described as tenant of the mortgagee as he receives the rent(9)

But if the mortgagee gives notice to the tenant not to pay to the mortgagor, he will be answerable as a mortgagee in possession(10).

Unless tenancy is determined the tenant of the mortgagor becomes tenant of the mortgagee and on redemption becomes the tenant of the mortgagor But where the tenant himself becomes the

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relief under Bombay Agricultural Debtors' Relief Act – Intervening period between making of application and date of award — Relationship of mortgagor and mortgagee subsists — Mortgagee's liability to account continues during the period)

Section 76 — Note 5

1. (1868) 3 Agra 153 (156) (DB).
2. AIR 1937 Bom 483 (486) (DB) :: 1881 All WN 10 (10) (DB).
3. AIR 1921 PC 118 (122, 123) : 47 Ind App 265 ** AIR 1936 Pat 211 (217) 14 Pat 560 DB).
4. (1841) 2 Moo Ind App 487 (500) (PC).
5. AIR 1933 PC 178 (179, 180) : 14 Lah 466 : 60 Ind App 273 ** (1879) 10 Ch D 335 (356) : 27 WR (Eng) 433, Re Stockton Iron Furnace Co.

   [See also (1897) 19 All 496 (498) (DB).]
6. See Note 7.
7. (1883) 22 Ch D 478 (479, 480) 31 WR (Eng) 315 Stanley v Grundy
8. (1865) 5 ER 860 (862) : 35 Beav 171, Ward v. Carttar.
9. (1971) 73 Pun LR 54.
10. (1856) 53 ER 157 (158) 113 (RR 195, Heales v M'Murray

mortgagee and the mortgagor sells the mortgaged property to another person the tenant mortgagee cannot claim a superior right of pre-emption as he is not a tenant of the mortgagee(**11**).

The fact that the mortgagees are in receipt of the rents and profits of the mortgaged estate, does not necessarily make them mortgagees in possession. In order to show that a mortgagee in receipt of the rents and profits is in possession, it ought to be shown, not only that he gets the amount of the rents paid by the tenants, but that he receives it in such a way that he has taken upon himself to intercept the power of the mortgagor to manage his estate and has himself so managed it and received the rents as part of the management (**12**) In *Noyes v Pollock*,(**13**) *B* who was the agent of the mortgagor, received the rents of the estate for him and applied them in payment of the interest to the mortgagees The mortgagees wrote to *B* enclosing notices to the tenants to pay the rents to them, which *B* was to serve on the tenants if the mortgagor should attempt to interfere The notices were not served on the tenants, but *B* paid the rents as he received them to the mortgagees It was held that the mortgagees could not be charged as mortgagees in possession. See also the undermentioned case(**14**) to the same effect.

Where the mortgaged property consists of independent tenements, possession of one will not mean possession of the other (**15**) The same rule has been held to be good in *Simmins v. Shirley*,(**16**) in the case of properties which are conterminous It was held in that case that to take possession of a farm or a field surrounded by copses is not to take possession of the copses Where the mortgagee is in possession of part of the mortgaged property and allows the mortgagor to remain in possession of the rest, he cannot, at the suit of the subsequent encumbrancer, be charged constructively as in possession of the whole.(**17**)

The second condition which must be satisfied in order that the section must apply is that the mortgagee's possession must be *qua* mortgagee (**18**) The Courts are slow to decide that such possession has been taken(**19**) and they will not treat possession as being held by the mortgagee as such, unless they are satisfied that he took possession in his capacity of mortgagee without reasonable ground for believing himself to be in possession in any other capacity.(**20**) It has however been held in the undermentioned case(**21**) that in the absence of any definite proof by the mortgagee that his possession was referable to any other deed or contract it must be presumed that he came in possession of the property as a mortgagee. Where the mortgagee takes possession as auction-pur-

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11. 1971 Pun LJ 755.

12. (1886) 32 Ch D 53 (63) : 34 WR (Eng) 383, Noyes v Pollock

[See also AIR 1964 Punj 346 (350, 351) (DB) (Where the tenant has already been on the premises as a tenant of the mortgagor and continues to pay rent to the mortgagee without showing that he continues to be the mortgagee' tenant under a fresh agreement of lease which is improvident or is shown not to be *bona fide* or otherwise likely to damage the property, such a tenant on redemption would not be dispossessed in execution of the redemption decree.) ** AIR 1937 Bom 483 (486) (DB).]

13. (1886) 32 Ch D 53 (61) : 34 WR (Eng) 383.

14. (1865) 1 Eq 29 (31) : 55 ER 860, Ward v. Carttar.

15. (1877) 6 Ch D 173 (174) 26 WR (Eng) 25, Simmins v Shirley

16. (1877) 6 Ch D 173 (174) : 26 WR (Eng) 25.

17. (1852) 51 ER 496 (496) 15 Beav 156 92 RR 361, Soar v Dalby

18. AIR 1958 Andh Pra 541 (544) (DB) ** AIR 1941 Pat 296 (298) (DB) ** AIR 1917 Oudh 42 (44) : 19 Oudh Cas 328.

19. AIR 1928 Cal 158 (162) (DB)

20. Fisher's Law of Mortgage, 7th Edition, P 721 – Quoted in AIR 1936 Nag 293 (294)

21. AIR 1962 Assam 52 (56) (DB).

chaser, he is not liable to account (22) Similarly, where the mortgagee is in possession in his capacity as lessee, he cannot be charged as a mortgagee in possession (23) But in some instances the mortgage and the lease really form part of the same transaction (24) In these cases, the mortgagee's possession is an mortgagee.(25) So also where a tenant purchases a mortgage and thereby becomes a mortgagee or where a tenant becomes a mortgagee by virtue of a mortgage created by the mortgagor in his favour and continues in possession after the termination of the lease, he does so as a mortgage.(26) Where the mortgaged was placed in possession under a *sudbharma* bond but no consideration was paid by the mortgagee, he was held liable to account for the income of the property as he was in possession *qua mortgagee* (27) Where, however, the mortgagee obtains possession under an invalid transfer of the equity of redemption, the generally accepted view is that the possession of the mortgagee from the date of the transfer will be not in his character as mortgagee, but under claim of full ownership (28) In the undermentioned case (29) of mortgage by conditional sale, the mortgagee, on failure of the mortgagor to pay the mortgage-money on the due date, took possession of the mortgaged property with the consent of the mortgagor It was held by the High Court of Calcutta that the mortgagee was bound to appropriate the rents and profits obtained during the period of possession, towards the mortgage-debt under clause (h) of this section as the arrangement did not change the relationship between the parties but was merely a mode of satisfaction of the debt.

Where the mortgagee, during the continuance of the mortgage, enters into possession wrongfully, it has been held that the law will treat his possession as that of a mortgagee and the principle of this section has been applied,(30) on the ground that 'by a wrongful act a man may acquire no

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22. AIR 1956 All 422 (425, 428) ILR (1956) 2 All 210 (DB) ** AIR 1936 Nag 293 (294) ILR (1936) Nag 19.

[See AIR 1948 Bom 379 (380) (Property subject to prior and subsequent mortgages sold in execution of money decree against mortgagor obtained by stranger — Property purchased by prior mortgagee subject to mortgages — Suit by subsequent mortgagee upon his mortgage against mortgagor and prior mortgagee — Tests to determine redemption amount explained — Prior mortgagee is entitled to interest but should account for profits and rents received by him) ** AIR 1948 Mad 132 (133) (Prior mortgagee suing without impleading puisne mortgagee, purchasing property in execution of his decree and entering into possession — In suit by puisne mortgagee on his mortgage prior mortgagee is liable to account for rents and profits of property and they must be applied in reduction of the amount payable to the prior mortgagee.)]

[But see AIR 1945 Mad 91 (92 93) ILR (1945) Mad 578 (Prior mortgagee purchasing property in execution of decree on his own mortgage is liable to account for income received from the property.)]

23. AIR 1941 Pat 296 (298) (DB) (Possession of mortgagee must be in some way referable to the mortgage) ** 1934 Mad WN 812 (813) (DB) ** AIR 1920 Pat 485 (486) 5 Pat L Jour 492 (DB) ** (1837) 7 ER 154 (167) 4 Cl & Fin 399, Page v Linwood

24. See Notes on Section 58

25. AIR 1914 Mad 661 (661) (DB)

26. AIR 1958 Mys 20 (22) : ILR (1957) Mys 100.

27. AIR 1941 Pat 452 (455).

28. See the AIR Commentaries on the Limitation Act 7th (1997) Edn , Art 61 Note 5

[But see AIR 1922 Cal 114 (115, 116) (DB).]

29. AIR 1917 Cal 217 (218) (DB).

Also see S. 58, Note 31.

30. AIR 1917 Nag 33 (35, 36) ** (1906) 2 Nag LR 92 (93, 94) (Fact that mortgagee was also a landlord does not make any difference) ** (1867) 7 Suth WR 30 (30) (DB) (Case before T P. Act.) ** AIR 1926 Sind 145 (148) : 20 Sind LR 277.

right and yet become subject to the responsibilities of a position wrongfully assuemd by such act".(31)

In England, it has been held that once a mortgagee takes upon himself the burden which is imposed on all mortgagees who are in possession, he must continue to perform the duty, and cannot, when he please select to give it up,(32) although the Court may relieve him in a proper case of the duties of mortgagees in possession by the appointment of a receiver.(33) Under S 24 of the Conveyancing and Law of Property Act, 1881 (44 and 45 Vict., Chap. 41), a receiver appointed by the mortgagee is deemed to be the agent of the mortgagor.(34) In this country also, the receiver appointed will, under S. 69A of the Transfer of Property Act, be deemed to be the agent of the mortgagor.

The question whether the mortgagee is a mortgagee in possession, and, if so, from what time, must be determined by the Court and ought not to be left to the Commissioner appointed to take accounts.(35)

See also the undermentioned case.(36)

6. Clause (a).

It is the duty of the mortgagee, when he takes possession of the mortgaged property, to manage it as if it were his own (1) The duty is similar to the care required from a trustee,(2) though it

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[See also AIR 1941 Oudh 84 (86) (AIR 1917 Nag 33 substantially approved.) ** AIR 1927 Mad 964 (965). (Section 76 is not in terms restricted to mortgagee who takes possession as mortgagee and the principle of it would apply to all mortgagees, who get into possession by way of further security for the payment of their debt)]

[See however AIR 1950 Trav-Co 33 (35) (DB) (Possession of mortgagee wrongful — No liability on his part to render account — His liability is to deliver up possession with mesne profits.)]

31. AIR 1917 Nag 33 (35).

32. (1889) 42 Ch D 590 (599, 600) : 38 WR (Eng) 61, Prytherch v Williams.

33. (1886) 32 Ch D 206 (208) · 34 WR (Eng) 498, Mason v Westoby

34. (1896) 2 Ch 212 (219, 220) 65 LJ Ch 502, Richards v Overseers of Kidderminster

35. AIR 1940 Bom 287 (287) : ILR (1940) Bom 645 (DB).

36. **AIR 1992 SC 1135 (1137) : 1992 AIR SCW 1025 : 1992 (2) JT 130.** (Mortgagee deemed to be tenant after 50 years possession as mortgagee in view of Kerala Land Reforms Act — Possession of mortgagee after decree of redemption for payment of compensation under Kerala Compensation for Tenants Improvements Act, 1958 — Possession as mortgagee not for 50 years — Mortgagee not deemed tenant.)

Section 76 — Note 6

1. **AIR 1958 SC 183 (185) : 1958 SCR 986.** (An agricultural lease created by mortgagee would be binding on the mortgagor even though the mortgage has been redeemed, provided it is of such a character that a prudent owner of property would enter into it in the usual course of management) ** **AIR 1952 SC 205 (206) : 1952 SCR 775** ** AIR 1964 Punj 346 (350, 351) (DB) ** AIR 1950 Pat 246 (247) 29 Pat 180 (DB) (Mortgagee in possession of bhaoli holding — Commutation of bhaoli into nakdi rent — Amalgamation of the holdings with other lands during continuance of mortgage by mortgagee without consent of mortgagor will not be binding on mortgagor after redemption of the mortgage.)

2. AIR 1964 Punj 346 (350) (DB) (Mortgagee taking possession of the mortgaged property must manage it as a person of ordinary prudence would do if it were his own)

See Section 15, Trusts Act, 1882.

[See also **AIR 1964 SC 1320 (1323) : (1963) 3 SCR 1.** (To confer the status of a deemed tenant upon a mortgagee in possession would be to invest him with rights inconsistent with his fiduciary character) ** (1909) 4 Ind Cas 357 (359) (DB) (Mad) (Mortgage is in the

cannot be said that the mortgagee in possession is a trustee for the mortgagor **(3)** The mortgaged property must be properly cultivated, if it is cultivable land, and must be put to the best use so that a fair amount of profits may be realized **(4)** The mortgagee is free to enter into any arrangement for the right and profitable administration of the estate **(5)** He may occupy the land himself and cultivate it to the best advantage,**(6)** or in the alternative, adopt the usual method of leasing out the mortgaged property to a solvent tenant**(7)** or to the mortgagor himself **(8)** If the mortgaged property is in the possession of an annual tenant, the mortgagee can, in exercise of his power of management, eject the tenant without the consent of the mortgagor **(9)** If he fails to perform the duty imposed by this clause, he will be liable for the consequent loss under the last paragraph of this section. Similarly mortgagee with possession is entitled to seek recovery of possession of leased premises from his tenant, for his own bona fide requirement of use as he is enjoined by S 76(a) to manage the property as a man of ordinary prudence would manage if it as were his own **(10)** Where the mortgagee occupies the land himself, he must cultivate the land by raising the ordinary crops which the mortgaged land is capable of yielding **(11)** When he prefers to lease out the property, which he is entitled to do in the ordinary course of management, the lease must be for a use to which the property was ordinarily put In the undermentioned case**(12)** it was held that an assignment of

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position of a trustee so he cannot do any act, which will give rise to any conflict between his interest and duty) ** (1910) 7 Ind Cas 772 (774) (DB) (Cal) (In certain respects and for certain purposes, mortgagee in possession is a trustee for mortgagor and cannot take advantage of that position to the detriment of mortgagor.)]

3. (1968) Beng LR Sup Vol. 901 (903) (FB) ** AIR 1955 Cal 569 (571) (DB) ** AIR 1950 Pat 246 (247) ILR 29 Pat 180 (DB) ** (1876) 2 Ch D 148 (162) 45 LJ Ch 395 34 LT 211 : 24 WR (Eng) 597 Eyre v Hughes ** AIR 1940 Bom 287 (288) ILR (1940) Bom 645 (DB) ** (1833) 39 ER 686 (689, 690) 1 Myl and K 277 36 RR 319 Leith v Irvine

4. ILR (1956) Nag 320 (328) (Where the subject of the mortgage is the proprietary interest of the lambardar it becomes the duty of mortgagee not to allow the tenancy land reverting to him to lie fallow but to see to it that it is let out.)

[See AIR 1923 Lah 71 (73)]

5. 1883 All WN 203 (203) (DB) ** AIR 1927 All 552 (553 554) 49 All 658 (DB)

6. AIR 1950 Pat 246 (247) ILR 29 Pat 14 (DB) ** AIR 1919 Pat 392 (394, 395)

7. (1977) 1 Rent CR 194 1976 Rev LR 260 ** AIR 1958 Madh Pra 319 (320) ** AIR 1954 All 16 (17) ** AIR 1953 All 472 (474) ILR (1954) 1 All 147 (DB) (Section 12 U P Agriculturists' Relief Act, has not changed the substantive law — Mortgagee given full power to let out land — Mortgagee letting out land — In such a case handing over possession upon redemption to mortgagor means such possession as the property is capable of when redemption took place Civil Revn No 544 of 1945 D/ (1948) (All) **Overruled.)** ** AIR 1927 All 552 (554) 49 All 658 (DB) ** AIR 1919 Pat 392 (394 395) ** AIR 1937 Cal 763 (764) ILR (1937) 2 Cal 181 (DB) (Mortgagor can lease even after redemption suit is instituted) ** AIR 1926 Pat 605 (606) 6 Pat 129 (DB) ** AIR 1930 All 413 (414) ** (1926) 97 Ind Cas 852 (852) (DB) (Pat) ** AIR 1929 Pat 630 (632) (DB) ** AIR 1925 Pat 198 (200, 201). (Bakasht lands can be let out.)

8. 1961 Jab LJ 1207 (1208) (If mortgagor takes mortgaged property on lease from mortgagee then mortgagee as landlord can file a suit on basis of a rent note) ** AIR 1958 Madh Pra 319 (320) ** AIR 1927 All 552 (554) : 49 All 658 (DB)

[See also AIR 1930 Lah 386 (387) (DB) (Mortgagor cannot turn round and plead that the lease that he executed should not be interpreted as a lease.)]

9. AIR 1927 Bom 145 (148) (DB).

10. AIR 1989 SC 553 (554) : (1988) 4 SCC 727.

11. (1864) 2 Bom HCR 211 (214) (DB).

12. 1883 All WN 203 (203) (DB).

the cultivated land to make a grove (*bagh*) could not be considered as an act done in the due management of the estate.

Though the mortgagee in possession is free to settle the land the general rule is that he cannot do so beyond the term of the mortgage, the principle being that a person cannot transfer a larger estate than he himself has **(13)** The principle in clause (a) of this section extends both to agricultural land and urban property **(14)** Thus, he cannot give a permanent lease **(15)** Under clause (c) of S 11, a lease determined by the termination of the lessor's interest in the property A lease granted by the mortgagee beyond the term of mortgage will, therefore, determine on redemption.**(16)** or on auction sale **(17)** Section 76(a), however, enacts an exception to this general rule If the lease is one which could have been made by the owner in the course of prudent management, it would be

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13. AIR 1958 SC 183 (185, 186) ** AIR 1956 SC 305 (312) : 1956 SCR 1 ** AIR 1952 SC 205 (206) : 1952 SCR 775 ** ILR (1967) 1 Mad 84 (88, 89) ** AIR 1964 Punj 346 (350) (DB) ** AIR 1963 Bom 42 (43, 44) ILR (1963) Bom 236 (DB) ** 1961 MPLJ 924 (926) ** AIR 1958 Bom 53 (55) ILR (1957) Bom 582 (This is subject to any rights that might be conferred on tenant by any statute) ** AIR 1950 Pat 246 (247) 29 Pat 180 (DB) ** AIR 1929 Pat 630 (632) (DB) ** (1910) 1 Upp Bur Rul 14 ** (1911) 11 Ind Cas 817 (818, 819) (All) ** AIR 1937 Cal 763 (764) ILR (1937) 2 Cal 181 (DB) ** AIR 1916 Mad 911 (911, 912) (DB).

[See also AIR 1954 Pat 326 (329, 330) (DB) (Usufructuary mortgagor not a proprietor or tenure-holder — Cannot confer right of occupancy on settlee — Settlee cannot be a raiyat — Cannot acquire right of occupancy in land — AIR 1952 SC 205, Foll.) ** (1870) 2 NWPHCR 199 (199) (DB) (Mortgagee cannot grant a title to any one for a period in excess of the duration of his own interest in the estate.)]

14. AIR 1972 Gau 37 (46, 47) : (1971) 12 Guj LR 980.

15. AIR 1952 SC 205 (206) : 1952 SCR 775 ** AIR 1972 Mys 81 (87) (1971) 2 Mys LJ 462 (The act of mortgagee in exchanging certain items of mortgage properties and creating lease of a permanent nature beyond the duration of the mortgage are not prudent acts and not binding on the mortgagor.) ** AIR 1963 Pat 26 (30) (DB) (Settlees on land claiming to be permanent tenants — Settlement of land held not valid beyond period of mortgage and on redemption of mortgage settlees were liable to be evicted — S A No 1714 of 1951, D/ 8-10-1956 (Pat), **Reversed.**) ** AIR 1929 Pat 630 (632) ** (1930) 14 RD 585 (586) ** (1911) 11 Ind Cas 817 (818, 819) (All).

16. AIR 1964 SC 1320 (1323) : (1963) 3 SCR 1 ** AIR 1958 SC 183 (185, 186) : 1958 SCR 986 ** AIR 1956 SC 305 (312) : 1956 SCR 1 ** AIR 1952 SC 205 (206) : 1952 SCR 775 ** AIR 1983 Raj 77 1982 Rajasthan LR 954 ** (1978) 80 Pun LR 230 (231) 1978 Rev LR 186 (Where there is express stipulation in mortgage deed that, the mortgagee had been given right to induct tenants into shop in dispute and as such even if mortgage were redeemed, he had a right to occupy the shop as a tenant, **held,** that such a stipulation in mortgage deed does not mean that mortgagee had been given express right to create a tenancy, which might subsist beyond extinction of mortgage) ** (1978) 2 Ren CJ 1 (2) (Punj) ** (1976) 78 Pun LR 628 ** AIR 1967 Madh Pra 237 (238) (DB) ** AIR 1963 Bom 42 (43, 44) ILR (1963) Bom 236 (DB) (Monthly tenancy created by mortgagee in possession — Subsequent suit for redemption by mortgagor — Decree for redemption — Tenancy terminates and tenant is not entitled to protection from eviction) ** 1961 MPLJ 924 (926) ** AIR 1958 Bom 53 (55) ILR (1957) Bom 582 ** 1952 All LJ (Rev) 226 (228) (DB) ** AIR 1918 Mad 207 (208) (DB). (The position is, however, different where the mortgage is only assigned) ** (1906) 3 All LJ 517 (518, 519) ** (1910) 1 Upp Bur Rul 14 (Mortgagor can oust mortgagee's lessee at any time of the year without giving him any notice.) ** (1911) 11 Ind Cas 817 (818, 819) (All).

17. 1966 Cur LJ 395 (Where mortgaged property is sold by public auction tenants of the mortgagee do not become tenants of the auction purchaser by reason of the lease granted by the mortgagee during currency of the mortgage.)

binding on the mortgagor, notwithstanding that the mortgage has been redeemed **(18)** But this being in the nature of exception, it is for the person, who claims its benefit to strictly establish it.**(19)** The onus is very heavy on the mortgagee or the tenant claiming through him as he has to establish that the mortgagee had acted like an ordinary prudent person and he had inducted a tenant for it was essential to induct a tenant in the interest of the mortgagor also **(20)** Where there was specific finding by lower Courts in the suit for redemption that the letting out of premises to the tenant by the mortgagee was not prudent act done in ordinary course of management and the finding had become final, the mortgagor is entitled to get recovery of possession from tenant **(21)** The general rule is also subject to another exception The rights of the tenant induced by the mortgagee may be improved by virtue of statutory provisions which may meanwhile come into operation **(22)**

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18. AIR 1964 SC 1320 (1323) : (1963) 3 SCR 1 (General rule has no application in the interpretation of a statute which has been enacted with the object of granting protection to persons lawfully cultivating agricultural lands) ** **AIR 1958 SC 183 (185, 186).** Where the lands over which the lease was created were home-farm lands under the direct cultivation of the proprietors, as distinguished from lands which were under cultivation by tenants having regard to the special rights which the Tenancy laws all over India have recognised in the owner in respect of such lands an act of the mortgagee which puts those rights in peril cannot be regarded as that of a prudent owner and it requires exceptional ground to justify it) ** **AIR 1956 SC 305 (312).** (Even in such a case the operation of the lease cannot extend beyond the period for which it was granted) ** **AIR 1952 SC 205 (206).** (A tenant who has been settled by the mortgagee in possession under a *bona fide* and permissible settlement and in whose favour rights conferred or created by a statute based on the nature of the land and possession for the requisite period, have sprung up cannot be ejected by the mortgagor even after redemption The exception however will not apply where terms of mortgage prohibit the mortgagee either expressly or impliedly from making any settlement of tenants on the land) ** 1985 MPRCJ 106 (111) (By virtue of S 76(a) during the continuance of the mortgage the mortgagee taking possession of the mortgaged property can grant lease in the prudent management of the property) ** 1965 MPLJ 451 (456, 457) (DB) (AIR 1963 Bom 42, Disting) ** AIR 1965 Punj 231 (232) (Redemption of mortgage — Tenancy created by mortgagee in course of management — When binding on mortgagor — Burden of proof lies on tenant to establish *bona fides* of mortgagee) ** AIR 1964 Punj 369 (370) (Tenancy would come to end with redemption — Permissible settlement by mortgagee is exception — Exception has to be proved if tenant maintains that he is still tenant) ** 1961 Ker LT 958 (959) (A 1958 SC 183 Foll) ** 1961 MPC 840 (842

[**See also** AIR 1954 All 16 (17) (DB) (Section 111(c) does not mean that on the mere redemption of the mortgage without the mortgagor exercising his option of putting an end to the tenancy, the tenancy automatically and *ipso facto* lapses on the date of the redemption.)]

19. AIR 1958 SC 183 (185, 186) ** AIR 1974 All 234 (236, 240) : 1974 All LJ 274 (FB) 1971 Ker LT 269 1970 Ker LJ 892 ** 1968 All LJ 446 1968 All WR (HC) 340 ** AIR 1965 Punj 231 (232) ** AIR 1964 Punj 369 (370) ** 1961 Ker LT 958 (959) (Lease by mortgagee — Lessee claiming fixity of tenure — Proof of legal possession by lessee necessary — Burden of proof is on lessee.)**

20. 1990 All LJ 815 (821).

21. AIR 1988 SC 299 (303) : 1988 (1) SCC 377.

22. AIR 1966 SC 1721 (1723). (AIR 1952 SC 205 Relied on — *Held* that during continuance of mortgage, S 15 of Rajasthan Tenancy Act (3 of 1955) came into force and that made the tenant *khatedar* who was entitled to claim benefit of S 161 of the Act) ** **AIR 1964 SC 1320 (1323) : (1963) 3 SCR 1.** (General rule has no application in the interpretation of a statute which has been enacted with the object of granting protection to persons lawfully cultivating agricultural lands) ** **AIR 1952 SC 205 (206) : 1952 SCR 775.** (Springing up of rights in the tenant conferred or created by statute based on nature of land held to be exception to general rule) ** AIR 1958 Bom 53 (55) ILR (1957) Bom 582

Where an urban property is leased out to a tenant by the mortgagee in possession the tenancy would come to an end on the redemption of the mortgage in the absence of any authority given by the mortgagor to the mortgagee to induct a tenant. Thus the tenant would not be entitled to protection under Bombay Rents, Hotel and Lodging House Rates Control Act (1947), when the mortgagor had never accepted him as tenant.**(23)**

Where the mortgagee inducted a tenant during the subsistence of attachment of the property the lease was affected by S 64, Civil P C and was voidable at the instance of the mortgagor. Thus the tenant could not claim the status of tenant against the mortgagor.**(24)**

A tenant who is inducted by usufructuary mortgagee gets his statutory rights under S. 9 of the Punjab Security of Land Tenures Act after its enforcement and simply on the redemption of mortgage, the mortgagors do not get a right to evict the tenant straightway without following the provisions of law.**(25)**

Section 76(a) of the Transfer of Property Act cannot apply to cases of urban immovable property and hence the lease created by the mortgagee in possession of an urban immovable property would not be binding on the mortgagor after redemption of the mortgage, even if it were to be assumed that the lease is such as a prudent owner of property would have granted in usual course of management.**(26)**

The lease given by the mortgagee terminates with redemption, in case of tenancy of urban house property and he is not entitled to protection under the Rent Control Act.**(27)**

The principle of Section 76(a) that acts done bona fide and prudently in the ordinary course of management may bind even after the termination of the title of the mortgagee in possession applies ordinarily to the management of agricultural lands and has seldom been extended to urban property.**(28)**

Where the management had not empowered the mortgagee to create a lease which would be binding on them after the redemption of mortgage, the tenant can claim tenancy rights only against

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[**See also** (1976) 2 Mad LJ 260 (262).]

23. 1997 (1) Guj LH 740 (749)

24. AIR 1988 SC 108 (109) : 1987 (3) SCC 553.

25. 1996 Pun LJ 638 (640)

26. (1978) 19 Guj LR 420 (445) : (1978) 2 Rent LR 25 (DB).

27. AIR 1972 SC 637 (637) : 1972 UJ (SC) 559. (M P Accommodation Control Act (1961) in this case) ** **AIR 1989 SC 436 (456) : (1989) 1 SCC 458** (AIR 1976 Guj 161 (FB), **Approved.**) ** **AIR 1976 Guj 161 : 17 Guj LR 497 (FB).** (Such lease is not protected under Bombay Rents Hotel and Lodging House Rates Control Act (1947) ** AIR 1981 Ker 107 (It could not be said that the mortgagee has rented out the building as a prudent and reasonable man) ** **AIR 1985 Raj 11 (19) : 1984 Rajasthan LR 709 (FB)** ** AIR 1987 Ker 130 (131, 132) 1986 Ker LT 336 ** 1981 MPLJ 132 (134) (Tenant inducted by mortgagee would not be protected by the provisions of M P Accommodation Control Act (41 of 1961) ** (1978) 1 Ren CJ 361 (363, 364) (Punj).

[**But see** AIR 1972 Guj 37 , 12 Guj LR 980. (Tenant inducted by mortgagee is entitled to Rent Control Legislation)]

28. AIR 1972 SC 637 (637) : 1972 UJ (SC) 559 ** AIR 1988 Delhi 1 (10) : (1988) 26 Reports 58 (FB). (Tenant inducted by mortgagee in possession — Cannot claim benefit of protection attended by Rent Control Legislation after redemption of mortgage — S 76(a) does not confer any right on such tenant - Principle of S 76(a) does not apply to urban property) ** (AIR 1974 All 234 (FB) and AIR 1980 Mad 276 (FB), **Dissented.**) ** AIR 1987 Ker 132 (135) · 1987 Ker LJ 18 ** (1984) 1 Bom CR 42 (44).

hislandlord viz., mortgagee and not mortgagor **(29)**

Where under mortgage deed mortgagee was not entitled to induct tenant who would continue beyond term of mortgage, and tenant continued in possession even after redemption of mortgage without any approval of mortgagor for such continuance, the tenant would not be entitled to protection of Rent Act as induction of tenant was not an act of prudent management **(30)**

It may be open to a tenant inducted upon urban property by a mortgagee with possession to rely upon S. 76(a) to claim tenancy right for the full term of tenancy, notwithstanding the redemption of the mortgage earlier.**(31)**

No person can confer on another a title better than he himself had Therefore a mortgagee in possession cannot create in the tenant inducted by him a right to continue in possession beyond the period of redemption.

Section 76(a) carves out an exception to the above rule but this exception is available only with regard to agricultural lands and not urban properties

The mortgagor would be bound by the tenancies if there is any stipulation in the mortgage deed authorising the mortgagee with possession to lease out the property In such case a tenancy may go beyond the term of the mortgage **(32)**

In a case from the Gujarat High Court, however, it is held that the principle of clause (1) not only extends to agricultural lands but also extends to urban property and a person lawfully inducted on the property by the mortgagee in possession continues to be a tenant under the Bombay Rent Control Act even after redemption It was further held that a tenant lawfully inducted on the property by a mortgagee under the terms of the mortgage is not affected by premature redemption of the mortgage.**(33)**

There is no distinction between agricultural land and urban immovable property in applying this principle If the principle is made applicable to urban property the Rent Acts at once come to the aid of the tenant of urban property after the termination of the mortgagee's interest During the continuance of the mortgage the rent control legislation does not apply But if the tenancy is binding on the mortgagor after redemption the Rent Acts apply The execution of a fresh rent note by a tenant in favour of the mortgagee when he was already in possession of the premises as tenant under the mortgagor does not amount to creation of fresh tenancy by the mortgagee and the tenant cannot be said to have been inducted by the mortgagee and such a tenant cannot be dispossessed

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29. AIR 1987 SC 2146 (2155) : (1987) 4 SCC 223 ** AIR 1992 Madh Pra 13 (21) : 1992 MPLJ 109. (Redemption of mortgage — Mortgagee s right in suit property extinguished — Tenants inducted by him not entitled to possession of suit basis) ** AIR 1987 SC 2146 Foll) ** AIR 1992 Madh Pra 1 (6) 1992 MPLJ 373 (Where the lease in favour of the tenant was created by the mortgagee and it was not the case of the tenant that he had a right to continue to be in possession beyond the term of the mortgage under the mortgage, the mortgagor is entitled to evict the tenant) ** 1991 Har Rent R 654 (656) (Punj and Har) (Mortgagee in possession of property as tenant prior to creation of mortgage — Redemption of mortgage — Mortgagor would be entitled to symbolic possession and not actual possession.) ** 1985 Har Rent R 545 (547) (P & H) (Where there was no express intention to allow the tenancy beyond the term of the mortgage, the tenancy would come to an end after the redemption, though the mortgage deed provided that mortgagee may induct the tenant.)

30. AIR 1989 SC 1110 (1116) : (1989) 2 SCC 395 ** AIR 1988 SC 108 (109) : (1987) 3 SCC 553.

31. AIR 1980 Mad 276 (293, 294) (1979) 2 Mad LJ 179 (DB) ((1976) 1 Mad LJ 351, **Overuled.)**

32. 1995 (2) Cur CC 117 (124) (Madh Pra).

33. AIR 1972 Guj 37 : 12 Guj LR 980

when the property is redeemed by the mortgagor The tenant holds the property as a tenant of the mortgagor and enjoys the protection given by the Rent Acts.(34)

Tenant of a mortgagor, unless his tenancy is determied at the time of the mortgagor, necessarily attorns to the mortgagee and after redemption he is relegated as tenant of the mortgagor (35)

In a case relating to agricultural tenancy in Vidarbha region of Maharashtra a lessee was inducted on the agricultural land by the mortgagee at the time when the tenancy legislation granting greater protection including proprietorship to lessees of agricultural land was on the anvil As per the mortgage deed the mortgagee was required to cultivate the land himself It was held that the granting of the lease was not the prudent act of management The lessee, therefore, could not be treated as a deemed tenant and was not entitled to statutory ownership under the tenancy legislation.(36)

See also the undermentioned cases.(37)

Where the mortgage is of a fractional share of an estate held in joint tenancy, the mortgagee must see that he receives out of the estate all that the mortgagor ought to have received — not only

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34. AIR 1980 Bom 79 (AIR 1974 All 234 (FB), **Dissented from.**) ** AIR 1978 Delhi 58 ILR (1977) 1 Delhi 600 (AIR 1970 Punj 104 (FB) and AIR 1976 Guj 161 (FB) **Dissented from.**)

35. **AIR 1970 Punj 104 (109) : 71 Pun LR 606 (FB).**

36. AIR 1976 Bom 61 : 1975 Mah LJ 503

37. 1984 All LJ 1167 (1169) (1984) 2 All Rent Cas 414 (Govt grant — Resumption of land by Central Govt — Resumption of grant would not result in extinction of interest of landlord automatically bringing to an end tenancy of tenant occupying such land) ** AIR 1982 All 503 (507) (Where in a case of usufructuary mortgage the mortgagee had not inducted anyone in possession over the mortgaged property pending the mortgage but claims himself to be the tenant prior to the mortgage but in fact the mortgagor was in possession prior to execution of mortgage, the mortgagee cannot claim benefit under Section 76(a) and he must deliver vacant possession over the mortgaged property on redemption of mortgage as his possession over property was in no other capacity except as mortgagee) ** AIR 1969 Pat 279 (281, 283) (If in spite of a condition to the contrary in the mortgage the mortgagee grants rights settling it with others as Bakasth land the person entering into settlement cannot claim occupancy rights as against the mortgagor) ** ILR (1967) 1 Mad 84 (94) (Tenant under usufructuary mortgagee — Cannot claim rights of cultivating tenant under Madras Cultivating Tenants Protection Act after redemption by mortgagor) 1959 BLJR 71 (73) (A tenant inducted upon a land by the usufructuary mortgagee cannot acquire occupancy rights under Tenancy Act) ** AIR 1952 Trav-Co 395 (396) ILR (1952) Trav-Co 61 (DB) (Mortgagor landlord is not bound to recognise lease of the holding granted by his mortgagee beyond the limits of the obligation created by the mortgage transaction itself — His right to recover possession on redemption is not in any way affected by S 4, Travancore Cochin Holdings (Stay of Execution Proceedings) Act, 1950) ** AIR 1929 Pat 630 (632) (DB) (Where the mortgagee grants a lease only for an indefinite period the tenants having been brought on the land as tenants in the ordinary course of management by the mortgagee in possession they are not liable to be rejected by the mortgagor on redemption if under any law they acquired the right to remain on the land against the will of the mortgagor) ** (1920) 56 Ind Cas 819 (820) (All) (Tenant held could not be evicted on redemption) ** (1926) 97 Ind Cas 852 (853) (DB) (Pat) (Tenant who has acquired tenancy right cannot be evicted by mortgagor on redemption.) ** (1906) 3 All LJ 517 (519) (Where the lessee has not acquired any right of occupancy, the mortgagor can maintain a suit to eject the lessee in a Civil Court.) ** (1922) LR 3 All Rev 313 (314, 315) ** AIR 1930 Cal 738 (738, 739). (Tenants settled by mortgagee — Mortgage deed not precluding mortgagee from such settlement — On redemption tenant cannot be evicted as trespasser) ** AIR 1930 All 413 (414, 415). (Tenancy created by mortgagee authorized so to do — On redemption tenancy is binding on mortgagor — Mortgagor desiring to terminate tenancy must do so by suit

that all the assets are realized and brought to account, but that the expenses are regulated with care.(38)

7. Clause (b).

Under this clause, the *law* requires a mortgagee to be diligent in realizing the rents and profits (1) In *Lord Kensington v Bowerie*(2) Lord Justice Turner explained the reason underlying such a provision thus :

> "A mortgagee, when he enters into possession of a mortgaged estate enters for the purpose of recovering both his principal and interest, and the estate being, in the eye of this Court a security only for the debt, the Court requires the mortgagee so entering to be diligent in realizing the amount which is due on the mortgage, in order that he may restore the estate to the mortgagor who, in the view of the Court, is entitled to it."

But he is not an assurer of the continuation of the same rate of profits which his mortgagor was able to raise The very change of management and possession may cause a falling off of receipts (3) The mortgagee, therefore, is not chargeable for the gross rentals as shown in the *jamabandi* (4) The rule is that the mortgagee in possession is only liable for what he received, unless it be proved that, but for his wilful default, he might have received more (5) The burden of proving wilful default is on

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under Tenancy Act) ** AIR 1919 Pat 392 (394 395) (Tenant inducted by mortgagee acquires non-occupancy rights — Suit by mortgagor ought to be instituted within six months after expiration of mortgage or its redemption under Art 1 Sch 3 Bengal Tenancy Act ** AIR 1925 Pat 198 (200 201) (Mortgagee settling bakasht and Tenant gets non-occupancy right and cannot be ejected as trespasser) ** AIR 1926 Pat 605 (606) 6 Pat 129 (DB) (Mortgagor cannot eject a tenant who has acquired an occupancy right by possession.) ** AIR 1916 Mad 911 (912) (DB) (Mortgagee s tenant continues as mortgagor s tenant — Mortgagor on redemption becomes landlord and can reject tenant let in by mortgagee) ** AIR 1931 All 743 (743) (DB) (In the case of agricultural leases the tenants do not become trespassers from the date of redemption — The only remedy of the mortgagor is to eject the tenants throught the revenue Court and not through Civil Court) ** (1911 11 Ind Cas 817 (818, 819) (All) (Tenancy created by mortgagee is binding on mortgagor on redemption If mortgagor desires to bring the tenancy to a close he must do so by a regular suit under the Tenancy Act) ** AIR 1937 Cal 763 (764) ILR (1937 2 Cal 181 (DB) (Mortgagee letting mortgaged property Tenant becomes occupancy tenant and is not liable to be ejected.)

38. (1865) 2 Suth WR 150 (150) (DB).

Section 76 — Note 7

1. AIR 1955 Cal 569 (571) (DB) (Loss referred to in concluding paragraph has reference to actual income that might or could have been realised during period when mortgagee was in possession.) ** AIR 1937 Bom 483 (486) (DB).
2. (1855) 7 De GM & G 134 (157) : 24 LJ Ch 442.
3. (1867-69) 2 Beng LRPC 44 (54) (PC).
4. (1903) 25 All 287 (295) · 30 Ind App 66 (PC) ** AIR 1917 Oudh 190 (192) ** AIR 1937 Bom 483 (487) (DB). (25 All 287 (PC), Followed.)
5. AIR 1955 Cal 569 (571) (DB) (He is liable not only for the income which actually arises but such income as might have been received if the property had been in the custody of an ordinary prudent person and he must utilise all opportunities for getting the income from the property) ** AIR 1950 Pat 379 (383) 29 Pat 545 (DB) (Mortgagee with full right of realising profits should account for what has not been realised due to his wilful default) ** (1878) 8 Ch D 424 (427, 428) 26 WR (Eng) 690 Mayer v Murray ** 1887 Bom PJ 12 (DB). (Held, no wilful default on the part of the mortgagee) ** (1864) 33 Beav 330 (337) : 11 LT 10 (12), Chaplin v Young ** AIR 1917 Oudh 190 (192) ** AIR 1937 Bom 483 (486, 487) (DB) ** (1855) 44 ER 53 (61, 62) 7 De GM & G 134 (157) 24 LJ Ch 442, Lord Kensington v Bouverie ** (1682) 23 ER 298 (298) 1 Ven 45, Anom ** (1876) 2 Ch D 148 (162) : 24 WR (Eng) 597, Eyre v. Hughes.

the mortgagor.(6)

Where the land mortgaged is one which is usually leased out, the mortgagee is answerable not only for what the tenants pay, but for not letting the property if he could have done so and for not getting the full rents from the tenants, if they could have paid them (7) But he is not necessarily bound to accept the highest rent offered irrespective of other considerations. Thus, the fact that the mortgagee could have got a better rent does not necessarily make out a case of wilful default (8) The law on the subject has been succintly laid down in *Hughes v. Williams*,(9) in which Lord Chandellor Erskine observes :

> "I do not mean to say, that to charge a mortgagee in possession, actual fraud is necessary It is sufficient, if there is plain, obvious, and gross negligence, by not making use of facts within his knowledge If for instance, the mortgagee turns out a sufficient tenant, and, having notice that the estate was under-let, takes a new tenant, another person offering more, an offer however not to be accepted rashly Another circumstance, that weights with me, is, that the mortagor, if he knows the estate is under let, ought to give notice to the mortgagee, and to afford his advice and aid, for the purpose of making the estate as productive as possible .Can the mortgagor lie by, not giving notice, that a greater rent may be made, and come afterwards by way of penal enquiry, to charge the mortgagee with the effect of his own negligence? . If such gross negligence can be shown as comes up to the description of wilful default he ought to be answerable for it But I determine this exception upon the principle that a mortgagee taking possession, is to take the fair rents and profits is liable only for wilful default, of which in this instance there is no pretence, this mortgagor not having even communicated that he had any . proposed tenants It would be mos dangerous to entangle mortgagees in a minute enquiry, whether some person would have given more which was never communicated."

Where the mortgagee fails to recover rent from tenants and allows it to become irrecoverable,(10) or obtains a decree and fails to execute it(11) he is liable for wilful default In *White v City of London Brewery Company*,(12) the mortgagees in possession were brewers They let the mortgaged premises with a restriction that the tenant should take his supply of beer entirely from them It was held that the mortgagee must account for such additional rent as they would have made if the premises had been let without restriction It cannot be said as a rule that *tadi* from *sindi* trees is

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[See also 1881 All WN 10 (10) (DB)]

6. 1962 Raj LW 376 (377) (Suit by mortgagee in possession for interest — Wilful default — Onus of proof — Onus on mortgagor to prove mortgagee's wilful default) ** AIR 1937 Bom 483 (486) (DB).

7. AIR 1950 Kutch 77 (77) (Usufructuary mortgage of property fetching rents — Property lying vacant for some period Mortgagee allowed interest during the period — Credit for fair rent should be given to the mortgagor for that period) ** (1886) 32 Ch D 53 (61) : 34 WR (Eng) 383 : 55 LJ Ch 513 : 54 LT 473, Noyes v. Pollock.

8. (1907) 3 Nag LR 106 (109, 110).

9. (1806) 8 RR 364 (365) 12 Vesey 493 6 Ves 459 (Quoted in 3 Nag LR 106)

10. (1868) 3 Agra 146 (146) (DB) ** AIR 1927 Oudh 170 (173) (DB) ** (1862) 10 WR (Eng) 287 (288), Brandon v Brandon (Mortgagee allowing tenant to remain in possession for a long time without paying rent is guilty of wilful default as to such rent)

[See also AIR 1937 All 337 (339) (DB) (Lease by mortgagor — Property leased subsequently mortgaged by usufructuary mortgage — Lease-money, held, should be included in accounting to the credit of mortgagor as mortgagee being in position of proprietor was bound to collect rent.)]

11. AIR 1936 Lah 42 (44) (DB), (Fact that mortgagor had granted the lease does not free mortgagee from his responsibility) ** (1684) 23 ER 453 (453) 1 Vern 258, Bucks v Gayer (Mortgagor recovering judgment in execution against tenant but refusing to take out execution — He must answer for the profits as in a case of wilful default.)

12. (1889) 42 Ch D 237 (245) 38 WR (Eng) 82 58 LJ Ch 855 61 LT 741

ordinarily a source of income A mortgagor of land on which there are *sindi* trees cannot, therefore claim any profits on account of *tadi*, which it is possible to tap from the trees, though he can claim the lease money if it is proved that the trees were actually leased in any year, or the income, if the mortgagee tapped from personally **(13)** See also the undermentioned case.**(14)**

Where the mortgagor himself is in occupation as lessee**(15)** or as agent**(16)** and has obstructed the mortgagee from making the best use of the property, the mortgagee cannot be held accountable on the basis of wilful default The reason is, where the party seeking relief is the sole guilty party, the Courts of Equity will leave him to the consequences of his own inequity and will decline to assist him to escape from them **(17)** In the undermentioned cases,**(18)** however, where the mortgagee obtained a decree for rent against the mortgagor, but allowed the decree to be barred by limitation, the rule of liability for wilful default was applied

It has been held in the case noted below**(19)** that a mortgagee entitled to possession and allowing the mortgagor to be in possession will, as against subsequent encumbrances, be charged with profits.

A mortgagee is not liable for his failure to make illegal collections **(20)**

8. Clause (c).

Under this clause the mortgagee in possession is bound to pay—

(a) the Government revenue;

(b) other charges of a public nature;

(c) all rent accruing due in respect of the mortgaged property during his possession, and

(d) any arrears of rent in default of payment of which the property may be summarily sold

The obligation imposed by the clause extends to making these payments only *out of the*

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13. AIR 1923 Nag 137 (139) (Mortgage with possession of waste land containing about 1000 sindi trees)

14. AIR 1929 All 260 (263) (DB)

15. 1951 Raj LW 9 (10) (DB) (AIR 1940 Lah 333 Relied on) ** AIR 1943 Mad 62 (64) ILR (1943) Mad 430 (DB) (Liability to account on the footing of wilful default under S 76(b) arises only when the mortgagee takes actual possession and control over the property The rental agreement notwithstanding, the mortgagee is deemed not to take possession of the mortgaged property so as to charge him with a liability for the uncollected rents and profits) ** AIR 1937 All 762 (763) (DB) (Mortgagor failing to pay rent which he was liable to pay under the lease to mortgagee) ** AIR 1940 Lah 333 (334) ILR (1940) Lah 658 (DB)

[**See also** 1951 All LJ 328 (330) (The words "the net profits which with the exercise of ordinary diligence might have been realized" by a mortgagee occurring in S 9(1) U P Debt Redemption Act, 1940 are inapplicable to a case where non realisation of the profits is occasioned by the act of the mortgagor himself)]

16. AIR 1937 Bom 483 (488) (DB)

17. Story, Equity Jurisprudence, Section 697 (Cited in 11 Bom 708 (718)

[**See also** 1951 All LJ 328 (331) (Case under S 9 U P Debt Redemption Act — Mortgagor-lessee held could not take advantage of his own default in making payment of rent and say that if mortgagee had enforced his rights and had exercised diligence he might have realised the money.)]

18. AIR 1951 Bom 19 (22) ILR (1951) Bom 209 (DB) (Mortgagee however was held entitled to stipulated amount of interest) ** AIR 1919 Mad 59 (61) 41 Mad 1043 (DB)

19. (1684) 23 ER 463 (463) , 1 Vern 270, Copping v Cooke.

20. AIR 1917 Oudh 141 (142) (Mortgagee held not liable to recover bhet from the tenant which the Courts did not recognize.)

income of the property As long as the income is sufficient to meet these, the mortgagee must make the payments out of that income and cannot add the payments to the principal money under S. 72, clause (b). If the income does not permit of such payment, he can add these payments to the principal money under that section.(1)

The provisions of the clause are not, however, absolute but are subject to a *contract to the contrary, and if the mortgagor, by such a contract, agrees to make these payments, this clause has no application.*(2)

A mortgagee who has paid rent of the mortgaged land is entitled to be reimbursed at the time of redemption if there is a contract to that effect.(3)

This clause is not referred to in S 77 Therefore even where there is a contract between the mortgagor and the mortgagee that the receipts of the mortgaged property shall be taken in lieu of interest or in lieu of interest and a defined portion of the principal, the mortgagee is liable to make payments under this clause unless there is a contract to the contrary within the meaning of this clause (4) The contrary view taken in the undermentioned case(5) is, it is submitted, not correct Neither this section nor S. 77 was referred to in the discussion of the question.

(A) Government revenue and other public charges.

As seen above the mortgagee in possession is bound, in the absence of a contract to the contrary, to pay out of the income of the property, the Government revenue and other public charges in respect of the mortgaged property (6) The law in this respect was the same even before the

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Section 76 — Note 8

1. AIR 1951 Nag 254 (254) ILR (1950) Nag 862 ** AIR 1919 Oudh 50 (53) 22 Oudh Cas 270 (DB) (Permission given by S 72(b) must be read subject to the obligation imposed by S 76(c).) ** **AIR 1924 PC 102 (106) : 51 Ind App 157 : 27 Oudh Cas 72.**

   [**See however** (1909) 2 Ind Cas 469 (471) (DB) (Bom) (Where a mortgage is with possession and profits are to be enjoyed in lieu of interest, the mortgagee is entitled to add to the mortgage-debt any amount paid by him as local cess which when the mortgage was passed, had not been imposed upon the mortgaged property and was not within the contemplation of the parties)]

2. AIR 1957 Pat 717 (719) (DB) ** (1907) 17 Mad LJ 517 (518) ** AIR 1916 Mad 1069 (1070) (DB) ** AIR 1934 All 888 (889) ** AIR 1916 Mad 859 (861, 862) 38 Mad 18 (DB) (Where the mortgagor has, by the terms of the mortgage, personally covenanted to pay the municipal taxes for the property and the same was paid by the first mortgagee the latter cannot claim to enforce it from the puisne encumbrancer.)

   [**See also** (1898) 20 all 401 (408) (DB) (Where the obligation to pay the Government revenue is, under the instrument, on the mortgagor, if the mortgagor does not pay it and the mortgagee had to pay it in order to protect the mortgaged property the mortgagee is competent under S. 72 to add the money so paid to the principal money — But where the mortgagee, under such circumstances, is also entitled to sue the mortgagor on his covenant in the deed of mortgage for the amount paid for the mortgagor, and the mortgagee elects to pursue this remedy, the remedy given to him by S 72 is not available, the two remedies not being concurrent) ** 1881 All WN 66 (66, 67) (DB) (Where mortgagor agrees to pay the land revenue and the mortgagee in possession is obliged to pay it, he can recover it as part of the mortgage-money with interest) ** 1881 Bom PJ 195 (DB) (Do)]

3. AIR 1972 Pat 183 (185).

4. AIR 1940 Pat 579 (580).

5. AIR 1923 All 433 (434) : 45 All 388 (DB).

6. AIR 1956 Trav-Co 49 (50) (Liability of sub mortgagee arises under S 76(c) on account of his default to pay the revenue taxes) ** ILR (1951) Trav-Co 282 (288) (DB) (The normal rule is that the mortgagee should pay the tax) ** AIR 1922 Oudh 91 (92) 25 Oudh Cas 2 (DB) ** AIR 1936 Mad 752 (757, 768) (DB)

passing of the Transfer of Property Act (7) Government revenue due upon *other lands* but covered by the *same pattah* as the mortgaged property is revenue due upon the mortgaged land and, consequently, the mortgagee in possession is bound to pay it in the absence of a contract to the contrary.(8)

Where a mortgage deed provided that the income of the property after deducting the revenue should be taken in lieu of interest, it was held that the mortgagee was bound to pay the revenue by the terms of the mortgage whether there was any profit or loss. If the usufruct exceeded the interest he was to take it without any reduction of the principal and equally he was bound to credit himself with the interest and pay the revenue if there was a loss (9)

The mortgagee is bound to pay not only the Government revenue etc., which had already been imposed before he entered into possession but which became due after he entered into possession,(10) but also the revenue that might be imposed for the first time during his possession (11) or enhanced during the continuance of such possession unless there is a contract to the contrary by which the burden of the enhancement is to fall on the mortgagor (12) The question whether there is

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[**See also** 1959 Ker LR 244 (DB) (Mortgage-deed providing that mortgagee should pay only tax — Thiruppuvaram is not tax but payment to jenmi — Mortgagee not liable to pay it to Government.) ** AIR 1949 All 681 (683) (Mortgagee in possession — Rent to be set off against principal and interest — Mortgagee paying municipal taxes — Mortgagee is entitled to recover amount to be paid from mortgagor.) ** AIR 1936 Pat 312 (313) (Mortgagee in possession paying municipal taxes — Rent agreed to be set off against principal and interest — Mortgagee is entitled to set off municipal taxes in mortgage account.)]

7. **AIR 1924 PC 102 (106) : 51 Ind App 157** ** AIR 1940 Pat 627 (629) (DB) ** AIR 1926 Mad 405 (406).

8. AIR 1915 Mad 481 (482) (DB)

[**But see** 1890 Bom PJ 211 (DB) (Case before the Act was extended to Bombay — Payment of cesses on land other than those included in the mortgage — Mortgagee is not entitled to debit it against the mortgagors.)]

9. AIR 1914 Nag 16(17) : 10 Nag LR 9.

Also see S. 77, Note 1.

10. AIR 1919 Oudh 50 (53) : 22 Oudh Cas 270 (DB)

[**See also** 1963 Mys LJ (Sup) 1 (6) (Public charges for period earlier to mortgage — Mortgagee not liable to pay such arrears.)]

11. AIR 1919 Oudh 50 (53) : 22 Oudh Cas 270 (DB)

12. AIR 1943 Mad 627 (629) : ILR (1944) Mad 254 (DB) (Held on the facts of the case that there was no contract to the contrary and therefore revenue enhanced during Kanomdar's possession was payable by the Kanomdar and not the Jenmi.) ** AIR 1926 Mad 405 (405) ** (1910) 7 Ind Cas 871 (873) (DB) (Mad) ** (1912) 14 Ind Cas 590 (591) (DB) (Mad) (Letters Patent Appeal from 12 Ind Cas 140.) ** AIR 1919 Oudh 50 (52, 53) : 22 Oudh Cas 270 (DB) (Where the parties intended that the mortgagee was to pay the revenue as assessed at the date of the mortgage deed and not the revenue as it might be assessed in future after a fresh settlement there is a contract to the contrary and the mortgagor must pay this extra revenue out of his own pocket.) ** AIR 1925 Oudh 678 (681) (Under a contract contained in the mortgage deed the liability for the enhanced revenue rested with the mortgagor.) ** (1909) 4 Ind Cas 1140 (1140) (Mad) ** (1907) 18 Mad LJ 31 (33) (DB) (It is on the mortgagee to prove a contract to the contrary in order to escape liability.) ** AIR 1932 Mad 154 (154) (The provisions of a mortgage bond must be read in the light of the general liability which the law casts on the mortgagee.) ** AIR 1916 Mad 127 (130) (DB)

[**See also** AIR 1954 Trav Co 251 (252) (Mortgage executed during pendency of suit by jenmi for enhancing mischavaram — Mortgagor and mortgagee are bound by decree in the

such a contract to the contrary must depend on the facts of each case **(13)** Where a mortgage deed provided that the mortgagee should pay a *specified sum* as Government revenue and appropriate the balance towards interest and the revenue was increased during his possession, it was held that it was clearly the intention of the parties that the income, less the specified sum, should go towards interest; that there was contract to the contrary within the meaning of this clause and that the mortgagor was liable to pay the enhanced portion of the revenue.**(14)** For other illustrations where the mortgagor was held liable to pay the enhanced revenue, see the undermentioned cases.**(15)**

Where, on the other hand, the mortgagee agreed to pay the Government revenue and take the balance himself but the amount of revenue was not specified and the possibility of the enhancement of revenue was within the contemplation of the parties, it was held that the mortgagee was liable to pay the enhanced rvenue.**(16)** So also, in another case,**(17)** where the mortgage-deed provided that the mortgagee will pay the revenue, Rs 68, to the Government and take the balance of the profits in lieu of interest so long as the mortgage lasted, it was held that the reference to Rs. 68 was not a considered reference to a specific sum of money which (and no more) was to be paid to Government, but that it was the intention of the parties that the mortgagee was to enjoy the *net profits* after payment of revenue and that therefore he was liable to pay the enhanced revenue. For other illustrations, where the mortgagee was held liable to pay the enhanced revenue and public charges, see the undermentioned cases.**(18)**

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suit — On principle recognised in S 76 mortgagee is bound to pay enhanced michavaram - He cannot claim compensation from mortgagor on account of enhancement.) ** (1912) 16 Ind Cas 184 (186) (Mad) (DB) (Where the kanom tenant is liable to pay the actual Government revenue during the period of his holding, he is liable to pay the enhanced assessment (Quaere — Whether S 76 of the T P Act is applicable to the determination of the liability of a kanom tenant in Malabar.)]

[**But see** (1906) 8 Bom LR 350 (353, 354) (DB) (Apart from special stipulation,a mortgagee is under no liability to pay assessment as between himself and his mortgagor)]

13. AIR 1914 Nag 16 (17) 10 Nag LR 9 ** AIR 1915 Mad 100 (101) ** (1907) 18 Mad LJ 31 (33) (DB).

14. (1910) 8 Ind Cas 845 (846) (DB) (Mad) ** (1902) 14 Mad LJ 488 (489) (DB) ** (1907) 17 Mad LJ 517 (518) ** AIR 1915 Mad 100 (101).

15. AIR 1917 Oudh 16 (18) (DB) (Where a condition in a usufructuary mortgage deed was that if owing to an enhancement of Government revenue the profits of the mortgaged property became less than Rs 252, the mortgagor must make good the deficiency in profits at the time of redemption, it was held that the mortgagee was entitled to claim the difference between original revenue and the enhanced revenue only if the mortgagee could show that the profits had become less than Rs 252 but not otherwise) ** 1931 Mad WN 595 (599) (Where the rents and profits are previously ascertained and their appropriation is definitely arranged by the deed of mortgage, any other payment out of them which would vary that method of appropriation is to be inferred not to have been contemplated; in other words, there is as regards such other payments (increase in the land revenue) a contract to the contrary.)

16. AIR 1917 Oudh 186 (187)

17. AIR 1917 Oudh 212 (213, 214)

[**See also** AIR 1932 Mad 154 (154) (Provisions of the bond must be read in the light of the general liability which the law casts on the mortgagee.)]

18. AIR 1914 Mad 151 (151) (DB) (Under a kanom the kanomdar agreed to pay the jenmi a certain fixed rent after deducting the interest on the kanom amount and the Government revenue payable — The Government revenue was increased — Held that the kanomdar must pay the increased assessment himself as the kanom deed gave him a right to the increase in the income of the property) ** **(1910) 32 All 612 (619) : 37 Ind App 182 (PC).** (Under the terms of a mortgagee the mortgage was to pay the Government revenue — The

Takavi advance granted to the mortgagor is a charge of a public nature and a mortgagee during whose possession it accrues due is bound to pay it in the absence of a contract to the contrary.(19)

Possessary mortgage of Inam land was executed The land was resumed by the State The mortgagee intentionally did not pay the occupancy price in time but paid subsequently and obtained re-grant in his name from Government Thus he gained advantage in derogation of the right of mortgagor Held that the benefit obtained by the qualified owner, the mortgagee will enure to or for the benefit of the mortgagor. The right to redeem will subsist notwithstanding any sale or forfeiture of the right of the mortgagor.(20)

(B) Rent.

Where the mortgaged property is leasehold property the mortgagee in possession is bound to pay the rent accruing due during the period of his possession (21) The words "and all rent" were inserted by the amending Act 20 of 1929 The amendment, however has not effected any change in the law Even under the law before the amendment it was the duty of a mortgagee in possession to pay the rent From the provisions of S 65, Cl (d) which required the mortgagor to pay the rent so long as the mortgagee was not in possession, it was clear that the Legislature had cast upon the mortgagee in possession the duty to pay the rent.(22)

Though the mortgagee in possession is bound to pay rent to the lessor under this clause the liability is, as has been seen in Note 1, only as *between the mortgagor and the mortgagee* the clause does not give the lessor any right to recover rent directly from the mortgagee (23) Nor can the lessor recover such rent from the mortgagee under the general law inasmuch as there is no *privity* of any kind between the lessor and the mortgagee of leasehold interest In order to create a privity of estate between them there must be *an absolute assignment* of the lessee's interest in favour of the mortgagee The mere fact of execution of mortgage and the taking of possession by the mortgagee is not sufficient to create such privity (24)

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bond provided that if the Government revenue be enhanced or decreased the mortgagor would be liable for it — Held, the mortgagor by this clause had not agreed to pay the enhanced revenue year by year separately — But the intention of the parties was that if the Government revenue was increased the mortgagor would be entitled to less by way of Malikana.) ** AIR 1919 All 74 (76) (DB) (Mortgagee entitled to deduct amount of enhanced revenue from malikana payable by mortgagee to mortgagor — Enhanced revenue exceeding amount of malikana — Excess of enhancement held could not be added to principal inasmuch as enhanced revenue implied enhanced rent which mortgagee would appropriate to himself)

19. AIR 1951 Nag 254 (254) ILR (1950) Nag 862 ** AIR 1916 Bom 108 (109) 40 Bom 483 (DB)

20. 1997 (2) Scale 741 (746).

21. AIR 1952 Pat 286 (288) 31 Pat 365 (DB) (Mortgage of holding with possession — Deed of mortgage silent as to liability to pay rent to landlord — Mortgagee is liable) ** (1878) 2 Cal LR 323 (324, 325) (DB) ** AIR 1918 Oudh 286 (287) , A usufructuary mortgagee of under proprietary plots is bound under S 76 of the T P Act to pay to the superior proprietor the rent due in respect of those plots and is therefore not entitled to recover it by way of contribution from the mortgagor under S. 69.)

See also the Report of the Special Committee.

Also see S 108(j), Note 4.

22. AIR 1938 Pat 196 (198) (DB).

23. ILR (1938) 1 Cal 21 (33) (DB) ** AIR 1925 Bom 330 (330) ** AIR 1941 Mad 401 (401)

24. AIR 1934 Bom 134 (136) : 58 Bom 327 (FB) (29 Bom 391 (DB) **Overruled;** 5 Bom LR 118 (DB) must also be held to be impliedly **Overruled.)** ** ILR (1938) 1 Cal 21 (33) (DB)

(C) Arrears of rent.

The mortgagee in possession is bound to pay only the arrears of rent in default of payment of which the mortgaged property will be liable to be *summarily* sold **(25)** It has been held that the word "summarily" indicates that the proceedings for realization of rent by sale of the property are of a summary nature as, for instance, in the case of a certificate proceeding under the Public Demands Recovery Act: and that it is not meant to apply to cases where sales are held under the provisions of the tenancy law according to which the property itself and not merely the right, title and interest of the mortgagor will pass.**(26)**

There is a difference of opinion on the question as to whether the mortgagee in possession is liable to pay only the arrears of rent that have accrued due during his possession or even the arrears of rent accrued due before his taking possession. According to one view,**(27)** he is liable to pay only the arrears of rent which have fallen due during his possession, while according to the undermentioned cases**(28)** he is liable to pay the arrears of rent even for a period prior to his possession. It is submitted that the latter view is to be preferred. No doubt S. 65, clause (d) imposes on the mortgagor the duty of paying rent for the period during which the mortgagee is not in possession and hence it may be said that the mortgagor is liable for the payment of arrears of rent for that period, but the liability to pay such arrears seems to have been purposely imposed on the mortgagee in possession who is in receipt of the income of the property, so that the property may not be summarily sold away. Otherwise there seems to be no reason for making provision, in the clause, for payment of arrears of rent if they are to be taken to be limited to the period of the mortgagee's possession when the mortgagee has been already made liable for the payment of rent for that period

(D) Failure to make payments.

When the mortgagee in possession being bound to pay the rent or the revenue fails to pay the same and the mortgagor is obliged to pay it himself, the mortgagor, in the redemption suit, can ask for the account which would debit the mortgagee with the amount paid by the mortgagor.**(29)** It is also open for him to realize the sum by a separate suit based on S 69 of the Contract Act.**(30)** He

** AIR 1925 Bom 330 (330, 331) (The mortgage in this case was by way of absolute assignment) ** AIR 1928 Nag 147 (148) (Voluntary payment of rent by mortgagee to landlord would not per se fasten liability on mortgagee to pay rent to landlord) ** (1894) 17 Mad 296 (297, (297 298) ** (1884) 10 Cal 443 (444) (DB) ** AIR 1918 Mad 425 (426) 40 Mad 1111 (DB) ** (1885) 12 Cal 185 (189) (DB) ** AIR 1927 Cal 725 (729) 54 Cal 813 (DB) ** **AIR 1934 Bom 134 (136) (FB).** (ILR 29 Bom 391, **Overruled.**)

Also see S 58, Note 38.

25. AIR 1938 Pat 196 (198) (DB)

26. AIR 1958 Pat 649 (651) (DB) (Section contemplates arrears of rent for the lands in mortgage and not for those which are outside the mortgage) ** AIR 1938 Pat 196 (198) (DB)

27. 1956 BLJR 495 (497) ** AIR 1938 Pat 196 (198) (DB).

[**See also** AIR 1925 All 189 (190) (Mortgagee is bound to pay rent on mortgaged property accruing after mortgage.)]

28. AIR 1951 Orissa 300 (301) ILR (1949) 1 Cut 121 (DB) (A statutory mortgagee of property such as one under S 225, Orissa Tenancy Act, is under same obligation as a usufructuary mortgagee under S 76(c) of this Act) ** AIR 1919 Cal 309 (311), (11 Mad 234, Relied on.)

29. AIR 1943 Oudh 433 (434) 19 Luck 286 (There is nothing to restrict this period to that for which accounting may be confined under S 30, U P Agriculturists' Relief Act) ** AIR 1927 All 713 (713) ** 1900 All WN 134 (135) (DB) ** (1884) 6 All 303 (308) (DB) ** AIR 1927 Mad 59 (59)

30. AIR 1955 Mad 265 (266) ** AIR 1927 All 713 (713) ** 1900 All WN 134 (135) (DB)

can also claim interest on such amount **(31)** It has been held that where the mortgagor is *not forced to pay* the amount of rent unpaid by the mortgagee but *voluntarily* pays it to the lessor, the mortgagor would be entitled to obtain a money decree for three years' rent only, against the mortgagee under S 70 of the Contract Act, that he cannot claim an amount under the last paragraph of this section there being no loss occasioned to him, and that he cannot claim interest on such amount.**(32)** Where the mortgage provided that the mortgagee was to appropriate, in lieu of interest, the balance of the profits remaining after payment of rent to the lessor, and that mortgagor was to redeem on payment of the principal, the mortgagee escaped paying rent for several years, it was held that the mortgagee, and not the mortgagor, was entitled to the benefit of such non-payment and that the mortgagor could not claim a reduction of the principal **(33)** It was observed in the undermentioned case**(34)** that the utmost that the mortgagor could be allowed to claim was that he should be indemnified against the contingency of a valid claim for arrears of these payments being made against him after his recovery of possession.

Where the mortgagee allows the property to be sold in default of payment of Government revenue, etc , and himself becomes the purchaser in the revenue sale, the sale does not deprive the mortgagor of his right to redeem**(35)** under S 90 of the Trusts Act, 1882, the mortgagee purchaser holds the land so purchased for the benefit of the motgagor, subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee So also where the property is sold to third person due to failure of mortgagee to pay the land revenue by operation of last para of S. 76, the mortgagor is entitled to the accounting of the loss occasions to it At best in such case, the question purchaser, on redemption would look to the mortgagee who had committed default in terms of mortgage and the court would give suitable directions in that behalf the posses

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31. AIR 1927 Mad 59 (59)

32. AIR 1940 Pat 579 (580, 581)

33. AIR 1954 Trav-Co 53 (55) ILR (1953) Trav Co 835 (DB) (Mortgagee to pay Sirkar tax and michavaram to jenmi — Jenmi's inaction to recover — Claim for michavaram barred — It enures for the benefit of mortgagee and not mortgagor) ** 19 (1) 10 Ind Cas 1, 3 (113, 114) (All) ** AIR 1929 Pat 37 (39) 7 Pat 44 (DB) (Mankana) ** AIR 1941 Mad 549 (550) (DB) (AIR 1940 Mad 686 **Reversed.**) ** AIR 1920 Pat 66 67 ** AIR 1934 Cal 149 (150) (DB).

34. AIR 1929 Pat 37 (39) : 7 Pat 44 (DB)

35. AIR 1959 Ker 178 (179) (DB) ** AIR 1959 Ker 94 (97) (DB) (Property sold in revenue sale and purchased by mortgagee — Mortgagee holds the same for benefit of mortgagor ** AIR 1958 Ker 230 (235) (DB) ** 1956 Ker LT 322 323 324) ** AIR 1956 Orissa 61 (63) ILR (1955) Cut 697 (DB) ** AIR 1954 Mad 144 (147) ILR (1955) Mad 425 (DB) (It is wholly irrelevant whether transaction is profitable or not) ** AIR 1952 Pat 42 (424 (DB) (Mortgagees, if they have defaulted in payment of rent cannot take advantage of any such default to purchase the property in the name of a person who has been established to be a benamidar of the mortgagees) ** AIR 1952 Trav Co 53 (56) (DB) (Mortgage of kanom right — Mortgagee undertaking to pay Government revenue and jenmi's dues Default in payment of jenmi's dues — Decree in suit by jenmi Execution sale of kanom right — Purchase by mortgagee benami in another's name Redemption by kanomdar Benefit must go to mortgagor) ** AIR 1951 Nag 254 (254 255) ILR (1950) Nag 862 ** AIR 1951 Orissa 300 (306) : ILR (1949) 1 Cut 121 (DB). **(Rent sale.)**

[See also AIR 1966 SC 126 (127) : (1966) 1 SCR 158. (Mortgagee agreeing to pay a portion of rent of entire holding and mortgagor agreeing to pay balance — Default by mortgagor in payment of rent payable by him — Mortgagee paying almost entire rent payable by him and defaulting payment of trifling sum — Rent sale and purchase by mortgagee — *Held*, S 90 and Illus (c) of Trusts Act not attracted — Suit by mortgagor for redemption held was liable to be dismissed) ** 1963 Mys LJ (Sup) 1 (6) (Before principles of S 90 of Trusts Act can be invoked, it must be shown that the advantage gained by mortgagee is refereable to some act or omission which as mortgagee he was under duty to refrain from

sion of the purchaser must be on behalf of the mortgagee and becomes liable to accompanying etc.(36) See also the undermentioned case.(37)

9. Clause (d).

This clause imposes on the mortgagee in possession the liability to make such *necessary* repairs of the mortgaged property as can be done out of the balance remaining after deducting from the rents and profits the payment mentioned in clause (c) and the interest on the principal money To the extent of this balance his liability to make necessary repairs is paramount (1) If loss is caused to the mortgagor by his failure to make such necessary repairs it may be debited against the mortgagee in the accounts to be taken in the settlement of the mortgage (2) He is, however, not bound to spend money any further than to keep the estate in necessary repairs (3) Nor is he bound, where the expenditure on the necessary repairs is likely to exceed the balance in his hands, to spend money out of his own pocket (4) If he does spend money out of his own pocket he cannot claim repayment

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** AIR 1960 423 (423) (Default by mortgagee in payment of portion of rent — Sale of property and purchase by landlord — Subsequent settlement with mortgagee — Mortgagee gaining advantage under S 90 Trusts Act — Mortgagor has right to redeem) ** AIR 1957 Andh Pra 430 (432). (Mortgaged property sold for arrears of revenue owing to default of mortgagee and purchased by stranger Latter selling it to mortgagee — Mortgage is revived and can be redeemed by mortgagor) ** AIR 1957 Pat 452 (454) (DB) (Tauzi being joint estate of several co-sharers — Other co-sharers failing to pay revenue upon their shares — Failure occasioning sale - Purchase by mortgagee — *Held* mortgagee not bound to pay revenue due upon shares not mortgagee — *Held*, mortgagee not bound to pay revenue due upon shares not mortgaged to her — Mortgage held extinguished by revenue sale) ** AIR 1953 Mys 114 (120) ILR (1951) Mys 503 (DB) (Payment of taxes is duty of mortgagee — He cannot affect right of mortgagor by purchasing property at a sale for such taxes.)]

[See however AIR 1957 Pat 136 (137) (Tenant mortgaging his property with possession — Mortgagee in possession bound to pay rent — Default — Holding brought to sale and purchased by landlord — Later property came into hand of original mortgagee — Mortgagee not entitled to redeem unless fraud is proved.)]

See also Section 60, Note 23.

36. AIR 1995 SC 1743 (1744) : 1995 AIR SCW 2734 : 1995 Supp (2) SCC 574.

37. AIR 1967 Ker 49 1966 Ker LJ 760 (2) (If there is a default on the part of the mortgagee in paying michavaram and renewal fee for Jenmi and the Jenmi recovers possession of the property and the mortgagee gets possession under a fresh lease from the Jenmi the mortgagor will be entitled to redeem and the fact that the mortgagor was impleaded by the Jenmi in his suit would not affect this right) ** AIR 1956 Trav-Co 49 (50) (Damages consequent on the failure of the mortgagee to fulfil his covenant to pay revenue dues in proper time is one of the items of accounting available to the mortgagor as against the mortgagee at the time of redemption and it does not matter that recovery on redemption has become impossible by virtue of loss of the mortgage holding during the interval, on account of the default of the mortgagee — No doubt the mortgagor could come in with claim for damages as soon as he is aware of the loss of the holding.)

Section 76 — Note 9

1. (1892) 15 Mad 290 (291) (DB).

2. (1892) 15 Mad 290 (291) (DB) *But he is not liable for deterioration which in the ordinary way may take place notwithstanding repairs, see* · (1836) 160 ER 335 (337) 6 LJ Ex Eq 38, Wragg v. Denham ** (1792) 145 ER 811 (811), Russell v. Smithies

3. AIR 1958 Mys 20 (23) ILR (1957) Mys 100 (He cannot effect constructions thereon) ** (1747) 26 ER 1098 (1099) · 3 Atk 517, Godfrey v. Watson.

4. (1967) 11 Law Rep 767 (775) (Mys).

See the Report of the Special Committee (1753) 160 ER 1136 (1136) . 4 Y & C Ex 570, Richards v. Morgan.

from the mortgagor under this clause but will be allowed to add the expenditure to the principal money under S 72, clause (b) if it is incurred for the preservation of the property from destruction.(5) Thus, the authority of mortgagee to make repairs is restricted to the net income from property meaning thereby that he can make repairs only from the amount out of rents and profits from property after deducting interest on the principal amount (6)

Any work by way of protection and maintenance of fruit trees on the mortgaged property which is only an ordinary operation of husbandry, does not call for any payment of compensation under the Kerala Compensation for Tenant's Improvements Act (7)

Under the English law a mortgagee in possession is allowed the expenses of necessary repairs under the head of "just allowances" in the accounts taken under the decree in a redemption suit (8)

The repairs which the mortgagee is bound to make must be *necessary*. Where the mortgagee in possession laid water-pipes in the house mortgaged to him and claimed credit for the money spent therefor, it was held that the act of the mortgagee was not a *necessary repair* and that consequently he was not entitled to be credited with the amount so spent (9)

Expenditure incurred in preserving the irrigation system of a zamindari has been held to be for keeping the property under repairs.(10)

The provisions of this clause, like those of clause (c), are not absolute but are *subject to a contract to the contrary*. Thus, where a mortgage bond contained an agreement between the parties on the matter of repairs, it was held that the Court was not competent to go outside the mortgage-bond in deciding on the matter.(11)

There is no contradiction between the provisions of this clause and clause (h) of this section as this clause is concerned only with making it obligatory on the mortgagee, in the absence of a contract to the contrary, to carry out necessary repairs to the property and limiting the amount which can be spent by him for carrying out the necessary repairs and not with the question of priorities.(12)

A mortgagee is bound to inform the mortgagor immediately by notice about the trees being cut and removed. If he is not informed he is liable for the value (13)

10. Clause (e).

A similar provision is made in S 66 for a mortgagor in possession and in S 108 clause (o) for a lessee. The clause in short means that the mortgagee in possession must not commit waste on

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5. AIR 1929 All 777 (778) (DB)
6. 1985 Guj LH 741 (745)
7. 1969 Ker LT 76 : 1969 Ker LJ 440.
8. (1877) 7 Ch D 192 (195) 47 LJ Ch 152, Tipton Green Colliery Co v Tipton Moat Colliery Co.

   [See also (1843) 49 ER 820 (821) 6 Beav 246 12 LJ Ch 309 Sandon v Hooper (Mortgagee in possession will be allowed for repairs necessary for the support of the property)]
9. AIR 1914 Mad 151 (152) (DB).
10. AIR 1916 Pat 96 (96) : 1 Pat LJ 589 (DB).
11. AIR 1960 Mad 24 (27) (Preservation of property — Mortgaged house in ruined condition — Covenant by mortgagor to pay costs of repairs carried out by mortgagee — Mortgagee incurring expenditure in repairs greatly enhancing value of property — Mortgagee entitled to cost of works along with mortgage money) ** AIR 1950 Kutch 74 (74) (Under mortgage-deed mortgagee to get repairs costs — Mortgagee entitled to costs incurred for preservation of house in its original condition — Mortgagee held entitled to such special costs) ** (1881) 5 Bom 127 (129) (DB).
12. AIR 1968 SC 250 (252, 253).
13. 1970 Ker LT 149 : 1969 Ker LR 950.

the property (1) This duty follows from his duty to manage the property as a person of ordinary prudence would manage if it were his own(2), and from his liability to return the property back to the mortgagor on redemption, in the same condition in which he received it (3) It is a well understood, though implied, term of every usufructuary mortgage, or even a lease, that a garden land should not be converted into a desert, by cutting all the trees, or a wet land denuded of all its fertility by continuous cultivation without manuring.(4) No reasonable mortgagor will contemplate the garden land being handed back to him after the period of 60 years, when the usufructuary mortgage is over, with no trees whether on the ground that all the trees existing on the land mortgaged had died or had fallen down.(5)

A specific clause in the mortgage is not required for delivering back the land in its original state by planting substitute trees in the place of the existing trees, and it is required only to support an alleged right for not planting substitute trees and delivering back the land with no trees (6) Where a mortgagee of a garden with arecanut trees on it plants substitute trees for those lost by age, he cannot claim compensation for them on the expiry of the mortgage (7) (See also Notes on S. 63A).

Subject to these restrictions he is entitled to use the property in any way he pleases (8) Thus he can grow any crop he can on the land and cut it away before the land is handed over to the mortgagor (9) Similarly, if he has planted trees on the land, he is entitled to remove them before handing over the land to the mortgagor(10). But as seen above, he will be committing waste if he

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Section 76 — Note 10

1. AIR 1955 Cal 569 (571) (DB) ** (1954) 2 Mad LJ 665 (666) ** AIR 1932 All 500 (502) (DB) (Felling unripe timber — The mortgagee can take wood of a tree falling from natural causes.)

   [See also AIR 1960 Ker 298 (299, 300) (DB) (Case before T P Act was applied to Travancore — Mortgagee in possession is liable in damages for active waste but for permissive waste only if he is grossly negligent) ** 1960 Ker LJ 1435 (1437) (DB) (Land with building thereon mortgaged — Burden is on mortgagee in possession to prove that building on mortgaged land ceased to exist due to natural causes and not due to his gross negligence) ** AIR 1946 Oudh 101 (102) 21 Luck 43 (DB) (Under T P Act possessory mortgagee has a right to build upon the land provided that it does not amount to waste) ** (1725) 25 ER 205 (206) : Cas Temp King 30, Withrington v. Banks.]

2. AIR 1925 All 576 (577) (A duty is cast on the mortgagee to see that the property is not lost by any encroachment) ** AIR 1924 All 153 (155) 46 All 115 (DB).

3. AIR 1963 Ker 261 (263) (Kompura at time of mortgage — Same not existing at time of redemption — No evidence that same fell down due to natural causes — Mortgagee is liable to pay damages for the Kompura to the mortgagor) ** AIR 1924 All 153 (155) 46 All 115 (DB) (Mortgagee granting occupancy rights on mortgaged land — Land cannot be so valuable to mortgagor-landlord as it was before those rights came into existence) ** AIR 1925 All 576 (577).

   [See AIR 1926 All 463 (464) (In a suit for redemption a mortgagee cannot be allowed to set up occupancy rights.)]

   [See also (1868) 9 Suth WR 488 (488) (DB) (The mortgagee must use the mortgaged premises as liable to become the property of the mortgagor)]

4. (1954) 2 Mad LJ 665 (665).

5. (1954) 2 Mad LJ 665 (666)

6. (1954) 2 Mad LJ 665 (666).

7. (1954) 2 Mad LJ 665 (666).

8. AIR 1925 All 576 (577) ** AIR 1925 All 794 (794).

9. AIR 1935 All 794 (794).

10. AIR 1926 Bom 595 (596) 50 Bom 692 (DB) ** AIR 1925 All 794 (794)

cuts down trees already existing on the land(**11**) or pulls down the property(**12**) The cutting of bamboos amounts to *saver* produce just like the cutting of jungle which requires to be cut periodically for its proper growth and in such a case the mortgagee in possession does not commit waste by cutting bamboo clumps planted by the mortgagor provided he shows that the bamboos were at the time when they were cut, of a mature age and ripe for cutting (**13**)

Where the land mortgaged is not agricultural land, it cannot be said that its utility is injured by the roots or stumps of trees planted by the mortgagee (**14**) Grant of a lease by the mortgagee in possession which is to enure beyond the redemption of the mortgage defeats the right of the mortgagor to khas possession and is an act which comes within the prohibition of this clause(**15**). (See also Note 6).

The mortgagees must not only not himself commit any act which is destructive or permanently injurious to the property but must not allow others also to do so (**16**) Thus where *A* the owner of a house having a door which gave communication between one half of the house and the other, mortgaged the two halves to different persons *B* and *C* after closing the door and subsequently B opened the door, it was held that the opening of the door was destructive of the property as it materially altered the condition of the house in which the mortgage *A* considered it to be most useful and that *C* the other mortgagee could institute a suit against *B* in order to have the door closed and restored to the condition in which it was when he entered on the property as a mortgagee.(**17**)

In the undermentioned case,(**18**) *A* mortgaged his house with possession to *B* *B* leased back

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11. (1954) 2 Mad LJ 665 (666) ** AIR 1946 Oudh 106 (108) 2 Luck 48 (Mortgaged property containing forest of babul trees — Cutting a babul tree by mortgagee amounts to an act of waste) ** AIR 1926 Bom 595 (596) 50 Bom 692 (DB) ** AIR 1919 Oudh 125 (125 126) ** (1725) 25 ER 205 (206) Cas Temp King 30 Withrington v Banks (Cutting timber)

[See AIR 1924 All 153 (154) : 46 All 115 (DB)]

[See also AIR 1936 Oudh 130 (131) (DB) (Mortgagee planting new trees to replace those which fell down — No injury to property — Cultivation of portion of grove enhances value of property) ** (1750) 26 ER 1214 (1214) 3 Atk 723 Farrant v Lovel (Court will grant injunction for staying waste by cutting timber)]

[See however AIR 1951 Trav Co 109 (118) : ILR (1951) Trav-Co 209 (FB) (Cutting timber and clearing ground for purposes of improvement would not constitute waste)]

12. (1845) 14 LJ Ch 120 (120) Sandon v Hooper (Affirming on appeal (1843) 6 Beav 246)

13. AIR 1929 Oudh 124 (124)

14. AIR 1926 Bom 595 (596) : 50 Bom 692 (DB)

15. AIR 1952 SC 205 (206) : 1952 SCR 775 ** 1961 MPLJ 924 (926) (Word 'injury' is used to signify reduction in value and utility of property mortgaged) ** AIR 1958 Bom 53 (55) : ILR (1957) Bom 582.

[See also AIR 1964 Punj 346 (351) (DB) (Tenant already on the premises as tenant of mortgagor — Continuing to pay rent to mortgagee and not shown to be mortgagee's tenant under fresh agreement of lease which is likely to damage property — *Held* no violation of S. 76(e))]

16. AIR 1928 Pat 17 (18) (Mortgagee from tenant cannot put an end to tenancy by suffering dispossession by landlord) ** (1894) 16 All 386 (387) (DB)

[See also AIR 1929 Lah 207 (208) (The usufructuary mortgagee is entitled to prevent an encroachment or trespass upon the property mortgaged while a simple mortgagee is not so entitled — But such rights relate to acts of third persons and not as between a prior and a subsequent mortgagee.)]

17. (1894) 16 All 386 (387) (DB).

18. 1885 All WN 262 (262) (DB).

the house to *A*. Subsequently, *C* purchased the equity of redemption at an execution sale. After *C's* purchase A removed portions of the house, *C* brought a suit against *B* for redemption and claimed damages for the removal. It was held that *B* was not in possession but *A* remained in possession as the tenant of *B* and therefore *A* was responsible, if any one was, for the loss, and not *B*. It is submitted that the decision does not seem to be correct because although *B* leased back the house to *A*, *B* was still in posssession through A, and B was therefore responsible for the loss caused by *A* after *C's* purchase. Had *A* himself claimed damages from *B* as mortgagee in possession the matter would have been different because in that case *A* could not take advantage of his own wrong but in this case after *C's* purchase *A* remained in possession as the tenant of *B* and not on behalf of *C* who had no right to take possession till the redemption of the mortgage.

A mortgagee in possession is not responsible for the loss arising from accidental causes such as fire.**(19)**

Where the mortgagee in possession commits waste, he may, when accounts are taken in pursuance of a decree for redemption, be debited with the loss occasioned.**(20)** Thus, where a mortgagee in possession cut down trees existing on the land, it was held that the mortgagor was entitled to a deduction at the time of redemption, of the amount equivalent to the value of the trees cut.**(21)** So also where the mortgagee in possession granted to the non-occupancy tenants, occupancy rights in return for *nazarana*, it was held that the land could not, after the accrual of the occupancy rights, be so valuable to the mortgagor as before and that the mortgagor was therefore entitled to the amount of *nazarana*.**(22)**

In the undermentioned case**(23)** decided before the Transfer of Property Act, the Allahabad High Court disallowed, in a suit for redemption, the claim of the mortgagor to set off against the mortgage-money the amount of compensation for waste committed by the mortgagee, on the ground that the amount of compensation was not an ascertained sum of money under S. 111 of the Code of Civil Procedure of 1877 (now Civil Procedure Code, 1908, O. 8, R. 6). This case was not followed in a later Madras case**(24)** decided under the Transfer of Property Act, and is no longer good law in view of the express provision in the last paragraph of this section.

Where a mortgagor makes a deposit under S. 83 of the Act and the deposit is accepted by the mortgagee, it has been held that the mortgagor can institute a suit for compensation for the waste within three years from the date of his re-entry under Art. 105 of the Limitation Act of 1908**(25)**. (Now see Art. 61 (c) of the 1963 Act.)

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19. (1880) 2 Mad 187 (192) (DB).

20. 1949 Ker LT 130 (134, 135) (DB) (Usufructuary mortgagee obtaining decree for possession and arrears of rent against mortgagor to whom property was leased back — Execution of rent decree by sale of equity of redemption — Mortgagor cannot ask in that proceeding for assessment of compensation for waste — To grant him that relief would by to allow him to obtain piecemeal accounting.) ** 1946 Mar LR 65 (66) ** AIR 1919 Oudh 125 (125, 126) ** (1886) 33 Ch D 226 (232, 233) 55 LJ Ch 893 55 LT 651, Taylor v Mostyn (A mortgagee in possession underletting the property is responsible for the loss caused by the sub-lessee.)

21. AIR 1959 Ker 38 (40) ILR (1958) Ker 838 (DB) (If there is no evidence that mortgagees ever informed mortgagors that any tree had fallen down due to natural causes they are liable to account for timber value of trees which were in existence when mortgagees got possession and which are now missing.) ** **AIR 1951 Trav Co 109 (118) : ILR (1951) Trav-Co 209 (FB)** ** AIR 1924 All 153 (154) 46 All 115 (DB).

22. AIR 1924 All 153 (155) : 46 All 115 (DB).

23. (1880) 2 All 252 (253) (DB).

24. (1892) 15 Mad 290 (291) (DB).

25. AIR 1919 Oudh 125 (126)

11. Clause (f) — Insurance.

Section 72 provides that where the mortgaged property is, by its nature, insurable the mortgagee may, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire, the whole or any part of such property. This clause provides that when he has so insured it and loss or damage by fire occurs, he must apply the money received by him under the policy or so much of it as may be necessary in reinstating the property or, if the mortgagor so directs, in reduction or discharge of the mortgage-money. It may be noticed that under S. 72 if the mortgage deed does not specify the amount of insurance, the mortgage can insure the property only for an amount which will not exceed two-thirds of the amount required to reinstate the property in case of total destruction.

The last clause of S. 72 provides that where the mortgagor himself has insured the property for the amount for which the mortgagee is authorized to insure, the mortgagee cannot insure the property again. When the mortgagor himself insures the property, and loss or damage by fire occurs, the mortgagee himself cannot claim from the insurance company the payment of the insurance money for the reason that the contract of insurance is a contract by the insurer to *indemnify the insured* against the loss that he may suffer. It is not a contract to indemnify a third person and there is no privity between the insurer and the third person. In order to entitle the mortgagee to a claim on the insurance money in such a case there must be a covenant not only to insure but to insure for the benefit of the mortgagee or the policy must be properly assigned to the mortgagee by the mortgagor.(1) But through the mortgagee himself cannot claim the insurance money from the insurance company, he can require the mortgagor, in a case where the mortgaged property is already insured by the mortgagor on the date of the mortgage, to apply the insurance money actually received by him in reinstating the property under section 49.

By the terms of a mortgage deed the mortgagor agreed to insure and keep insured during the continuance of the security, the mortgaged premises from loss or damage by fire and assign the policy to the mortgagee. In default of payments by the mortgagor, the mortgagee was to make the payment of the *premia* and such payments were to be a charge on the mortgaged premises. It was further provided that all sums received under such insurance would be applied by the mortgagee if so required by the mortgagor, in reinstating the premises. The property was not insured. The mortgagee brought a suit upon the mortgage and a receiver was appointed by the Court in the mortgage suit. The receiver insured the property under the orders of the Court. The loss by fire took place and the mortgagor claimed that according to the terms of the mortgage deed the insurance money should be applied in reinstating the property. It was held that the policy was not governed by the terms of the mortgage deed; the deed did not provide for what would happen in a case where the property having come into the custody of Court, was insured by an officer of the Court, for the benefit of all the parties to the suit; it might be that there were other parties to the suit besides the mortgagor and the mortgagee, the money having come by payments made by an officer of the Court, the Court had ample discretion in directing in what manner the money so received should be laid out, and in this case the Court came to the conclusion that the most convenient and best course for the application of the money was to allow the mortgagee to receive the money in part satisfaction of the mortgage rather than to direct the receiver to undertake the reconstruction of the property.(2)

12. Clause (g) — Mortgagee must keep accounts.

This clause imposes upon a mortgagee in possession a statutory duty to keep and render accounts of all the sums received and spent by him as a mortgagee.(1) The duty is analogous to that

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Section 76 — Note 11

1. AIR 1923 Rang 6 (7, 8) : 11 Low Bur Rul 294 (DB).
2. AIR 1918 Cal 450 (451) (DB).

Section 76 — Note 12

1. AIR 1958 SC 941 (945) : 1959 SCR 1085 : 37 Pat 1168 ** AIR 1962 Assam 52 (56) (DB).

imposed upon a trustee by S. 19 of the Trusts Act, 1882, and was recognised and enforced even before this Act.(2) It owes its origin in the view held by the Court of Equity that the rents and profits of the mortgaged property are incidents *de jure* of the ownership of the equity of redemption and that the mortgagee in possession is bound to apply whatever profits he actually receives towards the satisfaction of the mortgage-debt (3) The usufruct of the property thus represents the mortgagor's money in the hands of the mortgagee who is bound to render account at the time of redemption.(4) There will be two decrees in the suit namely, preliminary decree and final decree So far as the amounts statutorily debited to the mortgagee under this clause before the preliminary decree are concerned, these cannot be taken into account if the preliminary decree does not take these amounts into consideration at the time the Court makes the preliminary decree (5) But the same cannot be said of the net receipts realised by the mortgagee subsequent to the preliminary decree The mortgagee in possession will be liable to render account of the profits received by him for the period

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(Mortgagee in possession of land filing suit for sale of property — Mortgagee not establishing that possession is under some other deed or contract — Possession must be presumed to be referable to mortgage — Mortgagor is entitled to ask for adjustment of profits received by mortgagee against mortgage debt.) ** AIR 1960 Bom 158 (159) : ILR (1959) Bom 1318 (DB) (Transaction declared as mortgage under S 24 of Bombay Agricultural Debtors Relief Act — Mortgagee is liable to account from date of application Civil Revn. No 151 of 1951 **Overruled.**) ** AIR 1958 Andh Pra 593 (595) ILR (1957) Andh Pra 477 (DB) ** AIR 1957 Pat 564 (567, 568) (DB) (Bihar Tenancy Act (8 of 1885), S 171 — Statutory mortgage under — Mortgagor has right to demand accounts) ** AIR 1953 Pat 27 (30) (DB) The provisions of S 76(g) of T P Act relating to the mortgages apply to statutory mortgage created by S 171(1)(c) of the Bihar Tenancy Act) ** AIR 1952 Pat 155 (156) (DB) (Same rule applies to statutory mortgages as for instance one under S 171, Bihar Tenancy Act) ** AIR 1951 Kutch 1 (2) (Chittham mortgagee taking possession) ** AIR 1951 Orissa 300 (303) ILR (1949) 1 Cut 121 (Statutory mortgagee under S 225, Orissa Tenancy Act) ** AIR 1948 Oudh 263 (266) (Under the general law mortgagor is entitled at time of redemption to call upon mortgagee in possession to account for profits realised by him from the security during the period of his possession — U P Agriculturists Relief Act and U P Debt Redemption Act have not affected the mortgagor's right in this respect) ** **AIR 1920 PC 8 (10, 12) : 16 Nag LR 94** ** AIR 1941 Oudh 84 (86) ** AIR 1932 Oudh 123 (132) 7 Luck 454 (DB) (The Courts are loath to exonerate the mortgagee from the liability to account under S 76(g)) ** (1910) 6 Ind Cas 323 (327) (DB) (Cal) (Mortgagee acting as a receiver in a suit to enforce his own security) ** **(1904) 27 All 351 (355) (FB).** (A mortgagee who takes possession takes also the obligation upon him to account for the rents and profits during the time he is in possession)

[**See also** AIR 1962 Andh Pra 274 (289) (DB). (Debenture trustees entering into possession qua debenture trustees and carrying on business through their agents in purported exercise of a specific power — They are bound to account as mortgagees in possession) ** AIR 1950 Trav-Co 105 (106) (DB) (Mortgagee purchaser of property under his mortgage decree — Property under prior charge — Charge-holder in possession of property having purchased the same in execution of the decree upon a puisne mortgage — In suit for redemption of prior charge, charge-holder is bound to account from date of purchase of property by mortgagee under his decree.)]

2. **AIR 1931 All 562 (566) : 54 All 205 (FB)** ** AIR 1935 Pat 148 (149) (DB) ** AIR 1936 Pat 583 (584) (DB) ** **(1869) 2 Beng LR (PC) 44 (55) : 12 Moo Ind App 157** ** AIR 1919 Oudh 82 (83)

3. (1911) 11 Ind Cas 713 (716) (DB) (Cal) ** AIR 1917 Cal 217 (219) (DB) ** AIR 1929 Pat 571 (572) (DB).

4. **AIR 1965 SC 1055 (1058) : 1965 (2) SCR 154** ** AIR 1940 Mad 686 (687) (**Reversed** on another point in AIR 1941 Mad 549)

5. **AIR 1965 SC 1055 (1058) : 1965 (2) SCR 154.**

between the preliminary decree and the final decree (6)

This clause and the next one are absolute in their terms in the sense that they are not stated to be subject to any "contract to the contrary" It is not, therefore, open to a mortgagee in possession to contract himself out of the statutory obligation under this clause (7) The only exception to the clause is provided by S 77 and a mortgagee can be exonerated from the liability to render accounts only if he succeeds in bringing his case strictly within the provisions of that section (8) A simple case under S. 77 would be where the mortgagee is to appropriate the whole of the rents and profits

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6. **AIR 1965 SC 1055 (1058) : (1965) 2 SCR 154.** (*Held* observations in AIR 1949 Mad 613 that liability of the mortgagee to account for the net receipts from mortgaged property extended even to the period before the preliminary decree appeared to be rather wide) ** **AIR 1949 Mad 613 (614)**

7. **AIR 1931 All 562 (566, 567) : 54 All 205 (FB)** ** AIR 1955 Cal 569 (571) (DB) ** AIR 1949 All 189 (190) ILR (1949) All 302 ** AIR 1943 Oudh 38 (40) 18 Luck 273 (DB) ** AIR 1924 Oudh 92 (94) 27 Oudh Cas 250 (DB) ** AIR 1942 Oudh 203 (204) 17 Luck 727 (DB) ** **AIR 1935 Pat 148 (148, 149) (DB)**

   [See also (1931) 53 Cal LJ 380 (382) (DB) (Katkobala Mortgagee to remain in possession for 9 years and to appropriate profits in lieu of rent payable to landlord *Held* mortgagor could not redeem without payment of principal and interest apart altogether **from profits received by the mortgagee.)]**

   [But see (1911) 9 Ind Cas 978 (978) (DB) (All) (Submitted wrong in view of AIR 1931 **All 562 (FB).]**

   Also see S 77, Note 1.

8. **AIR 1958 SC 941 (945) : 1959 SCR 1085 · 37 Pat 1168** ** (1978) 2 Rent LR 464 (469) (Punj) ** (1967) 33 Cut LT 919 (921, 922) ILR (1967) Cut 695 ** ILR (1953) 3 Raj 318 (329) (DB) (Where according to the terms of the contract possession of property was delivered against the loan and the profits were to be enjoyed in lieu of interest the mortgagee is not liable to account for any profits arising out of the property so long as he was entitled to remain the possession He is entitled to possession unless the full amount of the mortgage is repaid Where the full amount is not paid he is not accountable for the profits derived from the property) ** **AIR 1931 All 562 (566, 567) 54 All 205 (FB)** 7 Ind Cas 293, **Overruled.**) ** AIR 1932 Oudh 123 (132) 7 Luck 454 (DB) ** AIR 1942 Oudh 203 (204) 17 Luck 727 (DB) ** AIR 1935 Pat 148 (148, 149) (DB) ** AIR 1929 Pat 571 (572, 573) (DB) ** AIR 1924 Oudh 92 (94) 27 Oudh Cas 250 (DB) ** AIR 1919 Cal 314 (316) (DB) (*Held* on facts that case was not of S 77 and hence mortgagee was liable to account.)

   [See AIR 1944 All 232 (233) ILR (1944) All 349 (DB) (Usufruct to be set off against interest — No burden on mortgagee to keep accounts — Covenant that not mortgagee but mortgagor would be liable for increase in assessment would not require mortgagee to keep accounts — But the question of such mortgagee accounting for profits may arise under the **U P Debt Redemption Act.)]**

   [See also 1887 All WN 245 (246) (DB) (Accounting to the terms of the deed before the Act mortgagee was to take profits in lieu of interest — This case was under S 77 — Still as he had not paid full consideration, mortgagee was held liable to account) ** AIR 1944 Oudh 238 (239) (DB) (Whether S 76(h) or S 77 applies to a particular case is to be determined upon the facts of that case It is not a question of public importance or of private importance which will serve as a precedent for cases likely to arise in future for the purpose of S 109(c), C P C) ** AIR 1943 Mad 100 (103) ILR (1943) Mad 195 (DB) (Fact that the mortgagee in possession besides the income of the mortgaged property is to receive fixed annual sum from the mortgagor in lieu of interest cannot alter the position To both cases namely where the mortgagee is to take income in lieu of interest and where he is to receive fixed annual sum from mortgagor in addition S 76(h) T P Act does not apply and the receipt by the mortgagee in lieu of interest cannot be said to be a payment so

in lieu of interest or in lieu of interest and a defined portion of the principle **(9)** But there may be a case, of a mortgagee who, while appropriating the rents and profits as stated above, also agrees to make an annual payment to the mortgagor In such a case a question whether the mortgagee is liable to account under this clause depends upon whether the annual payment is to be made independent of the rents and profits or out of the rents and profits. In the former case there is no question of accountability under this clause as the case is really one under S. 77 and the obligation to pay is independent of it In the latter case, however, where the annual payment is to be made out of the rents and profits, the mortgagee is liable to account, though the question of accounting will only arise in case the mortgagee makes default in payment **(10)** As the obligation to pay arises out of the mortgage transaction there is no question of limitation in respect of these payments and they continue to be recoverable so long as the relation of mortgagor and mortgagee exists between the parties.**(11)**

Although a mortgagee may not be entitled to claim possession on the basis of covenant contained in the mortgage bond and if for any reason he enters into possession as a mortgagee he would still be liable to fulfill the conditions laid down in S 76 Fair occupations rent may be credited towards income where he has failed to keep or maintain accounts **(12)**

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as to attract S 8(2), Madras Agriculturists' Relief Act) ** AIR 1942 Oudh 499 (501) 18 Luck 484 (DB) (Whether S 77 or S 76(h) applies is question of law Mention of rate of interest in deed held not conclusive as to liability to account on mortgagee's part) ** AIR 1942 Oudh 189 (191) 17 Luck 297 (DB) (Usufructuary mortgage — Mortgagee entitled to appropriate rents and profits in lieu of interest — Subsequent simple mortgagee redeeming prior mortgagee — Held simple mortgagee was not liable to account) ** (1931) 134 Ind Cas 95 (96) (DB) (Cal)]

9. AIR 1958 SC 941 (945) : 1959 SCR 1085 : 37 Pat 1168 ** (1967) 33 Cut LT 919 (921, 922) ILR (1967) Cut 695 (But even in such cases liability to account may arise under some other statute such as the Orissa Money lenders Act — Under that Act the mortgagor can redeem the property within 15 years and ask the mortgagee for accounts)

[See also AIR 1958 Mys 43 (48) ILR (1957) Mys 277 (DB) (Property in question to be in possession of mortgagee primarily for purpose of paying interest — It is necessary that mortgagee should account to mortgagors for income received by him during period he was in possession.)]

10. AIR 1943 Oudh 38 (40) 18 Luck 273 (DB) (Usufructuary mortgage of certain villages Interest fixed at 6 per cent per annum — Out of gross rental, which was stated at fixed sum, mortgagee to pay revenue and interest due to prior mortgagee Net profits to be appropriated by mortgagee towards interest on his mortgage and collection charges and balance to be paid over to mortgagor as surplus profits — Stipulation in supplementary deed that nazrana and saer income not to be accounted for but appropriated by the mortgagee as his own income — Held, mortgage did not fall under S 77 and mortgagee was therefore liable to account for saer and nazrana income to mortgagor, in spite of the stipulation in the supplementary agreement to the contrary) ** AIR 1930 Mad 160 (161) (DB) (Letters Patent Appeal from AIR 1925 Mad 825) ** AIR 1936 Pat 583 (584, 585) (DB) ** AIR 1917 Cal 853 (854) (DB) ** AIR 1914 Mad 661 (662) (DB) ** AIR 1917 Oudh 200 (202) , 20 Oudh Cas 25 (DB) ** 1887 All WN 245 (246) (DB) ** (1910) 6 Ind Cas 503 (504) (All) ** AIR 1927 Oudh 208 (208) ** AIR 1924 All 591 (592) 46 All 633 (DB) ** (1880) 5 Cal 333 (336) (DB) ** AIR 1939 Pat 427 (428) (DB) (Rent) ** (1905) 1 Cal LJ 531 (533, 537) (DB) (Do) ** AIR 1931 All 585 (587) (DB) ** (1880) 2 All 455 (460) (DB). (Malikana.) ** (1864) 1 Suth WR 144 (144) (DB).

11. AIR 1952 Trav-Co 552 (554) (DB) ** 1950 Ker LT 356 (361) (DB) (Possessory mortgage — Suit for redemption and arrears of michavaram payable to mortgagor under the mortgage — Decree for amount due from date of mortgage to date of suit was proper and michavaram cannot be limited to period of six years prior to suit) ** AIR 1914 Mad 661 (661) (DB) ** AIR 1925 Mad 825 (829) ** AIR 1936 Pat 583 (585) (DB) ** 1887 All WN 245 (247) (DB) ** AIR 1915 Mad 1215 (1218) (DB).

12. AIR 1987 All 155 (161) : 1986 All WN 963.

Prior to the passing of the Act, a mortgagee taking the usufruct of the mortgaged property in lieu of interest was liable to render accounts at the time of redemption under various usury Regulations even if there was a contract between the parties not to take accounts.(**13**) but those Regulations are repealed by the Usury Laws Repeal Act, XXVIII of 1855, and those cases are now governed entirely by **S. 77.**

The accounts to be kept by the mortgagee must be clear, full and accurate, and to be full they must be detailed and supported by the vouchers (**14**) The accounts must state the gross receipts realised from the tenantcy and not merely of what reaches the mortgagee's hands (**15**) Thus where a mortgagee employs an agent to collect rents, he must account not only for what his agent has handed over to him but also for what has been received by his agent as he must be treated as having received everything that was received by his agent (**16**) The account must be full and complete and not merely an abstract of receipts in lump sums during the period of the mortgagee's possession (**17**) The fact that the realisations made by the mortgagee are unauthorised or wrongful does not quality the mortgagee's liability to render account in respect of such realisations (**18**)

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13. 1864 Suth WR Gap No 177 (178) (DB) ** (1883) 5 All 419 (427) (DB) ** (1885) 8 Mad 185 (189) (DB) ** 1869 Pun Re No 99 ** (1875) 24 Suth WR 275 (276) (DB) ** (1872) 18 Suth WR 65 (67) (DB) ** **(1856) 6 Moo Ind App 393 (422) (PC)** ** (1865) 4 Suth WR 103 (104) (DB) (In the case of a mortgage with possession the reservation of 'huk-ann' to the proprietor cannot relieve the mortgagee from liability to account) ** 1864 Suth WR Gap No 109 (110) (DB) (Under S 10, Regulation XV of 1793 it is the duty of the Court to take an account of the receipts of the mortgagee from the property and then adjust the mortgage amount of principal and interest after ascertaining what was received by the mortgagee in possession) ** (1866) 6 Suth WR 6 (7) (DB) ** (1864) 1 Suth WR 365 (367) (DB) ** **(1890) 2 All 593 (597) (PC)** ** (1883) All WN 90 (91) (DB) ** (1912) 34 All 261 (265) (DB) ** **(1866) 6 Suth WR 283 (284) (DB)**

14. AIR 1933 PC 85 (87) ** AIR 1927 Oudh 199 (201) 2 Luck 564 (DB) ** AIR 1985 All 327 (331) ** AIR 1961 Bom 43 (45) ILR (1960) Bom 709 (DB) (So far as subsequent purchaser is concerned decree-holder mortgagee who went into possession of property on strength of foreclosure decree stands in the same position as mortgagee in possession and is liable to fulfil conditions of S 76) ** (1902) 26 Bom 363 (371) (DB) ** (1900) All WN 134 (135) (DB) ** AIR 1923 Lah 71 (73) ** AIR 1922 Lah 213 (213) (DB) Mortgagee failing to keep account of income Income will be taken to balance the interest due) ** AIR 1926 Oudh 514 (516) (DB) (Patwari's jamabandi cannot be accepted as substitute for private accounts of mortgagee) ** AIR 1927 Mad 1156 (1157) (Mortgagee not keeping accounts — Inference must be drawn against mortgagee and he cannot be paid any amount spent on repairs in absence of clear evidence) ** 1908 Pun LR No 95 P 289 (291) (DB) (Mortgagee failing to keep accounts of profits — Profits and interest held balanced each other) ** AIR 1929 All 260 (263) (DB) ** AIR 1926 Mad 955 (957) (DB) ** (1866) 6 Suth WR 127 (128) (DB) ** AIR 1929 All 384 (385) (DB) (Mere oral evidence that some amount of arrears remained outstanding would be wholly inconclusive)

[See also (1867) 2 Agra 116 (116) (DB).]

15. 1864 Suth WR Gap No. 177 (178) (DB).

16. (1885) 30 Ch D 336 (342) 33 WR (Eng) 787 55 LJ Ch 54 53 LT 430, Noves v Pollock

17. 1864 Suth WR Gap No 177 (178) (DB) ** AIR 1921 All 197 (197) (DB) (The accounts produced by mortgagee showing simply in one lump sum the alleged income from the zamindari for each year or part of the year, put no detailed account of all the incomings and all the outgoings — Held no account) ** AIR 1934 Oudh 104 (105) 9 Luck 456 (DB)

18. AIR 1927 Oudh 199 (202) 2 Luck 564 (DB) ** AIR 1932 Oudh 255 (261) 8 Luck 40 (DB) ** AIR 1932 Oudh 123 (133) 7 Luck 454 (DB) ** (1911) 11 Ind Cas 713 (717) (DB) (Cal). (Unauthorised realisation of cesses from tenants by mortgagee — Mortgagee is liable to account for them.)

In *Goluck Chunder Dutt v Mohan Lal*,(19) the way in which the account is to be kept by the mortgagee has been stated as follows :

> "In fact, the account required from the mortgagee is one setting forth what he has realised — from what portions of the mortgaged property — in what terms or periods — with what loss and gain on the several assets — with that necessary reductions — and what remains then as the net profits which can be taken as actual realisations towards liquidating the sum due under the mortgage transaction It is such an independent account as this, to be supported, and proved, and vouched ..... that the law requires."

The account may be kept by the mortgagee himself or by his own agent.(20) The accounts kept by the agent of the property managed by him are the principal's accounts on the principle *qui facit per alium facit per se*.(21) The account required of the mortgagee is, however, independent of that to be kept by any one else, such as a *patwari* of the village and cannot be dispensed with on the ground that the latter is keeping them.(22)

It is not necessary that a separate account should be maintained. The accounts relating to the mortgage contained in the general account books of the mortgagee can be relied upon (23)

Obviously, a mortgagee is required to keep and render accounts only in respect of that portion of the property of which he has taken possession (24)

Where three out of the four mortgagees enter into possession of some only of the mortgaged properties under a lease subsequent to the mortgage the possession not being in law as mortgagees' they are not liable to render account for rents and profits.(25)

An assignee of a mortgage is bound to account not only for the period subsequent to his assignment, but also for the period before his assignment (26)

It has been held that a person who has taken possession under a void mortgage is not under any liability to account, his duty is but to deliver possession to the person entitled to be in possession with mesne profits.(27)

Under S. 3(b) of the Madras Estates Abolition and Conversion into Ryotwari Act (26 of 1948), on and from the notified date the entire estate stands transferred to the Government and vests in them free of all encumbrances Though the relationship of mortgagor and mortgagee between the parties may continue in spite of the notification under the Act and the mortgageee in possession will be liable to render an account in accordance with the provisions of this clause, the mortgagor will not be entitled, in such taking of accounts, to the rents and profits of the property on and from the notified date.(28)

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19. (1866) 5 Suth WR 271 (276) (DB).

20. 1864 Suth WR Gap No. 177 (178) (DB).

21. (1869) 2 Beng LR (PC) 44 (56) : 12 Moo Ind App 157 (196) (PC).

22.. 1864 Suth WR Gap No 177 (178) (DB) ** AIR 1924 Oudh 92 (94) 27 Oudh Cas 250 (DB) ** AIR 1927 Oudh 199 (202) 2 Luck 564 (DB) ** AIR 1932 Oudh 255 (261) 8 Luck 40 (DB) ** AIR 1932 Oudh 123 (133) : 7 Luck 454 (DB).

[See also AIR 1926 Oudh 514 (516) (DB) (Patwari's jamabandi cannot be accepted as substitute for private accounts of mortgagee)]

23. AIR 1950 Kutch 90 (91) (Observations relating to keeping of account books made)

24. AIR 1937 Bom 484 (486) (DB).

25. 1971 Mer LR 5 (Andh Pra)

26. (1660) 22 ER 664 (665) : 1 Cas in Ch 2, Venables v. Fowle

27. AIR 1950 Trav-Co 33 (35) (DB).

28. AIR 1955 Mad 266 (266).

13. Accounts when to be taken.

It is a well-settled rule that the accounts between the mortgagor and mortgagee are to be made up and settled only at the time of redemption(1) and that the mortgagor must seek redemption before he calls upon the mortgagee to account. A suit merely for rendition of accounts is not maintainable. The mortgagor must ask for the further relief of redemption (2) See also Note 21.

Where it was not stipulated in the mortgage deed that mortgagee was placed in possession over the mortgaged property in lieu of interest only and was not accountable, Section 76(g) and (h) would apply and not S. 77. The mortgagee was therefore bound to account at the time of redemption.(3)

There is an exception to the above rule. Under the Dekkhan Agriculturists Relief Act,(4) a mortgagor could file a suit merely to take accounts and such a suit did not bar a further suit for redemption (5) The mortgagor can enforce the remedy of redemption and accounts in one suit, but if due to statutory provision redemption is unenforceable he can still pursue the remedy of accounts.(6)

Where in a suit on the mortgage for recovery of money by sale of the mortgaged property, the mortgagee who was in possession of the property during the continuance of the mortgage fails to establish his case that such possession was referable to his status as a tenant under the mortgagor, the latter is entitled in that suit itself to have an accounting from the mortgagee for the profits

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Section 76 — Note 13

1. AIR 1951 Mad 384 (386) ** 1949 Ker LT 130 (134, 135) (DB) ** AIR 1917 Oudh 200 (202) : 20 Oudh Cas 25 (DB).

   [See also AIR 1968 Mad 394 (399) : ILR (1968) 3 Mad 152 (DB) (Accounts under S. 76(i)) ** **AIR 1954 All 607 (608) (FB).** (Suit for redemption and damages — Not barred by S. 25 of U.P. Agriculturists Relief Act (27 of 1934).)]

2. AIR 1968 Mad 394 (397, 398) : ILR (1968) 3 Mad 152 (DB) (Amount due deposited by mortgagor into Court in 1951. Actual surrender of possession by mortgagee in 1959. Suit by mortgagor for accounts of surplus collections under S. 76(i) from the mortgagee — Article 105, Limitation Act of 1908 held governed the claim and not Art. 109. — Time would commence to run from actual delivery (1959) and not from deposit into Court (in 1951) — The account taken against the mortgagee in possession is an unbroken and continuous account of a debtor and creditor — The nature of the account itself is that it is one single integrated account and should be taken without any restriction as to time limit, the notion of a piece meal accounting at intervals has no place in such relationship.) ** AIR 1943 All 109 (110, 111) (The principle on which a mortgagor is not entitled to sue merely for accounts, is, it would not be right to give to the mortgagors the power to harass their mortgagees in possession with suits *de anno in annum* to ascertain what those mortgagees annually received from the lands over and above their necessary expenses in relation to those lands, such suits being brought without any present intention on the part of the mortgagor to pay to the mortgagees the balance due upon the mortgage and without liability to a decree therein either for foreclosure or sale. 5 Bom 614, Followed.) ** (1881) 5 Bom 614 (616) (DB) ** AIR 1917 Nag 107 (109) (DB)

   [But see AIR 1917 Mad 190(1) (190) (DB) (Purchaser of equity of redemption is entitled to sue mortgagee for accounts.)]

3. AIR 1985 All 327 (331).

4. Now see the Bombay Agricultural Debtors' Relief Act, XXVIII of 1939, S. 85.

5. (1896) 20 Bom 469 (474, 475) (DB) (The following earlier decisions under the Act before its amendment in 1882 applying the rule **held no longer good law.**) ** (1881) 5 Bom 614 (616, 621) (DB) ** (1881) 5 Bom 604 (607) (DB) ** (1883) 7 Bom 377 (378) (DB).

6. **AIR 1971 Ker 290 (292) : 1971 Ker LT 284 (FB).**

received by him and an adjustment of such profits towards the mortgage debt.(7) Where the payments due under the subsequent deeds of further charge have been tacked on to the amount payable under the principal mortgage deed, the Court must, at the time of accounting, set off the amount or balance left after paying off the amount due under the principal mortgage deed against the amounts due under the deeds of further charge.(8)

A direction for taking accounts in accordance with this section must be made in the decree and not be left to the Commissioner.(9)

14. Proof of accounts.

The mere putting forward of accounts is not sufficient proof of the accuracy of the accounts. They must be supported by some other evidence which the Court believes.(1) It is for the party who puts forward the accounts, namely the mortgagee, to explain them and to support them in such a way as to convince the Judge that there is such a probability of their accuracy as to make it reasonable for a prudent man to accept them (2) It is open to the mortgagor to show the accounts to be false.(3) Patwari's accounts may be used as a test of the accuracy of the accounts filed by the parties (4) Where the account in respect of the cost of improvements made by the mortgagee consisted of an account book which was not written from time to time and was not a contemporary record of the cost incurred but was one written *ad hoc* from rough slips of paper at a number of consecutive sittings, it was held that the account was not admissible in evidence but that the slips of paper would be admissible to corroborate the testimony of the mortgagee (5)

15. Failure to keep accounts — Effect of.

Where a mortgagee in possession fails to keep full and accurate accounts or neglects to produce them in Court, the Court will make every presumption against him (1) The Court will, in such cases, proceed on the hypothesis that all the tenants have paid their rent to the mortgagee and take

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7. AIR 1962 Assam 52 (56) (DB).

8. AIR 1955 NUC (All) 2028.

9. AIR 1940 Bom 287 (287) ILR (1940) Bom 645 (DB) ** AIR 1941 Bom 28 (29)

Section 76 — Note 14

1. AIR 1926 Mad 955 (957) (DB).

2. (1902) 26 Bom 363 (372) (DB) ** AIR 1926 Mad 955 (957) (DB) ** (1867) 7 Suth WR 82 (83) (DB) ** (1883) 13 Cal LR 128 (129, 130) (DB).

   [See also AIR 1922 Lah 213 (213) (DB) ** (1882) 6 Bom 669 (670) (DB) (In taking account on mortgage it lies upon mortgagee to prove what is due from mortgagor in respect of principal and interest.)]

3. (1868) 9 Suth WR 572 (574) (DB).

4. 1864 Suth WR Gap No 177 (178) (DB) ** (1870) 2 NWPHCR 217 (220) (DB). (It is the practice of the Courts to accept the jamabandi papers which are filed by patwari as *prima facie* evidence of the profits of an estate.)

   [See also (1868) 3 Agra 314 (315) (DB) (Mortgagor is not precluded from questioning the correctness of jambandi filed by patwari) ** (1866) 5 Suth WR 53 (53) (DB).

5. AIR 1950 Kutch 47 (47).

Section 76 — Note 15

1. AIR 1951 Pepsu 18 (23) 3 Pepsu LR 373 (DB) ** AIR 1950 Pat 379 (383, 384) : 29 Pat 545 (DB) ** AIR 1927 Oudh 199 (201) 2 Luck 564 (DB) ** 1876 Bom PJ 191 (DB) ** AIR 1932 Oudh 255 (261) 8 Luck 40 (DB) ** AIR 1941 Oudh 84 (87) ** AIR 1932 Oudh 123 (133) 7 Luck 454 (DB) ** AIR 1929 All 384 (385) (DB) (Mere oral evidence that some amount of the arrears remained outstanding would be totally inconclusive in the absence of the regular account books) ** AIR 1929 Lah 741 (742) (DB) ** (1866) 6 Suth WR 127 (128) (DB) ** AIR 1927 Mad 1156 (1157) AIR 1918 Lah 314 (317) (DB) **

the gross rental as the basis of calculation against him **(2)** In some cases, the presumption was made that the rent recovered by the mortgagee was equal to the amount of interest due to him and the mortgagor was allowed to redeem on payment of the principal only.**(3)** while in other cases, where the mortgagee was guilty of gross or wilful neglect in this respect, it was presumed that both the interest and the principal were satisfied from the usufruct **(4)**

It is, however, generally agreed that the presumptions of this kind should not be carried beyond reasonable limits **(5)** As has been observed by their Lordships of the Privy Council in *Shah Mukhum Lall v. Baboo Shree Kishen Singh*,**(6)** presumptions even in *odium spoliatoris* must be within reasonable limits, they must not be conjectures, and not grounded on data which the evidence itself shows to be in exact **(7)** Thus where there was a definite finding that the rent of the

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AIR 1936 Lah 42 (43) (DB) ** (1872) 18 Suth W R 65 (68) (DB) ** AIR 1934 Oudh 104 (105) : 9 Luck 456 (DB).

[See also ILR (1953) 3 Raj 59, (608) 601) (Mortgagor in possession of mortgaged property as lessee of mortgagee — Knowledge of rents paid by him and of arrears — Mortgagee failing to keep accounts — Adverse inference against mortgagee cannot be drawn — He is not disentitled to interest) ** 1951 Raj I W 9 (10) (DB) (If the mortgagor who has taken the property mortgaged on lease from the mortgagee is proved to have been in possession of the mortgaged property and paid no rent to the mortgagee or interest on principal amount no presumption can be drawn against the mortgagee for failure to keep accounts as required by S 76 In such a case the mortgagee is entitled to recover the interest as stipulated in the mortgage-deed for the extra period)]

2. AIR 1921 All 197 (197) (DB) ** AIR 1932 Oudh 255 (26) 8 Luck 40 (DB ** AIR 1932 Oudh 123 (133) 7 Luck 454 (DB ** AIR 1929 All 260 263 (DB ** AIR 1934 Oudh 104 (105 106) 9 Luck 456 (DB) (It cannot be laid down as a hard and fast rule that whenever a mortgagee has failed in the obligation imposed on him by S 76(g) he must necessarily be made liable on the basis of the gross rental It is conceivable that there may be cases in which the raising of the presumption that all the tenants have paid their rents may not be justified — In this case, the presumption was made)

3. **AIR 1933 PC 85 (87)** ** AIR 1961 Bom 43 57) (DB) ** AIR 1957 Raj 250 (252) (Mortgagee not entitled to claim interest unless there was any such term in mortgage deed which entitled mortgagee to claim interest in spite of failure — Case before application of T P Act to Bharatpur) ** ILR (1954) Patiala 346 350, 351 (DB) ** AIR 1951 Pepsu 18 23) 3 Pepsu LR 373 (DB) ** AIR 1949 All 189 (190) ILR 1949 All 502 ** AIR 1927 Oudh 199 (202) 2 Luck 564 (DB) ** AIR 1929 All 260 (264) (DB) ** AIR 1917 Nag 107 (1) (DB) ** AIR 1929 Lah 741 (742) (DB) ** 1908 Pun L R No 95 P 289 (291) (DB ** AIR 1922 Lah 213 (214) (DB) ** AIR 1941 Oudh 84 (87) ** AIR 1924 Oudh 92 (97) 27 Oudh Cas 250 (DB)

[See also AIR 1945 All 48 (52) ILR (1945) All 42 (DB) (Allegation that accounts of receipts and profits and interest have been wrongly calculated — Allegation does not amount to saying that no accounts were maintained — No ground for refusing to award any amount by way of interest to creditor.) ** AIR 1923 Lah 71 (73)

4. AIR 1928 Nag 223 (226) (DB) ** 1912 Pun Re No 97 (DB)

5. ILR (1954) Patiala 346 (350, 351) (DB) (It would not be pushing the presumption to an unreasonable limit that the income of the property was enough to pay up the interest and the land revenue that the mortgagee alleged to have paid on behalf of the mortgagor) ** AIR 1934 Oudh 104 (106) 9 Luck 456 (DB) ** AIR 1932 Oudh 255 (262) 8 Luck 40 (DB) (The presumption cannot be extended to unlawful realisations by mortgagee) ** AIR 1929 Lah 741 (742) (DB) ** AIR 1917 Nag 107 (110, 111) (DB)

[See also AIR 1921 PC 125 (125) : 47 Ind App 207 ** AIR 1927 Oudh 170 (173) (DB) (In case of account between mortgagor and mortgagee the Court cannot travel for purpose of finding rights and liabilities beyond the mortgage transaction)]

6. **(1869) 2 Beng LR (PC) 44 (58) : 12 Moo Ind App 157 (198) (PC)**

7. AIR 1924 Oudh 92 (96) 27 Oudh Cas 250 (DB) (The default of the mortgagee in keeping

property was Rs 15 per mensem, the Court refused to presume, from the failure of the mortgagee to produce accounts, that the rent was equal to the amount of interest **(8)** Similarly, it has been held that a failure to keep accounts does not *ipso facto* defeat the mortgagee's claim to compensation for additions and repairs made by him when the expenditure on that account has been independently established,**(9)** nor does such failure, by itself, disentitle a mortgagee to receive fair collection charges **(10)** The rule to be followed in cases of failure to keep or produce accounts by the mortgagee has been stated in *Shah Ghotam Nuzuf v Mt Emanum***(11)** as follows .

> "If the mortgagee has not kept proper accounts, the general presumption will be against him, but by this we do not mean to say that, because the mortgagee has neglected to keep proper accounts, all statements of the mortgagor against him must be taken as true The Court must take the best evidence available and decide upon it."

See also the undermentioned cases to the same effect **(12)**

16. Clause (h) — Mode of taking accounts.

This clause lays down a mode in which the accounts between the mortgagor and the mortgagee are to be taken. It embodies the same mode of calculations as was followed in cases before the Act **(1)** The method followed is to ascertain the gross collections at the end of a certain period, usually a year, and after deducting the necessary outlay on account of revenue, expenses of collection and the preservation of estate, the balance goes to reduce the interest, and if there is a surplus over, it goes to the reduction of the principal, the account being closed at the end of each period **(2)** If the net receipts are less than the amount due on account of interest, the deficit of interest is not, in the absence of a contract to that effect, to be added to the principal as that would mean charging compound interest **(3)** This mode of taking accounts is called accounting with rests and the advantage of it is, that when there is a surplus of net receipts over the amount of interest then due, the balance goes to reduce the principal and then the interest for the next period is calculated on the

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or producing the necessary accounts does not necessarily raise the presumption that the whole of the mortgage-money has been wiped off by the receipts of rents and profits of the mortgaged property.)

8. AIR 1923 Lah 141 (141)

[**See also** AIR 1927 Mad 1156 (1157) (Municipal taxes and quit rent allowed — Amount for repairs disallowed.)]

9. AIR 1917 Lah 28 (28) : 1916 Pun Re No. 99 (DB)

10. AIR 1934 Oudh 104 (106) : 9 Luck 456 (DB).

11. (1868) 9 Suth WR 275 (275, 276) (DB).

12. AIR 1966 Guj 40 (42, 43) ILR (1966) Guj 277 ** (1921) 63 Ind Cas 598 (600) (DB) (Lah) ** (1867) 7 Suth WR 82 (83) (DB).

Section 76 — Note 16

1. (1884) 6 All 303 (309) (DB).

2. AIR 1950 Kutch 90 (92) (If in any year the net usufruct does not cover the expenses of maintenance and improvement, the uncovered portion may bear interest at the same rate as the debt which should be recovered from the usufruct of subsequent years in the same fashion) ** (1921) 63 Ind Cas 598 (600) (DB) (Lah) ** **(1872) 10 Beng LR 386 (393) : 14 Moo Ind App 443 (450, 451) (PC)** ** (1865) 5 Sudh WR 200 (200) (DB) ** (1866) 1 Agra 132 (132) (DB)

[**See also** (1865) 2 Suth WR 289 (290) (DB) (The mode of calculation to be followed is every year to add to amount of interest to the principal sum, and then deduct the value of the usufruct)]

[**But see** (1910) 7 Ind Cas 871 (873) (DB) (Mad) (The rents and profits have first to be applied towards principal and then towards interest.)]

3. R B Ghose, The Law of the Mortgage in India, 5th Edn Vol 1, page 594

reduced principal.(4)

This clause does not lay down any definite rule as to when the rests are to be made It simply states that the receipts should be debited against the mortgagee "from time to time" The practice of the Courts is, however, to make rests at the end of each year(5) though, in one case, half yearly rests were made in calculating the interest.(6)

The mode of accounting in England differs from the above rule The ordinary rule there is not to direct rests in an account against a mortgagee in possession, unless at the time of entry into possession there is no arrear of interest due or there are any other special circumstances in the case to justify such a direction.(7) Thus, the amount of rents and profits runs from the beginning to the end without reference to the question whether the mortgagee has, at any particular time had in his hands more than sufficient money to pay the interest or not The rule is based on the ground that a mortgagee is not bound to accept payments in driblets but is entitled to have the account taken as a whole. The mortgagee is not, therefore, treated as repaid until such account is taken (8)

As stated above, the method of accounting under the clause does not contemplate the charging of compound interest, unless the parties specifically stipulate for it Before the amendment in

4. R B Ghose, The Law of Mortgage in India, 5th Edn , Vol 1 pages 594 595

5. R B Ghose, The Law of Mortgage in India, 5th Edn Vol 1, page 595 ** AIR 1935 Pat 148 (149) (DB) ** (1921) 63 Ind Cas 598 (600) (DB) (Lah) ** 1900 Pun L R No 4 P 10 (15) (DB) ** (1884) 6 All 303 (311) (DB) (Rest at the end of each year at the time when revenue was payable.)

6. (1880) 6 Cal 377 (380) (DB).

7. (1884) 6 All 303 (311) (DB) ** (1906) 1 Ch 165 (174) 54 WR (Eng) 274 Wrighley v Gill (Affirming (1905) 1 Ch 241) ** (1905) 1 Ch 435 (440) 53 WR (Eng) 281 Ainsworth v Wilding

Annual rests were not allowed in the following cases :

(1858) 27 LJ Ch 782 (783) 3 De G & J 119 121 RR 33 Nelson v Booth (No direction should be made for annual rests unless at the time of entering into possession there is no arrear of interest due to him) ** (1863) 55 ER 172 (172) 8 LT 409 Scholefield v Lockwood (When once liability to account without annual rests begins it continues) ** (1815) 56 ER 6 (6) 1 Mad 13 Webber v Hunt (On a decree against a mortgagee in possession to account rests cannot be made unless directed by decree) ** (1840) 49 ER 27 (28) 3 Beav 70, Finch v Brown. (No rests if there was an arrear of interest due at the time of mortgagee's taking possession) ** (1743) 26 ER 720 (721) 2 Atk 533 Gould v Tancred ** (1815) 34 ER 560 (560) 19 Ves 383 Davis v May (Direction to take account with rests is not the usual course) ** (1834) 58 ER 667 (668) 3 LJ (NS) Ch 149, Latter v Dashwood ** (1844) 63 ER 422 (428) 66 RR 78, Horlock v Smoth (The mere fact of an arrear of interest being or not being due to the mortgagee, which the mortgagee takes possession, is not decisive upon the question of rests but every circumstance must be regarded) ** (1840) 49 ER 53 (55) 9 LJ (NS) Ch 333 Wilson v Cluer ** (1835) 41 RR 203 (204) : 4 LJ (NS) Ch 113, Beldwin v Lewis.

Annual rests were ordered in the following

(1819) 56 ER 699 (700) 20 RR 296, Shephard v Elliot (Annual rents in excess of interest due — Rests were ordered) ** (1855) 52 ER 756 (757) 109 RR 579 Morris v Islip ** (1825) 37 ER 1184 (1186) 24 RR 106, Binnington v Harwood ** (1881) 29 WR (Eng) 437 (438), Carter v James (Rents received exceeding interest — Accounts directed to be taken with annual rests) ** (1841) 58 RR 266 (281) 4 Ir Eq 177, Incorporated Society v Richards ** (1742) 26 ER 646 (647) 2 Atk 409 Robinson v Cumming

8. (1905) 1 Ch 241 (253, 254) 53 WR (Eng) 334, Wrigley v. Gill (Affirmed in (1906) 1 Ch 165) ** (1858) 27 LJ Ch 782 (783) 121 RR 33, Nelson v Booth.

1929, the expression used in the clause was "interest on the mortgage-money" As defined in S 58, "mortgage-money" includes both principal and interest and hence it was thought that the expression in the clause might suggest charging of compound interest even where the deed of mortgage provided for simple interest. The word "mortgage-money" after the word "interest" was therefore omitted by the amendment in 1929 and now it is clear, that the interest may be simple or compound according to the contract of mortgage.(9)

Sections 11(1) and 17 of the Orissa Money-lenders Act (3 of 1939) override the provisions of this clause as respects matters provided therein.(10)

See also Note 12.

17. "Receipts from the mortgaged property."

The term "receipts" means the actual and gross realisations from the mortgaged property.(1)

Where a mortgagee in possession is evicted by the mortgagor and the mortgagee obtains against him a decree for possession with damages, the mortgagee is not liable to account for the amount of damages recovered by him under the decree, as the amount of damages is not the usufruct of the property.(2)

18. "Fair occupation rent."

Under cl. (h), occupation rent is to be charged against a mortgagee only when he personally occupies the mortgaged property.(1) Occupation must be distinguished from possession. A man may be in possession of an estate without being in occupation of it A person who takes rents from the tenants is in *possession* of the land, but the *occupation* of the land is with the tenants.(2) There is, therefore, no question of occupation rent if the mortgagee lets the property to tenants.(3) A man may be in occupation in law by occupying the estate himself or through his servants.(4) The term, "occupation rent", has also been used in S. 62 of the Trusts Act, 1882.

A fair occupation rent is properly represented by the rent which the mortgagee would have realised by letting it out to the tenants. Where, therefore, a mortgaged property is land and the mortgagee personally cultivates it, instead of letting it to tenants, the net profits of cultivation cannot be taken as occupation rent (5) It has, however, been held in the undermentioned

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9. See the Report of the Special Committee.

10. (1954) 20 Cut LT 481 (483) (DB). (Consequently even if the mortgage be held to be anomalous mortgage the mortgagee is not bound to render accounts in view of the proviso to S 11(1) — ILR (1954) Cut 435, Foll.) ** ILR (1954) Cut 435 (441) (DB).

Section 76 — Note 17

1. See the Report of the Special Committee.

2. (1866) Beng LR Sup Vol. 613 (617) (FB).

Section 76 — Note 18

1. AIR 1961 Bom 43 (47) : ILR (1960) Bom 709 (DB).

2. (1882) 21 Ch D 469 (475) 31 WR (Eng) 308 47 LT 604, Shepard v Jones ** (1846) 60 ER 619 (622) 15 Som 265 15 LJ Ch 343 . 74 RR 75, Trulock v Robey

3. AIR 1929 Pat 571 (573) (DB).

4. (1882) 21 Ch D 469 (475) : 31 WR (Engl) 308 47 LT 604, Shepard v Jones

5. (1867) 7 Suth WR 244 (244) (DB).

[See also AIR 1951 All 643 (648, 651) (FB). (Case decided under S 9(1), U P. Debt Redemption Act in which it was held that 'net' profits in that section should be interpreted in the same sense in which fair occupation rent is used in this section — Decisions in AIR 1944 All 283 ILR (1944) All 61, AIR 1950 All 192 ILR (1950) All 228, Civ Revn No 197 of 1945, D/- 5-1-1949 (All) and Cr No. 100 of 1946, D/- 10-2-1950 (All). **Overruled** and observations of Bind Basni Prasad, J in AIR 1948 All 344 . ILR (1948) All 310, **Dissented from.**)]

case(6) that a mortgagee personally occupying and cultivating the land may be charged with either an occupation rent or with the net profits of his cultivation as, under the circumstances of the case, may seem just. It is submitted that the clause lays down only one mode of charging the mortgagee in such a case and that is to charge a fair occupation rent. The clause does not warrant the other alternative mode of charging as suggested by the above case. What is the amount which the mortgagee would have realised if he had let out the land on the best terms available is in each case a question of fact.(7)

A mortgagee in possession of a house will not be charged with occupation rent during the time it is in so ruinous a condition that rent could not have been obtained for it (8)

It has been held that the mortgagee cannot charge loss in his agricultural operation to the debt account but must bear it himself (9)

19. Expenses of management and collection of rents and profits.

The provision for deducting, from the receipts, the expenses of management of the mortgaged property and of the collection of rents and profits thereof is new and has been introduced by the Amending Act of 1929. Prior thereto, the mortgagee could treat such expenses as accretions to the principal money and add them as such to the principal money at the time of redemption, under clause (a) of S. 72. It was, however, considered later on, that these expenses were more in the nature of outgoings than in the nature of accretions. In England also such expenses were and are treated as "just allowances".(1) The amendment gives effect to this view (2) A mortgagee in possession is now entitled to incur expenses for the management and for the collection of rents and profits thereof and can recover the same by making appropriate deductions from the receipts in his hands. The expenses of revenue survey of the mortgaged property(3) and the expenses incurred in digging a new well(4) have been allowed under the head of management expenses. Similarly, where a mortgagee employes servants or agents to manage the property, their salaries would be allowed to him as expenses of management.(5)

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6. (1910) 6 Nag LR 109 (112, 113)

[See (1875) 12 Bom HCR 88 (90, 91) (In the case of land personally occupied or cultivated by mortgagee, he should be charged with a fair occupation rent or with the actual net profits realized from the use of the land — Case before the Act.)]

7. AIR 1951 All 643 (644) (FB). (Mortgage of proprietary or under-proprietary land — Calculation on the basis of sanctioned rent rates gives fair occupation rent when there is no other evidence.)

8. (1824) 3 LJ Ch 57 (57) : 26 RR 219. Marshall v. Cove

9. AIR 1950 Kutch 90 (92).

Section 76 — Note 19

1. (1877) 7 Ch D 188 (192) 47 LJ Ch 150, Wilkes v Saunion ** (1889) 42 Ch D 237 (243) 58 LJ Ch 855, White v. City of London Brewery Co.

[See also (1886) 33 Ch D 279 (288) 56 LJ Ch 202 55 LT 190, Bompas v Kang (In allowing expenditure, all that must be allowed which is incidental and necessary for the purpose of obtaining the profits.)]

2. See the Report of the Special Committee.

3. (1865) 2 Bom HCR 220 (221) (DB).

4. (1895) 17 All 282 (284) (The well was built with the permission of the mortgagor.)

5. (1876) 2 Ch D 148 (162) : 45 LJ Ch 395, Eyre v Hughes ** (1880) 16 Ch D 53 (57) 50 LJ Ch 74, Union Bank of London v Ingram ** (1685) 23 ER 492 (492) 1 Vern 316 Bonithon v Hockmore (Bailiff appointed to collect.) ** (1818) 56 ER 473 (474) 18 RR 209, Davis v Dendy (He can appoint a receiver and charge his remuneration.)

[See also (1911) 10 Ind Cas 748 (764) (Bom) (Payment of fair remuneration to manager

As for the expenses of collection of rents and profits of the mortgaged property the general practice in this country is to allow a commission of ten per cent. on the gross rental to cover the cost of collection.(6) unless there is a stipulation providing otherwise or it is shown that the amount so allowed is unreasonable (7) In the undermentioned cases,(8) however, it was held that where a mortgagee files an account, the proper sum allowable is not five or ten per cent of the receipts, but what the mortgagee has actually spent and has shown in such account to have been spent for that purpose. A mortgagee is also allowed expenses *bona fide* incurred by him for realizing rent from the tenants through Court.(9)

It is, however, a well-established principle that a mortgagee in possession is not entitled to any remuneration for his personal trouble in respect of the mortgaged property and, therefore, cannot charge anything by way of salary or allowance for his personal services either, in connexion with the management or for the collection of rents and profits.(10) This principle was applied by their Lordships of the Privy Council even to a case where one of the co-mortgagees resided on the mortgaged property and managed it for the benefit of himself and his co-mortgagees.(11) But a mortgagee in possession may, in the deed itself, stipulate for a payment for his personal work and effect will be given to the stipulation if it is free from any circumstance of oppression or unfair dealing (12) In the undermentioned case(13) a stipulation contained in a separate agreement for payment of salary to the mortgagee in possession for management of the property — a mill in that case — was held valid and enforceable by the Court.

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of large concern to keep it in high state of efficiency is not clog on equity of redemption, and in principle it makes no difference whether manager is mortgagee in possession or third party) ** (1911) 1 Ch 618 (626) · 80 LJ Ch 426, Bath v Standard Land Co]

6. AIR 1950 All 105 (106) (But there must be proof that costs were actually incurred in making the collections If the lower Court disallows the costs of collections for want of such proof revision is not maintainable) ** AIR 1941 Oudh 498 (503) 16 Luck 812 (DB) ** AIR 1941 Oudh 380 (383) (DB). (Collection charges may be added where mortgagee is held liable to accounting under S 76 Where however mortgagee is not liable to account he is not entitled to collection charges in the absence of a provision to that effect in the mortgage-deed.) ** AIR 1934 Oudh 104 (106) 9 Luck 456 (DB)

7. (1866) 1 Agra 132 (132) (DB).

8. (1864) 1 Suth WR 133 (134) (DB) ** (1868) 9 Suth WR 572 (575) (DB).

9. AIR 1914 Oudh 330 (331) : 17 Oudh Cas 47 ** AIR 1941 Oudh 498 (502) · 16 Luck 812 (DB).

[But see (1898) 21 Mad 32 (33) (DB).]

10. (1904) 6 Bom LR 590 (592) (DB) ** (1911) 10 Ind Cas 748 (754) (Bom) ** (1890) 25 QBD 176 (180) 38 WR (Eng) 452 In re Wallis, Ex parte Lickorish ** (1876) 2 Ch D 148 (162) 45 LJ Ch 393, Eyre v. Hughes ** (1889) 41 Ch D 126 (136, 137) · 58 LJ Ch 361, Mainland v Upjohn ** (1866) 2 Eq 789 (795, 796) 12 Jur (NS) 426, Barrett v Hartley ** (1893) 1 Ch 129 (135) 41 WR (Eng) 49, In re Doody ** (1685) 23 ER 492 (492) 1 Vern 316, Bonithon v Hockmore ** (1805) 32 ER 902 (902) · 10 Ves Jun 405 8 RR 8, Langstaffe v Fenwick ** (1833) 39 ER 686 (689) 1 Myl & K 277 36 RR 319, Leith v Irvine ** (1740) 26 ER 475 (476) · 2 Atk 120, French v. Baron ** (1747) 26 ER 1098 (1099) . 3 Atk 517, Godfrey v. Watson.

11. **(1899) 26 Cal 1 (10) : 25 Ind App 241 (PC).**

12. (1911) 10 Ind Cas 748 (764) (Bom) (In England, it has been held in the following cases that a contract for remuneration will not be given effect to) ** (1740) 26 ER 475 (476) · 2 Atk 120, French v Baron ** (1833) 39 ER 686 (689) · 1 Mye & K 277 . 36 RR 319, Leith v. Irvine.

13. (1911) 10 Ind Cas 748 (767) (Bom)

20. "Surplus, if any, shall be paid to the mortgagor."

The clause further provides that if there is any surplus left in the hands of the mortgagee after the discharge of both interest and principal, it shall be paid back to the mortgagor (1) It is, however, silent on the point whether interest should be charged against the mortgagee when he retains the money in his hands instead of immediately refunding it to the mortgagor As a general rule interest will be allowed on the surplus on equitable grounds,(2) but there is a conflict of opinions as to the *time* from which it should be granted. According to some cases, as soon as the debt is discharged the money belongs to the mortgagor and hence interest should begin to run from the time when the debt stands discharged,(3) while, according to other cases, it should begin to run only from the date of the institution of a suit for redemption.(4)

The fact that the mortgagees have been paying the surplus profits for a period of twelve years to a stranger or for that matter even to a person who was once the owner of a part of the equity of redemption, instead of to the purchasers of the equity of redemption, does not take away the right of the purchasers to redeem the mortgage for a period of sixty years which is inherent in them under the Limitation Act.(5)

21. Clause (i).

Where a mortgagor makes a valid tender of, or deposits, the mortgage money in Court the mortgagee is bound to account for all the receipts of the property after the date of the tender or from the earliest time when the mortgagee could have taken the amount of the deposit out of Court, and the mortgagee is not entitled to deduct anything on account of expenses such as Government revenue, repairs, costs of management and collection charges (1) A *conditional tender of mortgage money does not amount to a valid tender* (2) The words "and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with

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Section 76 — Note 20

1. AIR 1922 Nag 259 (260)

   [See (1908) 7 Cal LJ 604 (610) (DB) ** (1870) 2 NWPHCR 217 (220) (DB) (In England it has been held that the mortgagee cannot after the suit of the second mortgagee pay the surplus to the mortgagor : *See* (1821) 56 ER 992 (993) : 6 Madd 11, Parker v Calcroft

   [See also ILR (1953) Mys 611 (613) (Case under Mysore Agriculturists Relief Act)]

2. (1869) 1 NWPHCR 111 (113, 114) (DB) ** AIR 1932 Oudh 123 (134) 7 Luck 454 (DB) ** (1927) 99 Ind Cas 183 (184) (DB) (Oudh) ** (1896) 16 Bom 141 (145)

   [See also AIR 1953 Trav-Co 533 (533) (DB) (Mortgagee agreeing to pay paddy as michavaram — Failure to pay — No stipulation to pay interest for arrears of michavaram — Damages to be awarded at 10% p.a.)]

3. AIR 1920 Nag 55 (59, 60) ** (1896) 16 Bom 141 (147) (From date of sale held under the power of sale granted by the deed) ** (1887) 35 Ch D 544 (549 550) 35 WR (Eng) 645 : 56 LJ Ch 745 : 56 LT 848, Charles v. Jones.

4. AIR 1924 All 881 (883, 884) : 46 All 897 (DB) ** (1883) 7 Bom 185 (187) (DB) (The rule applied to an application under Dekkhan Agriculturists Relief Act)

5. AIR 1951 Mad 384 (386)

Section 76 — Note 21

1. (1910) 5 Ind Cas 529 (531) (DB) (All) ** AIR 1929 Rang 271 (271) (The liability of the usufructuary mortgagee to account for the mesne profits arises only when money is tendered to him — The money must actually be tendered and a notice sent by the mortgagor asking the mortgaege to come to his place and take the money cannot be a tender of money and no liability of the mortgagee arises to account for the profits of the land)

2. 1968) MPLJ 451 (458) (DB).

   See also S. 83 N 20 & S. 84 N 5.

the mortgaged property" were added by S. 40 of the Amending Act of 1929 in view of the interpretation put upon the clause in *Subba Rao v. Shri Balusa Buchi*(3) where a Full Bench of the Madras High Court held that even after a valid tender, a mortgagee in possession was entitled to take credit for amounts which he paid after the tender to meet the Government revenue, the necessary repairs and the collection charges Wallis, C.J., thus observed :

> "Another question which arises in these appeals is as to the extent of the liability of a mortgagee remaining in possession after a lawful tender of deposit to account for the gross receipts of the mortgaged property under S. 76(i) On this clause the subordinate Judge has held that the mortgagees are not entitled to credit for amounts which they paid after the tender to meet the revenue demands on the mortgaged property, and for necessary repairs and collection charges, and the commentaries and one or two cases bear out this view, but in none of them has the clause been very fully considered Such a rule would involve a great hardship to a mortgagee who refused to accept the tender under a *bona fide* claim of right It is often exceedingly difficult under the existing law to say whether a transaction amounts to a mortgage or a sale, and where it is ultimately found to be a mortgage, it would be very hard to refuse the mortgagee credit for all the necessary expenses incurred by him whilst contesting the right to redeem. As observed in argument it would put him in a worse position than a trespasser, and there seems no need for so stringent a rule "

The amendment now leaves no room for such an interpretation of the clause and makes it clear that the expenses cannot be allowed to be deducted from the receipts.(4) The expenses will include even public taxes.(5) It has been held that expenses will include cost of cultivation also.(6)

It has been held, that the filing of a suit for redemption amounts to an offer to redeem and, therefore, a mortgagee who contests the redemption suit unsuccessfully is liable to account for what he receives after the institution of the suit.(7) It has, however, been held in the undermentioned case(8) that institution of suit for redemption of a usufructuary mortgage is not tantamount to tender of the mortgage money and that, therefore, where the mortgagor has deposited the amount of the mortgage money in Court only after preliminary decree has been passed, a decree for mesne profits cannot be granted from the date of institution of suit but can be granted only from the date of deposit of the mortgage money till the date of delivery of possession.

The words "deposits in manner hereinafter provided" have reference to a deposit made in Court under S. 83, and the words "the amount for the time being due on the mortgage" under this clause have got a similar meaning as the words "the amount remaining due on the mortgage" in S 83.(9)

The word "receipts" under this clause has the same meaning as the word "receipts" under Cl (h), namely actual and gross realisations. The word "gross" occurring before the word "receipts" under the old clause has been omitted by the Amending Act of 1929. The reason for the omission has been stated by the Special Committee as follows :

> "In Cl (i), the words "gross receipts" are used. This phrase was quite appropriate with regard to the fact that no provision was made in Cl (h) for deducting expenses incurred for the management of the property or the collection of the rents and profits Now that this provision has been made in Cl (h), it is unnecessary to retain the word "gross" in Cl (i) The same has been accordingly omitted "

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3. **AIR 1923 Mad 533 (535) : 47 Mad 7 (FB).**
4. See the Report of the Special Committee.
5. AIR 1946 Mad 464 (464).
6. AIR 1967 Pat 5 (5) (DB) (Mortgagee cannot deduct cost of cultivation of mortgaged land under S. 76 (i).) ** AIR 1957 Pat 123 (124) (AIR 1919 Pat 392 (1), **held no longer good law.**)
7. AIR 1917 Low Bur 122 (123) : 9 Low Bur Rul 18.
8. AIR 1962 Pat 203 (203).
9. AIR 1919 Mad 292 (272) (DB) (Amount due on the mortgage does not include value of improvements.)

Even after a tender or deposit, the mortgagee does not cease to be a mortgagee and become a trespasser. He still continues to be a mortgagee but with a heavier liability to account. The claim by the mortgagor for the receipts from the mortgagee under the clause is therefore one arising from and connected with his right to redeem or recover possession of the property (**10**). Where, therefore, after a refusal of a valid tender or deposit by the mortgagee, the mortgagor brings a suit for redemption, a second suit for the recovery of the receipts alone is barred under O. 2, R. 2 and S. 11, Explanation IV of the Civil Procedure Code.(**11**)

22. Last paragraph.

The last paragraph of the section lays down that if the mortgagee in possession fails to perform any of the duties imposed on him by the various clauses and consequent *loss is caused to the mortgagor* the mortgagee may be debited with such loss at the time when accounts are taken in pursuance of a decree in a redemption suit or in a suit on the mortgage. The word "may" indicates that the section provides a cumulative remedy and does not bar any other remedy which the mortgagor may have under the law.(**1**) Thus, if loss is caused to the mortgagor, he need not wait till the institution of the redemption suit, but can recover it by filing a separate suit for it immediately (**2**). All matters between mortgagor and mortgagee regarding accounts, equities etc. have to be worked out in a single suit.(**3**)

The mortgagor, however, cannot be compelled to file a separate suit. In the undermentioned case(**4**) decided before the Transfer of Property Act, the High Court of Allahabad disallowed, in a suit by the mortgagee for recovery of mortgage money, the claim of the mortgagor to set off the amount of loss against mortgage money on the ground that the amount of the loss was not an ascertained sum of money under S. 111 of the Civil Procedure Code of 1877 (now Civil Procedure

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10. AIR 1968 Mad 394 (397, 398) : ILR (1968) 3 Mad 152 (DB) ** AIR 1967 Pat 5 (6) (DB).

11. AIR 1925 Rang 13 (14) : 2 Rang 382 ** (1907) 34 Cal 223 (227, 228, 233) (DB) ** (1907) 31 Bom 527 (533, 534) (DB) ** (1910) 6 Ind Cas 336 (337) (DB) (Cal). (Claim for mesne profits between date of tender or deposit and date of decree must be included in suit for redemption, but claim for mesne profits for period which intervened between date fixed for redemption and date of actual delivery for possession may be enforced in separate suit.) See also the AIR Commentaries on the Code of Civil Procedure, 10th (1985) End. O. 2, R. 2, Note 18.

[**See also** AIR 1968 Mad 394 (399) : ILR (1968) 3 Mad 152 (DB). (Law discountenances multiplicity of proceedings between the mortgagor and the mortgagee and any litigation before them and the reliefs prayed for therein should be such as to enable the Court to afford final and complete relief between the parties. The mortgagor cannot merely file a suit for accounts for the receipt of the surplus profits under S. 76(1) either year after year or for any period leaving outstanding the claim for redemption and for recovery of possession.)]

Section 76 — Note 22

1. AIR 1955 Trav-Co 277 (278) : ILR 1955 Trav-Co 666 (DB) ** (1909) 33 Mad 71 (73) (DB) ** AIR 1929 Oudh 124 (125).

[**But see** AIR 1954 Bom 417 (418) : ILR (1954) Bom 1131. (Hence a subsequent suit for compensation for alleged demolition of the mortgaged property by the mortgagee in possession will be barred under O. 2, R. 2, Civil P.C. if such a relief is not claimed in a prior suit for redemption — 33 Mad 71, **Dissented from.**)]

2. AIR 1955 Trav-Co 277 (278) : ILR (1955) Trav-Co 666 (DB). (Kanom tenant — Cutting of trees on holding — Landlord can claim compensation without suing for eviction or redemption.) ** AIR 1929 Oudh 124 (125). ('May' cannot be considered as having the force of 'must'.)

3. ILR (1971) 1 Mad 217.

4. (1880) 2 All 252 (253) (DB).

Code, 1908, O 8, R 6) This case was not followed in *Shiva Devi v Jaru Heggade*(5) where it was held that under S 76 the estimate of loss caused to the mortgagor by the failure of the mortgagee, was an item which must be considered in determining the accounts in settlement of the mortgage

Where a mortgagor fails to get the matter of the loss settled at the time of the preparation of the decree for redemption, he cannot file a separate suit for the recovery of such loss after the passing of the decree which fixes the amount of the redemption money.(6)

Where the mortgagor makes a deposit in Court under S. 83 and the deposit is accepted by the mortgagee, a suit for redemption on the mortgage does not become necessary. In such a case the mortgagor need not claim the compensation for the loss in the proceeding under S 83, as the object of those proceedings is to make an offer irrespective of all controversy or to obtain summary redemption leaving any dispute about the excess to be settled by a regular suit. The mortgagor can bring a suit for the recovery of the loss within three years from the mortgagor's re-entry on the property under Art 105 of the Limitation Act (1908). (Now see Art. 61(c) of the Limitation Act of 1963).(7)

Where on a deposit made by the mortgagee in Court in respect of a mortgage with possession the mortgagor withdrew the deposit on refusal of the mortgagee to accept it, the mortgagor is entitled to mesne profits from the date of original deposit.(8)

It should be noted that a mere failure of the mortgagee to perform any of the duties under the section is not sufficient but a *loss* must have been caused to the mortgagor by such failure.(9)

In *Gopala Menon v. Narayana Kurup*,(10) where part of the mortgaged security, while in the possession of the mortgagee, was acquired under the Land Acquisition Act, and the mortgagee could not put the mortgagor in possession of the whole of the mortgaged property, it was held that the proper course was to debit the mortgagee with the value of the land in taking the mortgage accounts under this section, if the property could not be identified

It has been held that where the mortgagee in possession wrongfully withholds the collections.

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5. (1892) 15 Mad 290 (291) (DB).

   [See also AIR 1925 Oudh 654 (656) (DB) (Separate suit cannot lie for recovery of alleged waste committed by mortgagee, the matter ought to be settled at time of preparation of decree for redemption) ** AIR 1920 Oudh 24 (24) (If there is any accounting to be done between the parties in respect of the mortgage transaction whether on account of receipt of profits in lieu of interest or on any other account arising out of the mortgage relation between the parties, that ought to be done before the final decree is passed)]

6. AIR 1954 Bom 417 (418) ILR (1954) Bom 1131 (A subsequent suit for compensation for the alleged demolition of the mortgaged property by the mortgagee while in possession will be barred under O 2, R 2, C P Code, if such a relief is not claimed in a prior suit for redemption brought by the mortgagor — AIR 1922 Bom 156(2) · 46 Bom 218, Rel. on; (1910) 33 Mad 71, **Dissented from.**) ** AIR 1925 Oudh 654 (656) (DB) (The question cannot be gone into in an application for restitution under S 144, Civil Procedure Code.)

7. AIR 1968 Mad 394 (401) · ILR (1966) 3 Mad 152 (DB) (Amount due deposited by mortgagor into Court in 1951 — Actual surrender of possession by mortgagee in 1959 — Suit by mortgagor for accounts of surplus collections under S 76(1) — Art. 105, Lim Act of 1908 held governed the claim and not Art. 109 — Time would commence to run from 1959, date of actual delivery and not from date of deposit in 1951.) ** AIR 1919 Oudh 125 (126).

8. AIR 1966 Mad 77 (81) : 78 Mad LW 205

9. AIR 1940 Pat 579 (580).

10. AIR 1918 Mad 888 (888) (DB) (Same course should be adopted if after identification the mortgagee is unable to give possession owing to some default on his part)

the Court can direct interest to be paid on such collections.(11) The usual rule is to award such interest with annual rests.(12) (See also Note 16).

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77. RCEIPTS IN LIEU OF INTEREST.— Nothing in S. 76, Cls. (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Synopsis

1. **Scope of the section.**
2. **"Defined portions of the principal."**
3. **Mortgagor may make himself liable to account though mortgagee is not liable to do so.**

1. Scope of the section.

Under S 76 the liability of the mortgagee in possession is, under some of the clauses thereof absolute, while the liability under other clauses is subject to a contract to the contrary In the former case, the parties are not at liberty to contract themselves out of the liability so imposed (1)

This section provides that the absolute liability under Cls (b) (d) (g) and (h) of S 76 does not apply where the parties have contracted that the receipts from the mortgaged property shall be taken in lieu of interest on the principal money, or in lieu of interest and defined portions of the principal (2)

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11. AIR 1968 Mad 394 (405 406) ILR (1968) 3 Mad 152 (DB) ** AIR 1945 Mad 297 (298) ILR (1946) Mad 255 (DB) (A mortgagee in possession is not a trustee in the strict sense of the term but he holds a fiduciary character A Court of equity therefore, has full power to direct interest to be paid on collections which have been wrongly withheld by a mortgagee in possession.)

12. AIR 1968 Mad 394 (406) : ILR (1968) 3 Mad 152 (DB)

Section 77 — Note 1

1. AIR 1943 Oudh 38 (40) 18 Luck 273 (DB) (AIR 1931 All 562 (FB) and AIR 1942 Oudh 203, Followed) ** **AIR 1931 All 562 (566) : 54 All 205 (FB).** (7 Ind Cas 293 **impliedly Overruled.)** ** AIR 1935 Pat 148 (149) (DB) ** AIR 1929 Pat 571 (573) (DB) ** AIR 1924 Oudh 92 (94) 27 Oudh Cas 250 (DB) (Mortgagee's duty under S 76(g) is absolute ** AIR 1919 Mad 322 (328, 329) 41 Mad 959 (DB) ** AIR 1942 Oudh 203 (204) 17 Luck 727 (DB). **(Terms of S. 76(g) and (h) are absolute.)**

   Also see S. 76, Note 12.

   [But see (1911) 9 Ind Cas 978 (978) (All) (Express agreement between mortgagor and mortgagee that former will not claim accounts debars him from claiming accounts)]

2. **AIR 1958 SC 941 (945) : 1959 SCR 1085 : 37 Pat 1168** ** 1983 All LJ (NOC) 23 ** AIR 1957 Pat 564 (567) (DB) (**Reversed** on another point in AIR 1962 SC 914) ** ILR (1955) Hyd 356 (361) (DB). (Mortgagee in possession — Stipulation that income to be in lieu of interest — Mortgagee not entitled to claim interest) ** ILR (1953) 3 Raj 318 (329) (Section 77 is a proviso to S 76) ** AIR 1947 Mad 197 (200) ILR (1947) Mad 411 (DB) ** AIR 1946 Pat 36 (37) 24 Pat 545 (DB) ** AIR 1942 Oudh 189 (191) 17 Luck 297 (DB) (Simple mortgagee redeeming prior usufructuary mortgage under which the mortgagee was entitled to appropriate profits towards interest and obtaining possession of the property — Simple mortgagee acquires all the rights of usufructuary mortgagee and is not liable to account — Fact that in suit on his mortgage he has allowed set off to mortgagor for profits received against interest due will not make him liable for ac-

Where there is no such special contract, the general provisions of S. 76 will apply.(3) This section, which embodies a limited exception to S. 76, omits any reference of Cl. (c) of S. 76.(4) That clause has no reference to any accounting. It merely casts upon the mortgagee in possession the liability to pay all charges of a public nature and all rent accruing due in respect of the property during his possession.(5)

In the cases referred to in this section it is no concern of the mortgagor whether the mortgagee collects the rents and profits under S. 76, Cl (b), or keeps an accurate account under Cl (g), or applies the receipts properly under Cl (h) If the usufruct exceeds the interest or the interest and the portion of the principal as the case may be, towards which the usufruct is to be appropriated, the mortgagee will be benefited thereby. If there is a loss, it is the mortgagee who must bear it.(6)

The exemption under this section from the liability to account arises only when there is a contract to take the usufruct for the *whole interest* or for the *whole* interest and the defined portions of the principal. The section does not apply where the mortgagee has *to hand over a fixed portion* of the rents and profits to the mortgagor, or where the mortgagee is to appropriate the rents and profits in lieu of a *portion of the interest*.(7) In *Muhammad Sadiq v. Harakh Narain*.(8) Courtney-Terrell, C.J., observed as follows :

> "Now the liability to account of a mortgagee in possession depends entirely upon whether under the contract he has to hand over from time to time anything of the rents and profits to the mortgagor, for, of such money he is a trustee for the plaintiff until it is paid over In cases where only a portion, fixed or proportionate of such rents and profits, is to be retained by way of interest, the liability to account is clear. Similarly, where the whole of the rents and profits are to be retained in reduction of a fixed

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counts) ** **AIR 1933 PC 136 (141)** ** AIR 1924 Oudh 92 (94) 27 Oudh Cas 250 (DB) ** (1866) 6 Suth WR 283 (284) (DB) (Case under S. 4 of Act XXVIII of 1855) ** AIR 1937 All 317 (318, 319) (DB) (Mortgage with possession — Mortgagee to hold possession in lieu of interest — Rate of interest not specified — No liability of mortgagee to account.)

[**See also** AIR 1946 Oudh 93 (86) 21 Luck 124 (DB) (Mortgagee to remain in possession in lieu of principal and interest for a term of years — Simple money decree passed in his favour under S 14, U P Encumbered Estates Act (25 of 1934), before expiry of term — Suit by mortgagor for profits realised by mortgagee from date of application under S 4 and date of decree — Burden of proving amount of profits realised by mortgagee lies on mortgagor as mortgagee was exempt from keeping accounts under S 77.) ** (1931) 134 Ind Cas 95 (96) (DB) (Cal) ** (1864) 2 Mad HCR 289 (290) (DB)]

3. AIR 1957 Pat 564 (567) (DB) (**Reversed** on another point in AIR 1962 SC 914)

4. AIR 1943 Oudh 433 (434) : 19 Luck 286.

5. AIR 1946 Pat 36 (37) : 24 Pat 545 (DB).

[**See also** AIR 1936 Pat 312 (313) (Mortgagee in possession paying municipal taxes — Rent agreed to be set off against principal and interest — Mortgagee is entitled to set off municipal taxes in mortgage account.)]

6. ILR (1955) Hyd 356 (360) (DB) ** AIR 1947 Mad 197 (200) ILR (1947) Mad 411 (DB) ** AIR 1914 Nag 16 (17) : 10 Nag LR 9.

Also see S. 76, Note 8.

7. AIR 1943 Oudh 38 (41) 18 Luck 273 (DB) (Mortgagee to pay a fixed sum every year to mortgagor as surplus profits after appropriating net profits towards interest — *Held* section was not applicable) ** AIR 1936 Pat 583 (584) (DB) ** AIR 1935 Pat 148 (149) (DB) ** AIR 1942 Oudh 203 (204) : 17 Luck 727 (DB).

[**But see** (1908) 7 Ind Cas 293 (294) (All). (Submitted not correct — **Impliedly overruled** on a different point in AIR 1931 All 582)]

8. AIR 1936 Pat 583 (584, 585) (DB).

rate of interest and the mortgagor must pay the balance of the fixed rate from some other source it is clearly necessary to account because the mortgagee is in possession and the mortgagor cannot otherwise know how much excess he may have from time to time to pay .

"Where, however, he is entitled to retain the whole of the rents and profits and where as in this case his liability to make the stipulated payments to or on behalf of the mortgagor is independent of the amount of such rents and profits as he may in fact receive from the property, there can be no reason to call upon him to account The failure to pay over the stipulated amounts to the mortgagor is the failure of a debtor and not the failure of a trustee to account satisfactorily for the property of another, and there is no reason to hold him liable to account with yearly rests or to apply the sums which he annually fails to pay in reduction of the capital of the loan"

The question whether the mortgagee is or is not liable to account has to be decided with reference to facts of each case upon a consideration of the mortgage deed **(9)**

The section postulates the existence of a stipulation of interest for its application Where there is no stipulaton of interest at all or a determined rate of interest, the provisions of S 77 cannot be applicable. The benefits of provisions of S 77 which are limited by the specific provisions of that section cannot be extended by analogy Where there was in fact no stipulation of interest such a stipulation cannot be presumed.**(10)**

Where it was not stipulated in the mortgage deed that mortgagee was placed in possession over the mortgaged property in lieu of interest only and was not accountable, S 76(g) and (h) would apply and not S 77 The mortgagee was therefore bound to account at the time of redemption.**(11)**

Generally, if the parties agree that the rents and profits are to be taken in lieu of interest it is wholly unnecessary to mention the rate of interest But it does not necessarily follow that simply because the rate of interest is mentioned, the parties must have intended that there is to be accounting between them.**(12)**

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9. AIR 1958 SC 941 (946) : 37 Pat 1168. (Liability of mortgagee to render accounts depends on terms of deed — *Held* it was not a case where receipts from mortgaged property were divided between mortgagor and mortgagee but one where mortgagee paid specified amount to mortgagor and appropriated entire receipts in lieu of interest — Hence there was contract within meaning of S 77 to the effect that receipts should be taken in lieu of interest and that mortgagee was not bound to render any accounts to mortgagor) ** (1978) 2 Rent LR 464 (467) (Punj) (Usufructuary mortgage — Held mortgagee was absolved from liability of keeping accounts of the rents and profits of mortgaged property) ** AIR 1946 Oudh 83 (86) 21 Luck 124 (DB) (Mortgagee to remain in possession for a certain period in lieu of interest and principal — He is not liable to account for profits) ** AIR 1944 Oudh 238 (238) (DB) (Application for leave to appeal to Privy Council from AIR 1942 Oudh 499.)

10. (1968) 1 Andh LT 341 (350). (AIR 1968 SC 941, Foll.)

11. AIR 1985 All 327 (331)

12. AIR 1958 SC 941 (946) : 37 Pat 1168 ** AIR 1942 Oudh 499 (501) 18 Luck 484 (Mortgagee to take possession of shops in certain contingency and thereafter to appropriate rent towards interest — Mortgagor entitled to redeem on paying entire principal with interest prior to possession in lump sum — Case held covered by S 77 — Mention of rate of interest in deed held not conclusive as to accounting AIR 1934 Oudh 220, Followed) ** AIR 1934 Oudh 220 (221, 222) : 10 Luck 70 (DB).

[See AIR 1944 Mad 501 (502) (Usufructuary mortgagee to appropriate rents of mortgaged property fixed at Rs 50 per year in lieu of interest fixed at 8 per cent per annum on principal amount which would come to Rs 50 per year - Mortgagee to deliver possession on payment of principal amount on expiry of term — *Held* that the mention of interest at a particular rate could only be regarded as made for the purpose of assessing the return to the mortgagee on the amount invested by him on the estimated yield and did not render the mortgagee liable to account.)]

Illustrations.

(1) Where the mortgage deed provided : "The mortgagee shall appropriate the surplus profits towards interest, we, the mortgagors having no claim for profits and the mortgagee having no claim for interest," the Privy Council held that the mortgage deed was "a contract" within the meaning of S 77 and that the mortgagees were not liable to account **(13)**

(2) A usufructuary mortgage deed of an occupancy holding provided that the mortgagee was to take the profits in lieu of interest after payment of rent to the Zamindar. The mortgagor was to redeem on payment of the mortgage money in a lump sum During the subsistence of the mortgage the mortgagee escaped the payment of the rent to the Zamindar for some years The question arose as to who was to get the benefit of those sums, which should have been paid to Zamindar, but which, as a matter of fact, were not paid It was held that the mortgagee was entitled to the benefit of such non-payment.**(14)**

(3) Where a mortgage deed provided that after payment of Government revenue and *malikana* to a third person, all the profits should go to the mortgagee, the mortgagors having no concern with them it was held that the mortgagee's failure to pay the *malikana* did not render him liable to account, as the mortgagor suffered no specific loss and that the utmost that the mortgagors could be allowed to claim was that they should be indemnified against the contingency of a valid claim for arrears of *malikana* being made against them after their recovery or possession **(15)**

(4) The principal terms of a mortgage deed were that the mortgagees were to take possession and to receive the profits in lieu of interest They were, however, to pay *malikana* to the mortgagors The *malikana* was not paid. It was held that the mortgagees were liable to account and that the mortgagors were entitled to redeem on payment of the principal after deducting the *malikana* for the years of which it was not paid.**(16)**

(5) A sub-mortgage deed recited that the sub-mortgagor would repay the mortgage money with interest at a certain rate, that the sub-mortgagee was to be in possession, and that after paying the annual Government revenue the balance was to be appropriated towards the interest It was held that the sub-mortgagor was not entitled to ask for an account.**(17)**

(6) A usufructuary mortgage deed set out the annual profits according to the rent roll and allowed the remission of establishment charges, rent, cess, etc That left a net profit of Rs 110, out of which Rs 80 was to be set off against interest, and the balance against the principal The area and the income of the property were liable to variation It was held that the parties did not intend to have their rights and liabilities adjusted on the basis of the actual figures mentioned in the document and that, therefore, the mortgagee was not exonerated from his liability to account.**(18)**

(7) The terms of a usufructuary mortgage provided that out of the annual profits the revenue should be paid by the mortgagee and the balance should be appropriated as the interest The mortgagee failed to pay the revenue for some years, and the mortgagor was compelled to pay it The mortgagor was held entitled to charge against the mortgagee the amount of revenue he had been compelled to pay by reason of the mortgagee's default.**(19)**

See also the undermentioned cases.**(20)**

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13. AIR 1933 PC 136 (141).**14.** (1911) 10 Ind Cas 113 (113) (All) ** AIR 1941 Mad 549 (550) (DB). (Reversing AIR 1940 Mad 686.)

Also see S. 76, Note 8

15. AIR 1929 Pat 37 (39) : 7 Pat 44 (DB)

16. AIR 1924 All 591 (592) 46 All 633 (DB) ** (1880) 2 All 455 (460) (DB).

Also see S. 62, Note 6.

17. AIR 1934 Oudh 220 (221, 222) : 10 Luck 70 (DB)

18. AIR 1919 Cal 314 (316) (DB).

19. (1884) 6 all 303 (308) (DB).

20. AIR 1958 Mys 43 (48) : ILR (1957) Mys 277 (Evidence showing that mortgagee was in possession primarily for paying interest — It is necessary that he should account to mortga-

In a case governed by the provisions of the Bengal Money-Lenders Act (10 of 1940) the mortgage deed contained an express contract excluding the liability of the mortgagee in possession to account. It was held that the object of the Act being to give relief to the parties against contracts contrary to its provisions the Act abrogated such contracts, unlike this section which made express provision for liability of the mortgagee in possession subject to a contract between the parties. Hence the mortgagee was liable to render accounts in spite of the express contract in the mortgage

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gor for income received during period he was in possession) ** AIR 1918 Oudh 432 (434) (DB) (Usufructuary mortgagee failing to pay off prior encumbrance — Mortgagor is entitled to claim accounts and to set off for amount paid in satisfaction of prior encumbrance) ** AIR 1944 All 232 (233) ILR (1944) All 349 (DB) (Mortgage with possession — Mortgagee to set off usufruct towards interest — *Held* mortgagee was not liable to keep accounts — Fact that the mortgagee was liable for payment of revenue then assessed on the property but that the mortgagor was liable for any further assessment made during the period of mortgage would not render the mortgagee liable to keep accounts) ** AIR 1944 Mad 501 (502) (Usufructuary mortgage for Rs 625 with interest at the rate of 8 per cent per year which would amount to Rs 50 per year — Mortgagee to remain in possession for a period of 60 years and to enjoy the rents of the mortgaged lands which were fixed at Rs 50 in lieu of interest on the principal — After expiry of period mortgagee to deliver possession on payment of principal amount — Suit for redemption by mortgagor before the expiry of the period on the ground that debt was discharged by operation of Madras Agriculturists Relief Act (IV of 1938) — *Held*, that though interest at a particular rate was mentioned, there being no provision in the deed that if the yield of the property was less than the estimated rent of Rs 50 the mortgagor was liable to make good the deficiency or if the yield was more, the mortgagees were accountable to the mortgagor for the excess over such rent the receipt of the profits by the mortgagees could not be regarded as payments by the debtor for the purpose of S 8(2) of Act IV of 1938 Hence, the debt was not discharged) ** AIR 1943 Oudh 38 (41) : 18 Luck 273 (DB) (Usufructuary mortgage — Mortgagee to appropriate net profits after deducting revenue payable, and the interest due to prior mortgagee, towards interest fixed at 6 per cent per annum — A fixed balance was to be paid to mortgagor every year as surplus profits — Mortgagor by a separate deed also agreeing that the nazarana and saer income will not form part of interest but would be appropriated by mortgagee as his own income without any liability for accounting — *Held* that the mortgagee was liable to account for the realisation of saer income in addition to the gross rental of the property.) ** AIR 1942 Oudh 499 (501) 18 Luck 484 (Mortgagee to take possession of shops in certain contingency and thereafter to appropriate rent towards interest — Mortgagor entitled to redeem on paying entire principal with interest prior to possession in lump sum — Case held covered by S 77 and mortgagee is not liable to account — Mention of rate of interest in deed held not conclusive as to accounting) ** AIR 1932 All 500 (501) (DB) (Mortgage deed stating that interest on mortgage-money and profit of mortgaged property would be equal — No mention as to payment of rent — Mortgagee was disallowed the amount of rent which he paid to the zamindar) ** AIR 1914 Nag 16 (17) 10 Nag LR 9 (Mortgagee to pay land revenue and balance to be appropriated towards interest — Mortgagee held must suffer if there was loss — No enquiry as to profits held could be permitted) ** AIR 1926 Cal 1239 (1239) (DB) (Mortgagee put in possession in lieu of interest — He is only entitled to principal and not any interest) ** AIR 1925 Oudh 114 (116, 117) 28 Oudh Cas 100 (DB) (Mortgage deed providing that the mortgagee to claim no interest and mortgagor to claim no profits of mortgaged property — Mortgagee held not liable to account at time of redemption) ** 1889 Bom PJ 18 (DB) (Mortgagee to appropriate profits towards interest, to be calculated at agreed rate — If profits not sufficient to cover interest, mortgagor undertaking to pay balance — Mortgagee held liable to account) ** (1911) 11 Ind Cas 713 (717) (DB) (Cal) (Mortgagee to pay fixed sum annually to mortgagor — Balance of profits to be utilized towards revenue and interest — Annual profits never paid in cash — Mortgagee held liable to account) ** AIR 1914 Mad 661 (662) (DB). (Kanpanayam deed — Profits to be appropriated towards interest — 200 paras of paddy to be delivered annually to mortgagor — No accounts to be taken — Mortgagee held liable to be debited with the payments he had not made to the mortgagor) ** AIR 1930

deed (21) This was followed by the High Court of Orissa in case arising under the Orissa Money-Lenders Act (3 of 1939).(22)

A mortgagee permitted by the deed to appropriate the usufructs for the interest on the principal is exempted from liability to account for such usufruct, but reading S 77 with S.9 of the Orissa Money-Lenders Act it is clear that the latter provision overrides S. 77 and exemption is no longer available. The mortgagee will have to render accounts for allowing the interest accruing from the usufructs.(23)

It was held in undermentioned case(24) that S 77 of T P Act and S. 11 of Bihar Money-Lenders Act, 1975 are not at all repugnant to each other. They are independently applicable in their spirit and tenor to the facts of each case.

Where the mortgagee had advanced only a sum of Rs. 283/- out of the sum of Rs. 3000/- which he had undertaken to pay, he could not plead that, in view of the recitals in the deed that the rent of the property should be adjusted against the interest payable on the mortgage amount, he was not liable to render account In such circumstances, Section 77 would not be attracted at all.(25)

2. "Defined portions of the principal."

Suppose, a mortgage deed after providing for the interest, provides that the mortgagee should be in possession, and should appropriate a *fixed* sum out of the rents and profits towards the principal debt. Can this be said to be a contract that the receipts of the property should be taken in lieu of interest and defined portions of the principal" within the meaning of this section? In *Sheshayya v Lakshminarasimha Rao*,(1) Justice Venkatasubba Rao doubted if the section applied to such a case The reason given was that the ratio between the principal debt and the fixed sum to be appropriated does not remain constant throughout the period of the mortgage.

3. Mortgagor may make himself liable to account though mortgagee is not liable to do so.

The fact that the mortgagee is not liable to account by virtue of S. 77 does not mean that there is to be no accountability on *either* side. It is not inconsistent with the provisions of S 77 that the mortgagor should impose upon himself a liability to make good certain possible deficiencies in profits, although the mortgagee is not liable to account.(1)

Mad 160 (163) (DB) (Mortgagee to appropriate annually fixed sum towards principal debt and interest, and pay fixed sum to mortgagor — Mortgage debt thus to be discharged within 55 years — Annual payments not made — Mortgagee held liable to account AIR 1925 Mad 825, Affirmed) ** (1912) 16 Ind Cas 217 (218) (DB) (Mad) (Where a mortgage-bond stipulates for the appropriation of profits towards interest without mentioning the rate of interest, and a portion of the principal amount is received by the mortgagee, the Court in its decree should direct the appropriation of a portion of the rent proportionate to the balance of principal remaining unpaid towards interest and hold the mortgagee accountable for the balance — If no portion of the amount paid would be debitable towards the principal, no question of accountability for the profits would arise.) ** AIR 1918 Oudh 432 (434) (DB). (Notwithstanding the terms of the mortgage, accounting becomes essential where the mortgagee has failed to carry out his part of the contract) ** (1904) 27 Mad 86 (92) (DB) (Interest to be appropriated out of rents — No liability to pay it)

21. AIR 1962 Cal 457 (459) (DB).

22. ILR (1967) Cut 695 (697, 700).

23. AIR 1974 Orissa 196 (198) : 40 Cut LT 267.

24. 2001 (4) Pat LJR (HC) 716 (721).

25. AIR 1972 Mys 178 (181) : (1972) 1 Mys LJ 52.

Section 77 — Note 2

1. AIR 1930 Mad 160 (163) (DB).

Section 77 — Note 3

1. AIR 1941 Oudh 380 (382, 383) (DB) (Profits to be appropriated in lieu of interest

Priority

78. POSTPONEMENT OF PRIOR MORTGAGEE.— Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Synopsis

1. **Scope of the section.**
2. **"Fraud."**
3. **"Misrepresentation."**
4. **"Gross neglect."**
5. **Prior mortgagee failing to obtain or parting with title deeds, whether guilty of gross neglect.**
6. **Prior mortgagee by deposit of title deeds not obtaining all the title deeds, whether guilty of gross neglect.**
7. **Laches on the part of the prior mortgagee in instituting his suit, whether amounts to gross neglect.**
8. **"Fraud, misrepresentation or gross neglect" must be the proximate cause of the inducement.**
9. **Subsequent mortgagee having notice of the prior mortgage cannot obtain priority over the prior mortgagee.**
10. **The section applies to mortgagees.**
10A. **Prior mortgagee losing priority — Mortgagor's liability to him is not affected.**
11. **Burden of proof.**
12. **Distinction between S. 78 and latter part of S. 93.**
13. **Law in the Punjab.**
14. **Priority by estoppel.** See Note 16 on S 48

1. Scope of the section.

This section provides an exception to the general rule laid down in S 48,(1) and provides that a prior mortgagee forfeits his priority to which he is entitled under the general rule and is postponed to a subsequent mortgagee, if, through the fraud, misrepresentation of gross neglect of the prior mortgagee, the subsequent mortgagee is induced to advance money on the security of the mortgaged property (2) The section is based on the law of estoppel (3) The principle is that a subsequent mortgagee who is, in fact, misled by the mortgagor taking advantage of the conduct of the prior mortgagee can, as against the prior mortgagee, take advantage of his conduct (4)

Mortgagor covenanting to make good loss arising from reduction of profits — Profits reduced by remission of rent — Mortgagor liable to make good deficiency)

Section 78 — Note 1

1. AIR 1936 Cal 283 (284) 63 Cal 880 (DB) ** AIR 1928 Sind 179 (186) 23 Sind LR 97 (DB) ** AIR 1930 Lah 920 (927) 11 Lah 564 (DB) ** AIR 1930 Cal 22 (23) 56 Cal 868 ** AIR 1935 Lah 887 (888) (DB).

   [See AIR 1923 PC 211 (213) : 50 Ind App 283 (Priority is specifically dealt with in Ss 78, 79 and 80 (old).) ** AIR 1927 Cal 538 (542) (DB)]

2. AIR 1934 Nag 29 (30) 30 Nag LR 196 ** AIR 1929 Rang 298 (300) ** AIR 1935 Lah 887 (889) (DB) ** (1889) 12 Mad 429 (433) ** (1886) 8 All 324 (339, 340) (DB) ** AIR 1933 All 299 (300) (DB) (For the application of this section it must be proved that fraud, etc of the prior mortgagee was the proximate cause for the advance of money by subsequent mortgagee — If it is not the proximate or the primary cause but only one of the various contributory factors which led the subsequent mortgagee to advance money, this section will not apply.)

3. AIR 1918 Cal 411 (411) (DB).

   Also see S. 48, Note 16.

4. AIR 1932 Cal 589 (593) 59 Cal 781 (DB) ** AIR 1927 Cal 538 (542) (DB) ** (1884) 26 Ch D 482 (492) 53 LJ Ch 629 51 LT 806 32 WR (Eng) 626, Northern Counties of England Fire Insurance Co. v. Whipp

To succeed in the plea based on S. 78 of the Act, it is necessary that it is proved and found that the subsequent mortgagee was directly, and not, remotely, induced by reason of gross neglect on part of prior mortgagee to advance money on the security of the mortgaged property (5)

The words "fraud, misrepresentation or gross neglect" in the section point to three different kinds of conduct and are disjunctive. Nor being co-extensive in their meaning one cannot be defined in terms of the other.(6)

2. "Fraud."

The Act does not contain any definition of fraud It is, however, defined in S 17 of the Contract Act, 1872, and this definition would be applicable for the purposes of this Act in view of S. 4

Where a subsequent mortgagee takes his mortgage at the instance of the prior mortgagee who fraudulently conceals the fact that he has a prior mortgage, the prior mortgagee will be postponed to the subsequent mortgagee.(1)

A subsequent mortgagee claiming relief against the prior mortgagee on the ground of fraud must plead fraud and must specifically set out the particulars of the fraud alleged.(2)

3. "Misrepresentation."

The definition of the word "misrepresentation" as given in S 18 of the Contract Act, 1872, is as follows :

"Misrepresentation means and includes—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;

(3) causing, however, innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement."

It is in the above sense, that the word "misrepresentation" must be taken to have been used in this section.(1) It will cover cases which are called cases of "constructive fraud" in the Courts of Equity in England, in which there is no intention to deceive, but where the circumstances are such as to make the party, who derives a benefit from the transaction, equally answerable in effect as if he had been actuated by motives of fraud or deceit (2) In the undermentioned case,(3) a prior

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[See also 1906 Pun LR No. 23 p. 81 (83) (DB).]

5. AIR 1983 Ker 38 (42) : 1982 Ker LJ 624 (DB).

6. (1911) 15 Cal WN 813 (817) (PC). (When the first mortgagee helped the mortgagor to induce the second mortgagee to advance money by declaring that the property was free from encumbrances, he cannot then turn round and claim priority over that mortgage in his own favour.) ** AIR 1916 Cal 33 (39) · 43 Cal 1052 (DB) ** AIR 1932 Cal 589 (594) 59 Cal 781 (DB) ** AIR 1934 Nag 29 (31) : 30 Nag LR 196.

Section 78 — Note 2

1. (1869) 11 Suth WR 286 (288) (DB)

[See also (1740) 26 ER 427 (427) · 2 Atk 49 · Barn (Ch) 101, Berrisford v Milward ** (1699) 23 ER 833 (833) 2 Vern 370, Draper v Borlace ** (1706) 23 ER 958 (959) 2 Vern 554, Ibbottson v. Rhodes.]

2. AIR 1930 Cal 22 (28) : 56 Cal 868

Section 78 — Note 3

1. AIR 1916 Cal 33 (39) : 43 Cal 1052 (DB) ** AIR 1934 Nag 29 (30, 31) 30 Nag LR 196

2. (1878) 3 Bom 242 (267). (Case of cancellation of a deed on the ground of misrepresentation under S. 18, Contract Act.)

3. AIR 1934 Nag 29 (30, 31) : 30 Nag LR 196.

mortgagee endorsed an acknowledgment of full satisfaction on the back of the mortgage deed and handed over the deed to the mortgagor The amounts paid by the mortgagor were, in fact, paid not towards the satisfaction of the mortgage in question, but towards the satisfaction of a different mortgage and this fact ought to have been within the knowledge of the prior mortgagee It was held that the prior mortgagee had made a "misrepresentation" within the meaning of S 18, Cl (1) of the Contract Act; and that he must be postponed to the subsequent mortgagee, who advanced money on the security of the mortgaged property under the belief that the prior mortgage was discharged

A prior mortgagee, on hearing that the mortgagor is again mortgaging the property for the second time, is not under a duty to inform the intending mortgagee that he has a previous mortgage The mere circumstance, that the mortgagee, on knowing that the mortgagor was dealing with the property, kept silent is, therefore, not sufficient to postpone him to the subsequent mortgagee **(4)** But if with full knowledge of his own title, he stands by and allows the mortgagor to deal with the property as if it was unencumbered and misleads the subsequent mortgagee into the belief that he was taking a security which is otherwise unencumbered, he is postponed to the subsequent mortgagee **(5)** Thus, in the undermentioned cases,**(6)** a prior mortgagee attested the subsequent mortgage deed which made no mention to the prior mortgage but which on the contrary stated that the property was unencumbered It was held that the prior mortgagee was not guilty of any *intentional fraud* but by his conduct lost his priority as with full knowledge of his own title he stood by and allowed the mortgagor to deal with the property as if it was unencumbered while the subsequent mortgagee acting under the belief that there was no prior encumbrance advanced money on the security of the property.

4. "Gross neglect."

The term "gross neglect" is not defined anywhere in the Transfer of Property Act The term, as used in this section, may be said to mean a failure on the part of the prior mortgagee to take such reasonable precautions against the risk of a subsequent mortgagee being deceived as in the circumstances renders it unjust that the prior mortgagee should retain his priority **(1)** A definition of the term in any precise words is not practicable, nor desirable, and each case must depend upon its

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4. (1876) 1 All 303 (306) (DB) ** (1865) 4 Suth WR 45 (47) (DB)

[**See also** (1890) 14 Bom 506 (510) (DB) (Prior mortgagee and subsequent purchaser) ** **(1876) 1 Ind App 144 (156) (PC). (Do.)**

5. (1868) 3 Agra 402 (406) (DB) ** (1976) 1 All 303 (306) (DB)

[**See also** (1890) 14 Bom 506 (510) (DB) (Prior mortgagee and subsequent purchaser) ** (1890) 14 Bom 506 (510) (DB) (Prior mortgagee and subsequent purchaser) ** (1870) 7 NWPHCR 315 (319) (DB) (Do) ** (1887) 12 Bom 33 (36) (DB) (It upon general principles of equity, the conduct of the purchaser of equity of redemption is such as to amount to a standing by and allowing the prior mortgagee to make further advances to the mortgagor on the security of the same property under the supposition that the mortgagor is still the owner of the equity of redemption such conduct would give the mortgagee a better equity) ** **(1873) 1 Ind App 144 (156) (PC).** (Prior mortgagee and subsequent purchaser.)]

6. (1868) 3 Agra 402 (406) (DB) ** (1876) 1 All 303 (306 307) (DB) (Mere attestation by prior mortgagee of a subsequent mortgage in favour of another person is not sufficient to create estoppel against him, if he is not aware of the contents of the deed)

[**See also** (1718) 24 ER 440 (441) 1 P Wms 393 2 Eq Cas Arb 612 Mocatta v Murgatroyd (Attesting witness was presumed to know the contents of the deed)]

Section 78 — Note 4

1. AIR 1930 Cal 22 (28, 29) 56 Cal 868 (The Court must be satisfied that the subsequent encumbrancer was induced directly and not remotely to advance money by reason of the gross neglect of the prior mortgagee) ** AIR 1983 Cal 38 (42) 1982 Ker LJ 624 (DB) ** AIR 1938 Mad 87 (89) (It would be gross neglect' within the meaning of S 78 of the T P

particular circumstances (2) Thus, an act or omission that would amount to gross neglect in the case of a banker or a man of business might not be so regarded in the case of an ignorant and uneducated person.(3) But it must be such as will be sufficient to create an estoppel against him (4) In *Dixon v.Muckleston*,(5) Lord Selborne observed :

> "There may be omission or negligence equivalent, in practical effect, to acts: because where there is something which a person ought to do, and must be presumed to know that he ought to do, and does not do it, the consequence is that his neglect in not doing it may be regarded as due to what is called

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Act, if a prior mortgagee has by any act or omission of his enabled the mortgagor to deal with the property as if it is not encumbered) ** AIR 1934 Nag 29 (31) 30 Nag LR 196 (Mortgage deed endorsed by mortgagee as fully satisfied — Presumption of satisfaction is strong — Subsequent mortgagee advancing money is justified in acting on footing that mortgage was discharged.)

[See also AIR 1936 Cal 293 (288) 63 Cal 880 (DB) (It must at least be carelessness of so aggravated a nature as to amount to neglect of precautions which the ordinarily reasonable man would have observed and to indicate an attitude of mental indifference to obvious risks. Case law discussed.)]

2. 1946 MLR 30 (Civ) (31) ** AIR 1930 Cal 22 (29) · 56 Cal 868 ** (1908) 31 Mad 7 (10) (DB) ** AIR 1930 Rang 246 (247) (DB). (Failure to obtain possession of title deeds is not gross neglect) ** AIR 1940 Lah 269 (271) ** AIR 1936 Cal 283 (284) 63 Cal 880 (DB) ** AIR 1933 All 290 (300 301) (DB) (Property wrongly described as being situate in khata khewat No 1 in the deed of gift in favour of the mortgagor — It was so described in a mortgage deed in favour of a third person Both deeds mortgaged — Prior mortgagee relying on these documents is not guilty of gross negligence in not inspecting the entries in the revenue papers as he had no reason to suspect the deeds) ** AIR 1933 Cal 398 (400) : 60 Cal 225 (Prior mortgagee not immediately registering his mortgage but registering it within time allowed by law — No gross neglect) ** (1898) 2 Cal WN 750 (754) ** (1889) 12 Mad 429 (431) ** (1908) 4 Mad LT 217 (218) (DB) (Mere failure to obtain title deeds does not amount to gross neglect) ** AIR 1926 Rang 195 (187) 4 Rang 238 (Title-deeds handed over to the mortgagor for the specific purpose of effecting mutation of names in the Land Revenue Registers — Mortgagee not guilty of gross neglect) ** AIR 1928 Rang 136 (137) · 6 Rang 423 (DB) (Prior mortgage registered — Failure to report the mortgage in his favour by the prior mortgagee from a grantee of oil wells in Burma to the Warden of the oil field does not amount to gross neglect under the circumstances) ** AIR 1929 Lah 314 (314) (The mere fact that a prior mortgagee was entitled to possession does not cast any obligation on him to take possession and his mere failure to take possession or to record the prior mortgage deeds in the revenue papers does not amount to such gross negligence as would deprive him of his right of priority) ** AIR 1940 Lah 308 (308 309) (A mortgagee who allows the mortgagor to remain in possession of the mortgaged property as a tenant is not guilty of gross negligence) ** AIR 1943 Lah 113 (117) (DB)

[See also AIR 1938 Mad 161 (163) (DB) (A prior mortgagee not taking diligent steps to have a legal mortgage executed in his favour — Subsequent mortgagee misled into lending money in ignorance of prior mortgagee's claim — Prior mortgagee postponed to subsequent mortgagee.)]

3. AIR 1930 Cal 22 (29) : 56 Cal 868.

4. AIR 1934 Nag 29 (32) . 30 Nag LR 196 (It is immaterial that the prior mortgagee has acted merely carelessly and that his conduct was free from any improper motive There can be gross neglect even where a man acts in the most entire good faith) ** AIR 1930 Cal 22 (28, 29) 56 Cal 868 ** (1872) 8 Ch App 155 (160) · 42 LJ Ch 210 (214) 27 LT 804 21 WR (Eng) 178, Dixon v Muckleston

5. (1872) 8 Ch App 155 (160) 42 LJ Ch 210 (214) . 27 LT 804 21 WR (Eng) 178 (Note — The quotation is taken from 42 LJ Ch 210.)

[See also (1857) 44 ER 887 (889) · 27 LJ Ch 220 · 6 WR (Eng) 144 · 2 De G & J 1, Roberts v Croft (Omission to call for all title-deeds — No gross negligence)]

gross or wilful negligence, which is equivalent to an act But it must be something which raises a possible equity against him, operating upon the principle of that which, in equity, as distinct from law, is conveniently designated by the term "estoppel, that is, the man who has conducted himself in such a manner is not entitled to deny the truth of his own representations if it be a case of express representation, he is not entitled to deny being bound by the natural consequences of his own acts if it be a case of positive acts, he is not entitled to refuse to abide by the consequences of his own wilful and unjustifiable neglect, if that is the nature of the case By one or other of those means he may have armed a third person with the power of going into the word underfaise colours and if it be really and truly that owing to his act, or to his improper omission such an apparent authority and power has been vested in his neighbour, he must be bound upon equitable principles by the use made of that authority and power."

In *Monindra Chandra Nandy v Troyluckho Nath Burat* (6) Jenkins, J , held that the "gross neglect," must amount to *evidence of fraud* The learned Judge based his judgment in that case on English decisions In England the question has, however, become complicated by the importance given to the legal estate as opposed to the equitable estate, and the legal mortgage always prevails against the equitable, unless the holder of the legal mortgage has done or omitted to do something which prevents him in equity from asserting his paramount rights (7) As held by their Lordships of the Privy Council in *Imprial Bank of India v Rai Gyaw Thu and Co* (8) ' the question in England is not so much one of priority in time, as of the possibility of an equitable mortgage being allowed to prevail over a legal one."(9) In England it has, therefore, been held in some of the cases that in order to deprive the legal mortgagee of his superior right he must be guilty of fraud or gross neglect amounting to an evidence of fraud (10) In later decisions,(11) however, this rule is not followed and gross negligence not amounting to an evidence of fraud is also made the ground of depriving the legal mortgagee of the protection given to him by the legal estate But as between two equitable estates the English Courts have uniformly applied the general principle that when one of two innocent persons must suffer, it shall be he who by his own acts and conduct has caused the other to be

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6. (1898) 2 Cal WN 750 (754)

[**See also** (1889) 12 Mad 429 (431) (Negligence in order to be gross must amount to constructive fraud) ** (1885, 8 Mad 200 (201 202) (DB) (Case before Transfer of Property Act.) ** (1889) 13 Bom 229 (233, 234) (DB), (Two sales.)]

7. **AIR 1923 PC 211 (213) : 50 Ind App 283** ** AIR 1928 Sind 179 (186, 187) 23 Sind LR 97 (DB).

8. **AIR 1923 PC 211 (213) : 51 Cal 86 . 1 Rang 637 : 50 Ind App 283.**

9. *As to the English decisions on this subject see the following cases*

(1996) 33 Ch D 1 (13) 55 LT 458 *National Provincial Bank England v Jackson* (The question is not what circumstances may as between two equities give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate) ** (1889) 40 Ch D 182 (189) 58 LJ Ch 238 *Farrand v Yorkshire Banking Co* (Do) ** (1884) 26 Ch D 482 (487) 53 LJ Ch 629 *Northern Counties of England Fire Insurance Co. v. Whipp. (Do.)*

10. (1884) 26 Ch D 482 (494) . 53 LJ Ch 629. *Northern Counties of England Fire Insurance Co v Whipp* (The Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of mere carelessness or want of prudence on the part of the legal owner) ** (1896) 2 Ch 192 (195, 196) 65 LJ Ch 680 Lloyds Bank Ltd v Bullock (Do) ** (1893) 1 Ch 352 (360) 62 LJ Ch 100 68 LT 152, Jones v Ingham (Do) ** (1885) 29 Ch D 725, (730, 731) 53 LT 84, Manners v Mew (Prior legal mortgagee asking for the title-deeds but not getting them on some excuse — *Held*, not guilty of fraud or negligence amounting to fraud.) ** (1871) 6 Ch App 652 (654) 40 LJ Ch 777, Ratcliffe v Barnard ** (1826) 38 ER 309 (317) 26 RR 49, Martinez v Cooper ** (1801) 31 ER 998 (1002) 5 RR 245, Evans v. Biknell ** (1806) 33 ER 50 (52) 8 RR 319, Barnett v Weston

11. (1899) 2 Ch 264 (274) ' 81 LT 212, Oliver v. Hinton. ("To deprive a purchaser for value

imposed upon.(12) The view taken by Jenkins, J., in *Monindra Chandra Nandi v. Trovluckho Nath Burat*,(13) has not been accepted as laying down a correct rule by the High Courts in India and it has been held that it would not be proper to interpret S. 78 in the light of English decisions which are decided under circumstances which do not obtain in India and that "gross neglect" by itself and apart from any element of fraud or misrepresentation is sufficient to postpone a prior mortgagee to a subsequent mortgagee under the section (14) Thus, in *Nandalal v. Abdul Aziz*,(15) Holmwood and Iman, JJ., observed :

> "Now whatever definition we take of the three ingredients of the section, fraud, misrepresentation or gross negligence, it is clear that the section makes them disjunctive and that one cannot be defined in terms of the other or others. They are three different kinds of conduct and are in no way co-extensive."

The section makes only "gross" neglect as the ground of postponing the prior mortgagee and,

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without notice of a prior incumbrance of the protection of the legal estate it is not essential that he should have been guilty of fraud, it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority — Per Lindley, M R) ** (1907) 2 Ch 104 (114) 76 LJ Ch 500 Walker v Linom, (1899) 2 Ch 264 followed) ** (1913) 2 Ch 18 (24) 82 LJ Ch 481, Grierson v National Provincial Bank ** (1921) 1 Ch 98 (104) 90 LJ Ch 149, Hudson v. Viney ** (1904) 20 TLR 607 (609) 48 SJ 589, Cottery v National Provincial Bank of England Ltd (Prior legal mortgagee not guilty of gross negligence not postponed to subsequent equitable mortgage)

12. AIR 1928 Sind 179 (187, 188) 23 Sind LR 97 (DB) ** (1889) 12 Mad 429 (433) ** (1886) 33 Ch D 1 (12, 13) 34 WR (Eng) 597, National Provincial Bank of England v Jackson (As between equitable claims the question is whether one party has acted in such a way as to justify him in insisting on his equity as against the other) ** (1898) 1 Ch 315 (321, 322) · 46 WR (Eng) 248, Roper v Castell and Brown Ltd (As between equitable incumbrancers in determining priority the possession of the deeds has always been treated as a circumstance of great importance) ** (1885) 29 Ch D 221 (229) 33 WR (Eng) 781, Lloyds Banking Co v Jones (Where the equities are otherwise equal the possession of title-deeds gives priority to person who has got them) ** (1901) 2 Ch 231 (260) 49 WR (Eng) 451, Taylor v London and County Banking Co (Order of priority between purely equitable titles is governed by order of time unless there has been some act or omission on the part of the owner of an equitable title prior in point of time, such as to cause that title to be postponed to a subsequent equitable interest) ** (1878) 9 Ch D 189 (192) 26 WR (Eng) 810, Bradley v Riches (Do) ** (1888) 39 Ch D 238 (245) · 57 LJ Ch 1022, Union Bank of London v Kent (Do) ** 1892 AC 244 (259, 262) : 66 LT 565, Taylor v Russell ** (1888) 40 Ch D 182 (189, 190) 37 WR (Eng) 318, Farrand v Yorkshire Banking Co (Prior equitable mortgagee negligently allowing the mortgagor to deal with the deeds as if they were his own postponed to the subsequent equitable mortgagee) ** (1898) 2 Ch 347 (349, 350) 78 LT 832, Hopkins v Hemsworth (On facts held that prior equitable sub-mortgagee by deposit of title-deeds was not guilty of gross negligence and therefore not postponed to the subsequent equitable sub-mortgagee.)

13. (1898) 2 Cal WN 750 (754)

14. AIR 1943 Lah 113 (117) (DB). (Affirming AIR 1940 Lah 269) ** AIR 1930 Cal 22 (28, 29) 56 Cal 868 ** AIR 1916 Cal 33 (39) 43 Cal 1052 (DB) ** (1892) 15 Mad 268 (274, 275) (DB). (Allowing the title-deeds of the mortgaged property to remain in the hands of the mortgagor for a period of four years without any reasonable explanation for doing so amounts to gross neglect within the meaning of the rule) ** AIR 1932 Cal 589 (594) 59 Cal 781 (DB) (AIR 1916 Cal 33, Foll) ** AIR 1928 Sind 179 (183) 23 Sind LR 97 (DB) ** AIR 1936 Cal 283 (287, 288) 63 Cal 880 (DB) ** AIR 1934 Nag 29 (31) 30 Nag LR 196 ** (1889) 12 Mad 424 (428).

    [See however AIR 1929 Lah 314 (314). (Neglect must be such as amounts to fraud or misrepresentation.]

15. AIR 1916 Cal 33 (39) : 43 Cal 1052 (DB).

therefore, a slight negligence on the part of the prior mortgagee is not sufficient to postpone him (16) Where the mortgagor had mortgaged the property in favour of Bank and deposited necessary documents, registration extract of sale deed and a letter informing Bank that original sale deed was lost, held, failure on part of Bank to have enquired from the contractors of mill who alleged to have lost original sale deed does not, therefore constitute gross neglect against the Bank (17)

As to what "gross negligence" generally is, see Note 30 on S 3

5. Prior mortgagee failing to obtain or parting with title deeds, whether guilty of gross neglect.

A mortgagee does not owe any duty to persons who may become puisne mortgagees of the same property, to take care that the mortgagor does not commit a fraud on them by remaining in possession of the title deeds (1) So also having once obtained possession of the title deeds he is not under an absolute obligation to retain them at all events (2) In *Northern Counties of England Fire Insurance Co. v. Whipp*,(3) Fry, L.J., observed :

> 'The case was argued as if the legal owner of land owed a duty to all other of Her Majesty's subjects to keep his title deeds secure, as if title deeds were in the eye of the law analogous to fierce dogs of destructive elements, where from the nature of the thing, the Courts have implied a general duty of safe custody on the part of the person having their possession or control this view is in our opinion impliedly negatived by the whole course of decisions and it is expressly repelled by the observations of the present Lord Chancellor in *Agra Bank v. Barry* (4) where he said "It has been said in argument that investigation of title and inquiry after deeds is "the duty" of a purchaser or a mortgagee, and, no doubt, there are authorities (not involving any question of registry) which do use that language But this, if it can properly be called a duty is not a duty owing to the possible holder of a latent title or security It is merely the course which a man dealing dealing *bona fide* in the proper and usual manner for his own interest ought by himself or his solicitor to follow with a view to his own title and his own security If he does not follow that course the omission of it may be a thing requiring to be accounted for or explained It may be evidence, if it is not explained of a design inconsistent with *bona fide* dealing to avoid knowledge of the true state of the title What is sufficient explanation must always be a question to be decided with reference to the nature and circumstances of each particular case These observations appear to us conclusive on the point and they at the same time, suggest the conclusion that if in any case it shall appear that a prior legal mortgagee has undertaken any duty as to the custody of the deeds towards any given person and has neglected to perform that duty with due care and has thereby injured the person to whom the duty was owed, there the legal estate might be postponed by reason of the negligence

It has, therefore, been held that a failure to obtain possession of (5) or parting

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16. AIR 1936 Cal 283 (284, 287 288) 63 Cal 880 (DB) ** (1889) 8 Mad 200 (202) (DB) (Case before the Act.) ** AIR 1932 Cal 589 (594) . 59 Cal 781 (DB)

17. AIR 1982 Andh Pra 292 (277) : (1982) I Andh LT 157

Section 78 — Note 5

1. AIR 1930 Cal 22 (28) : 56 Cal 868
2. AIR 1930 Cal 22 (28) : 56 Cal 868.
3. (1884) 26 Ch D 482 (493, 494) 32 WR (Eng) 626 · 53 LJ Ch 629 51 LT 806
4. (1874) LR 7 HL 135 (157).
5. AIR 1943 Lah 113 (117) (DB) (Mortgage by deposit of title deeds in favour of *A* — Subsequently registered mortgage in favour of *B* — Third mortgage in favour of *C* — **Held**, *B*'s failure to call for title deeds from mortgagor at the time of her mortgage could not by itself amount to gross neglect so as to give priority to *C* over *B* *C* could not be said to have been misled in entering into the transaction of his mortgage in the belief that property was free from prior encumbrance as *C* could have been aware of *B*'s mortgage if he had made enquiries at Registration Office AIR 1940 Lah 269, **Reversed**) ** (1908) 31 Mad 7 (11, 12) (DB) (Delay in registration caused by mortgagor and consequent failure of the mortgagee to obtain title-deeds does not amount to gross negligence) ** AIR 1930

with,(6) the title deeds by the prior mortgagee is not *necessarily* such a "gross neglect" as would postpone him to the subsequent mortgagee under this section. If the circumstances show that the prior mortgagee had made an enquiry about the title deeds at the time of taking his mortgage, that an explanation was given by the mortgagor and that the explanation was a reasonable one, the prior mortgagee cannot be charged with "gross neglect," for the failure to obtain possession of the title deeds.(7) Where the relation between the prior mortgagee and the person in possession of the title deeds, is not merely that of mortgagor and mortgagee, but of a fiduciary nature such as that of client and solicitor, the prior mortgagee cannot be held guilty of gross neglect by reason of the improper act of the mortgagor so long as the mortgagee has no ground to suppose that there has been any want of good faith on the part of the mortgagor.(8) Similarly, where the mortgagee is induced to

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Rang 246 (247) (DB) (Failure to obtain title deeds by first mortgagee held not to be 'gross neglect') ** AIR 1916 Cal 33 (41) 43 Cal 1052 (DB) (Neglect to recover the title-deeds by a vendor from a vendee who has secured the greater part of the purchase-money to the vendor by giving him a mortgage on the property itself when the vendor has full notice that the vendee is impecunious and a bad paymaster, and whereby the vendee is enabled to obtain a second mortgage on the property by deposit of the title-deeds is gross and culpable negligence, and is rendered more so by a deliberate suppression of the existence of the mortgage in the sale deed and a suggestion that the purchase-money was required in cash and paid accordingly.) ** (1908) 4 Mad LT 217 (218) (DB) (Mere failure to obtain title-deeds at the time of mortgage is not gross negligence within the meaning of this section.) ** AIR 1938 Mad 87 (89) (Prior mortgagee allowing mortgagor to retain title-deeds and delay registration in order to enable mortgagor to raise money by borrowing or selling some of the properties — Subsequent mortgagee satisfying himself that there was no encumbrance on property and taking mortgage — Prior mortgagee held guilty of gross neglect) ** (1789) 29 ER 360 (361) 2 Bro CC 650, Jourle v Rand (Mortgage of reversion — Mere fact of not taking the deeds is not sufficient to postpone him — There must be voluntary leaving of deeds) ** (1857) 69 ER 1256 (1268) 27 LJ Ch 74, Carter v Carter (In order to postpone an incumbrancer prior in point of date by a subsequent incumbrancer who has got the title-deeds the latter must show not only his own possession but that the former was guilty of gross negligence in not having obtained them)

[**See also** (1860) 45 ER 745 (748) 3 LT (NS) 796 (798), Hunt v Elmes (Prior legal mortgage — Subsequent sale — Purchaser obtaining title-deeds — Prior mortgagee held not guilty of fraud or gross negligence and not postponed)]

6. AIR 1926 Rang 195 (196, 197) 4 Rang 238 (Deeds handed over to mortgagor for effecting mutation of names in revenue records — No gross negligence) ** (1869) 4 Mad HCR 369 (372, 373) (DB) ** (1898) 2 Cal WN 750 (754) (Mortgagee returning the title-deeds to the mortgagor according to the practice prevailing in the mofussil not guilty of gross neglect.)

[**See also** (1864) 10 LT 840 (841) 12 WR (Eng) 1074, Dowle v Sounders (Mere parting with title deeds was not enough to postpone a mortgagee but it was a circumstance of which explanation must be given If a reasonable explanation could be given, the mortgagee could not be postponed unless either in the act of parting with the deeds or in the subsequent conduct of the person thus acting, the Court could see such an amount of negligence as to justify an inference of fraud.)]

7. **(1910) 37 Cal 239 (248) : 37 Ind App 19 (PC).** ** (1908) 4 Mad LT 217 (218, 219) (DB) (Mortgagee making enquiry and obtaining reasonable explanation about title-deeds — No gross neglect) ** (1869) 4 Mad HCR 369 (373) (DB) ** (1891) 15 Mad 268 (275, 276) (DB). (Prior mortgagee allowing title-deeds to be in possession of the mortgagor nearly four years after his mortgage with no reasonable explanation for the fact — Mortgagee postponed by reason of gross neglect) ** (1890) 13 Mad 383 (387, 388).(*Held*, there was no reasonable excuse for parting with title deeds and prior mortgagee was postponed) ** (1882) 21 Ch D 124 (129, 130) 51 LJ Ch 634, Clark v Palmer

8. AIR 1930 Cal 22 (29) 56 Cal 868 (Following (1907) 2 Ch D 104.) ** (1901) 2 Ch 231 (261) 70 LJ Ch 477, Taylor v London and County Banking Co

part with the title-deeds upon such grounds and under such circumstances as to exonerate him from any serious imputation of negligence, he cannot lose his priority, only because the mortgagor afterwards dishonestly hands them over to a second mortgagee.(9) Thus, where the mortgagee is induced by the mortgagor to part with the deeds of the specific purpose of effecting of the mutation of names in the Land Revenue Registers he cannot be charged with gross neglect under this section.(10) But a mortgagee handing over the deeds to the mortgagor for the purpose of raising money by another mortgage is guilty of gross neglect unless he takes precautions that the person advancing money on the security of the deeds knows of his mortgage (11)

Much greater care is necessary on the part of the prior mortgagee as regards the custody of the title-deeds in the case of a mortgage by deposit of title deeds than in the case of any other mortgage. The principle on which one should proceed in such a case is that if the possession of the title-deeds is an essential part of the prior mortgagee's security then if, he having got them, allows them to pass again into the possession of the mortgagor without any sufficient reason he would be postponed to the subsequent mortgagee to whom they are delivered (12)

Under S. 3, a person is deemed to have notice of a prior registered instrument from the date of its registration Before the amendment of S 3 in 1929 there was a conflict of opinion in the High Courts as to whether the registration of a document was of itself a notice (See Note 34 on S 3) (It was however held, even before the amendment, that the universal system of registration existing in this country was one of the circumstances to be taken into consideration in deciding whether the prior mortgagee was guilty of gross neglect under S 78 and that a subsequent mortgagee wilfully abstaining from the obvious course of searching in the registration office could not obtain priority over a prior registered mortgage merely because the prior mortgagee did not call for the title deeds and retain them in his control (13) A prior mortgagee registering his mortgage within the period of

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9. (1869) 4 Mad HCR 369 (373) (DB) ** AIR 1926 Rang 195 (196) 4 Rang 238

10. AIR 1926 Rang 195 (197) : 4 Rangt 238

[**See however,** (1852) 61 ER 425 (428) 1 Drew 193 · 94 RR 642 Waldron v Sloper (Mortgagor obtaining title-deeds from the mortgagee for the purpose of enabling him to complete certain purchase and promising to return them *forthwith* — Mortgagor not returning the deeds forthwith and the mortgagee not caring to have the deeds back for more than four years — Mortgagor depositing the deeds with another person — *Held* the mortgagee by his laches in not asking for the return of the deeds for a period of more than four years enabled the mortgagor to commit fraud and had no equity against the subsequent mortgagee)]

11. (1889) 12 Mad 424 (428) ** AIR 1928 Sind 179 (188) 23 Sind LR 97 (DB) ** AIR 1938 Mad 87 (89) ** AIR 1930 Cal 22 (28, 31) 56 Cal 868 ** (1870) 10 Eq 92 (98) 23 LT 212 Briggs v Jones (A person who puts it in the power of another to deceive and to raise money, must take the consequences, he cannot afterwards rely on a particular or different equity.) ** (1857) 44 ER 895 (902) 25 Beav 205, Perry-Herick v Attwod (Prior legal mortgagee leaving the title-deeds in the hands of the mortgagor intentionally to raise a certain sum of money by another mortgage which should have precedence — Mortgagor raising larger sum — Mortgagee cannot complain because he puts it in the power of the mortgagor to raise any sum of money he pleases.)

12. AIR 1936 Cal 283 (289) : 63 Cal 880 (DB).

13. AIR 1918 Low Bur 44 (45 46) (DB) ** (1908) 31 Mad 7 (10) (DB) (Following (1874) LR 7 HLC 135; 12 Mad 429, 13 Mad 383 and 15 Mad 268 where contrary was held, distinguished as relating to transactions in Presidency town where title-deeds are of much greater importance than in the distant mofussil) ** (1898) 2 Cal WN 750 (754) ** AIR 1930 Cal 22 (29) 56 Cal 868 (Following (1874) LR 7 HLC 135) ** (1910) 7 Ind Cas 810 (810) (DB) (Mad) ** AIR 1935 Lah 887 (888) (DB) ** AIR 1936 Rang 152 (157) 14 Rang 494 (DB) (**Overruled** on another point in AIR 1938 Rang 306 (FB)) ** AIR 1935 Rang 26 (29) (DB) ** AIR 1926 Rang 195 (197) 4 Rang 238 ** (1874) LR 7 HLC 135 (148 149) : Ir R 8 Eq 325, Agra Bank v. Barry. (Per Lord Cairns.)

four months allowed to him under S 23 of the Registration Act, cannot be said to be guilty of gross neglect on the ground of delay in registration **(14)**

6. Prior mortgagee by deposit of title deeds not obtaining all the title deeds, whether guilty of gross neglect.

It has been seen in Note 39 on S 58, that for the creation of a mortgage by deposit of title deeds it is not necessary that *all the deeds relating to the property* should be deposited with the creditor, or that the documents deposited should disclose a *complete title of the depositor's interest in the property*, but that it is sufficient if *some of the material documents of title* are deposited with the creditor with the intention of creating a security It follows that if some of the material documents of title are deposited with one creditor and some with another, valid mortgages by deposit of title deed will be created in favour of both the creditors **(1)** The question, in such cases, arises whether the prior mortgagee is guilty of gross neglect in not demanding all the title deeds from the mortgagor In the undermentioned case**(2)** the mortgagor deposited with the creditor, the original probate of the Will by which his grandfather bequeathed his property to him Along with the probate he also deposited a certified copy of the redemption certificate relating to the property standing in the name of his grandfather The mortgagor told the creditor that the original had been lost As a matter of fact the original was deposited with another creditor. It was held that the deposit of the certified copy of the redemption certificate, taken along with the probate, clearly indicated an intention to create a security on the property and a valid mortgage by deposit of title deeds was created, and that the creditor was not guilty of gross neglect within the meaning of S 78 in relying on the word of the mortgagor as to the loss of the original redemption certificate and in not taking an affidavit from him In another case,**(3)** the documents relating to the sale of the property in favour of the mortgagor were deposited by him with the creditor but the *sanads* granted by Bombay Government to his predecessors in-interest were not deposited It was held that the mortgagee was not guilty of gross neglect in not demanding the sanads In a third case**(4)** one S held two plots of land under a registered sale deed He also had with him the two original lease deeds under which the plots were held by his vendor There was an endorsement on each of the lease deeds that the property was sold to S. S deposited the sale deed and the lease deed with regard to one of the plots with A and subsequently deposited the lease deed with regard to the other plot with B It was held that a mortgage by deposit of title deeds *on the whole of the property* was created in favour of A and the mere fact that he did not insist on obtaining the lease deed subsequently deposited with B did not amount to gross neglect under this section so as to postpone him to B as the lease deed on the face of it must clearly have shown the existence of the sale deed.

7. Laches on the part of the prior mortgagee in instituting his suit, whether amounts to gross neglect.

A delay in filing a suit on the mortgage cannot be a gross neglect within the meaning of this

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[**See also** AIR 1928 Rang 136 137) 6 Rang 423 (DB) ** (1889) 12 Mad 424 (428)]

14. AIR 1933 Cal 398 (400) : 60 Cal 225.

[**See however** (1889) 12 Mad 424 (428). (Non-registration would not of itself be gross negligence as the law allows for months but it is a reason for extra caution)]

Section 78 — Note 6

1. AIR 1932 Cal 589 (492) : 59 Cal 781 (DB).

2. AIR 1932 Cal 589 (493, 594) 59 Cal 781 (DB) (Following (1872) 8 Ch App 155)

[**See also** (1872) 8 Ch App 155 (161, 162) 42 LJ Ch 210 27 LT 804 21 WR (Eng) 178. Dixon v Mukleston (Owner in fee depositing some of the deeds of conveyance by way of security with a letter stating that the deeds were title deeds — Mortgagee giving credit to the statement of the mortgagor and not examining them is not guilty of gross negligence)]

3. AIR 1930 Lah 920 (927) : 11 Lah 564 (DB)

4. AIR 1929 Rang 65 (66) : 7 Rang 28 (DB).

section, inasmuch as a person is entitled under the law to file a suit at any time within limitation. In the undermentioned case(1) the Nagpur Judicial Commissioner's Court observed as follows:

> "In matters in which the Courts have a discretion either as regards the granting of relief or as regards the form of relief to be granted, any laches on the part of the plaintiff may and should be taken into account. But in matters which are excluded from the discretion of the Courts the statutory rights of the plaintiff can only be defeated on proof of acquiescence or other conduct which would amount to an estoppel. In the present case no such conduct is even alleged, much less is there any proof of such gross neglect on the part of the plaintiff as would justify his mortgage being postponed to the mortgages held by the defendant-respondents."

8. "Fraud, misrepresentation or gross neglect" must be the proximate cause of the inducement.

In order to invite the application of this section, the fraud, misrepresentation or gross neglect on the part of the prior mortgagee must be the *proximate cause* of the inducement for the advancement of money by the subsequent mortgagee. If it is not the proximate cause of the inducement but is only one of the various contributory factors that led the subsequent mortgagee to advance the money, the section has no application (1). Thus, where the prior mortgagee is guilty of gross neglect, but the subsequent mortgagee is also guilty of contributory negligence, the prior mortgagee cannot be postponed to the subsequent mortgagee under this section (2).

9. Subsequent mortgagee having notice of the prior mortgage cannot obtain priority over the prior mortgagee.

The section does not apply if the subsequent mortgagee has notice of the prior mortgage at the time of taking his mortgage(1), for if he has such notice, it cannot be said that he was induced to advance money on the security of the mortgaged property through fraud, misrepresentation or gross neglect of the prior mortgagee. In places where one knows that mortgages by deposit of title

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Section 78 — Note 7

1. (1905) 1 Nag LR 158 (161, 162).

Section 78 — Note 8

1. AIR 1943 Lah 113 (117) (DB). (He must have been induced directly and not remotely by the omission — Prior registered mortgage in favour of A — Second mortgage in favour of B — Failure on A's part to obtain mortgagor's title deeds, held did not amount to gross neglect nor did it induce B to advance money on the false belief referred to in the section, A's mortgage being registered and so notice to subsequent mortgagees.) ** AIR 1933 All 299 (300) (DB) ** AIR 1930 Cal 22 (28) : 56 Cal 868 ** AIR 1934 Nag 29 (32) : 30 Nag LR 196.

2. AIR 1933 All 299 (301) (DB). (Subsequent mortgagee failing to examine the title deed of his mortgagor although it as mentioned in his mortgage.) ** (1915) 18 Ind Cas 487 (487) (DB) (Low Bur). (A having a registered mortgage in his favour but not obtaining title deeds — Subsequent mortgage by deposit of title deeds in C's favour — **Held**, that A was negligent in not having secured the documents of title to the property to but that C was still more negligent in not searching the registers at the Registration office.) ** (1891) 15 Mad 268 (279, 280) (DB).

Section 78 — Note 9

1. AIR 1943 Lah 113 (117) (DB). (Registered mortgage in favour of A followed by mortgage in favour of B — B cannot claim priority over A's mortgage on the ground that by A's gross neglect he was induced to advance money.) ** AIR 1936 Cal 283 (289) : 63 Cal 880 (DB) ** (1891) 15 Mad 268 (277, 278) (DB). (Confirming on appeal 13 Mad 383.) ** AIR 1927 Cal 538 (543) (DB). (The question in this case was whether prior mortgage could enforce his rights against subsequent purchaser.) ** AIR 1938 Mad 161 (163, 164) (DB) ** (1894) 18 Bom 444 (446, 447) (DB). (Registration of prior mortgage held amounted to notice.) ** (1856) 44 ER 465 (470) : 8 De GM and G 454 : 25 LJ Ch 792 : 2 J (NS) 1177 : 4 WR (Eng) 734 : 114 RR 194, Atterbury v. Wallis.

deeds are legal and usual, abstention from injury as to whether the title deeds were already pledged amounts to constructive notice, under S 3, of the prior mortgage (2) It is however in favour of a person in possession of the title deeds that the doctrine of constructive notice can be invoked on the ground of the omission of the other party to call for them and not in favour of a person who has not got been them.(3)

It has been held in a Bombay case,(4) that where the prior mortgagee induces the subsequent mortgagee to advance money by *false representations*, he cannot avoid the consequences resulting from his conduct on the ground of *constructive notice* on the part of the subsequent mortgagee; because in such a case it is not a sufficient answer for him to say : "If you had used due diligence you would have found out that my statement was untrue You had the means afforded you of discovering the falsity and did not choose to avail yourself of them." See also the undermentioned case(5) to a similar effect.

10. The section applies to mortgagees.

The section refers to a "prior mortgagee" and a "subsequent mortgagee." It is, therefore, clear that the section will not apply where both the prior and the subsequent transferees are not *mortgagees*.(1) However, the rule of estoppel on which the section is based is of a wider application and a prior transferee inducing another person to take the transfer of the property will be precluded from setting up his rights under the prior transfer to the prejudice of the subsequent transferee (2) Thus where through the gross neglect of a prior mortgagee, a person is induced to purchase the mortgaged property as unencumbered, the prior mortgagee is precluded from setting up his rights under the mortgage as against the purchaser and the purchaser obtains absolute title to the property (3)

[**See also** (1908) 4 Mad LT 217 (218) (DB) ** AIR 1935 Lah 887 (888) (DB) (Property situate in many destricts — Registration in one district is sufficient notice to subsequent mortgagee) ** (1873) 17 Eq 15 (18, 19) 43 LJ Ch 46 · 29 LT 571 · 22 WR (Eng) 148, Maxfield v. Burton.]

2. AIR 1927 Cal 538 (543) (DB) **** AIR 1923 PC 211 (216) : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283.**

   Also see S. 3, Note 32 and S. 79, Note 8.

3. **AIR 1938 Mad 161 (163, 164) (DB).**

4. (1894) 18 Bom 444 (446) (DB) (Obiter — Following (1882) 20 Ch D 1.)

5. (1841) 66 ER 943 (953 954) · 1 Hare 43 11 LJ Ch 83, Jones v Smith (Prior chargeholder on inquiry stating that there is a prior mortgage on other property only)

Section 78 — Note 10

1. AIR 1961 Cal 300 (305) (DB) (Section has no application where the competition is between a mortgagee and a subsequent purchaser) ** AIR 1934 Oudh 283 (283) (DB) (Section 78 does not apply to the case of a prior mortgagee and a subsequent vendee)

2. AIR 1934 Mad 302 (302) (DB). (Prior mortgagee taking active part in bringing about sale — Mortgagee is estopped from setting up his mortgage to purchaser's prejudice) ** AIR 1927 Cal 538 (542) (DB) ** AIR 1918 Cal 411 (411) (DB).

3. (1912) 15 Ind Cas 335 (336) (All) (One B purported to hypothecate four plots of land in Mouza N. As a matter of fact, the name of N was inserted in the mortgage deed by mistake, the property being situated in Mouza A to one K, free of all charges. In a suit brought on the basis of the mortgage held that K was not bound by that mortgage.) ** AIR 1927 Cal 538 (542) (DB) (Purchaser in that case had notice of the prior mortgage which therefore could be enforced against him.) ** AIR 1918 Cal 411 (411) (DB) ** AIR 1937 Mad 195 (199) (DB) (The mortgagee parted with the title deeds relating to the properties when he had sufficient reasons to think that the mortgagor required them for the purpose of effecting a sale of the properties — **Held,** there may not arise estoppel in the sense of S 115, Evidence Act, but the conduct of the mortgagee was akin to the kind of negligence con-

The principle underlying S 78 also applies to sales and a prior mortgagee guilty of fraud will be postponed after subsequent vendee.(4)

If the fraud vitiates a prior mortgage same principle will apply if the subsequent sale is effected.(5)

10-A. Prior mortgagee losing priority — Mortgagor's liability to him is not affected.

A question of priority can only arise as between successive *mortgages* The fact that a mortgagee loses, for some reason, his priority as against a subsequent mortgagee cannot affect him prejudicially as against the mortgagor

Illustration

A mortgages X and Y to B and then X alone to C C brings a suit on his mortgage impleading B as a party to the suit B fails to plead his priority and the property X is held by the Court to be subject to a prior claim in favour of C B's failure to raise the point will preclude him, on the principle of constructive *res judicata*, from raising the question of his priority in respect of X in a subsequent suit But this will not affect his position in regard to Y *vis-a-vis* the mortgagor As regards the mortgagor and all persons standing in his shoes, B will be entitled to enforce his debt and have it paid to the full form y (1)

11. Burden of proof.

As this section is an exception to the general rule laid down in S 48 the burden of proving this exception lies on the party who asserts it.(1)

12. Distinction between S. 78 and latter part of S. 93.

One A deposited title-deeds of certain lands with Bank B in 1910 as security for advances made to him by Bank B *from time to time, but no maximum was expressed to be secured by the mortgage by deposit of title deeds* In 1914 A executed a registered mortgage on the same property in favour of C. C, however, did not inquire about the title deeds when he took his mortgage After the mortgage in favour of C, B made further advances to A, but did not make any search in the registration office to see whether the property was mortgaged in the interval to anybody else The question for determination was whether Bank B could claim priority in respect of the advances made to A after the execution of the registered mortgage in favour of C It was held by their Lordships of the Privy Council.(1) that S 78 had no application to the case, as the further advances

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templated by S 78, T P Act) ** (1884) 8 Mad 200 (201 202) (DB) (Prior mortgage parting with title deeds, but not guilty of gross neglect — He could enforce his rights against subsequent purchase.) ** AIR 1934 Mad 302 (302) (DB)

4. AIR 1970 Mad 226 : (1969) 2 Mad LJ 530
5. AIR 1970 Mad 226 : (1969) 2 Mad LJ 530

Section 78 - Note 10-A

1. **AIR 1915 PC 21 (24) : 42 Ind App 163.**

Section 78 — Note 11

1. AIR 1953 Mad 1000 (1001) (Existence of prior mortgage not disputed but genuineness attacked by subsequent mortgagee — Burden is on subsequent mortgagee to show that prior mortgage is a sham and bogus one created with intent to defraud him) ** AIR 1936 Cal 283 (284) 63 Cal 880 (DB) ** AIR 1934 Nag 29 (30) 30 Nag LR 196 ** AIR 1929 Rang 298 (300) ** AIR 1933 All 299 (301) (DB) (Section 78 has no application if gross neglect on the part of the prior mortgage is not established) ** (1909) 9 Cal LJ 78 (82) (DB). (If a subsequent mortgagee whose right of alleged priority is disputed, desires to establish the priority of his subsequent mortgage over a prior mortgage and he is joined as defendant by the prior mortgagee in his suit on such prior mortgage he must come forward and assert his title to priority over the earlier mortgage In case of failure he is precluded from claiming any right of priority in a subsequent suit.)

Section 78 — Note 12

1. **AIR 1923 PC 211 (217) : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283.** (On appeal from AIR 1918 Low Bur 44.)

could not be said to have been induced by any act on behalf of C.

13. Law in the Punjab.

The Transfer of Property Act is not in force in the Punjab But the principle enunciated in this section is applicable to cases arising in that State.(1)

14. Priority by estoppel.

See Note 16 on S. 48.

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79. MORTGAGE TO SECURE UNCERTAIN AMOUNT WHEN MAXIMUM IS EXPRESSED.— If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Illustration

A mortgages Sultanpur to his bankers B and Co , to secure the balance of his account with them to the extent of Rs 10,000 A then mortgages Sultanpur to C, to secure Rs 10,000, C having notice of the mortgage to B and Co , and C gives notice to B and Co , of the second mortgage At the date of the second mortgage, the balance due to B and Co does not exceed Rs 5,000 B and Co subsequently advance to A sums making the balance of the account against him exceed the sum of Rs 10,000 B and Co , are entitled to the extent of Rs 10,000, to priority over C

Synopsis

1. **English and Indian law of tacking compared.**
2. **Scope of the section.**
3. **"To secure future advances."**
4. **"The performance of an engagement."**
4A. **Balance of a running account.**
5. **"Expresses the maximum to be secured thereby."**
6. **"In respect of all advances."**
7. **"Not exceeding the maximum."**
8. **Notice.**
9. **Charge.**
10. **Further advance made after sale of equity of redemption.**

1. English and Indian law of tacking compared.

Before the passing of the English Law of Property Act in the year 1925 the English law as to tacking was as follows :(1)

(1) The mortgagee of a *legal estate* could tack on to his mortgage any further advances made by him provided he *had no notice* of the other mortgages when he made the advance.

(2) A subsequent *equitable* mortgagee could acquire the legal estate of the prior mortgagee

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Section 78 — Note 13

1. AIR 1943 Lah 113 (117) (DB) (Appeal from AIR 1940 Lah 269) ** AIR 1935 Lah 887 (888, 889) (DB) ** AIR 1940 Lah 308 (308, 309) ** AIR 1930 Lah 920 (927) 11 Lah 564 (DB) ** AIR 1929 Lah 314 (314).

Section 79 — Note 1

1. (1969) LR 8 Eq 155 (160) 38 LJ Ch 454 20 LT 601, Daun v City of London Brewery Co See Williams and Eastwood, Principles of the Law of Real Property, 1933 Edn , pages 324 to 327.

Also see Topham, New Law of Property 4th Edn , 1932, pages 302 to 304

and tack on his equitable mortgage to the legal mortgage provided that, at the time of advancing money on his equitable mortgage, *he had no notice* of the other mortgages.

Under the English Law of Property Act, 1925 (15 Geo. v. Ch 20 S. 94) a prior mortgagee *whether legal or equitable*, can, by tacking, gain priority over subsequent mortgages in respect of further advances only—

(1) if an arrangement has been made to that effect with the subsequent mortgages; or

(2) if he had *no notice* of the subsequent mortgages at the time when he made the further advance; or

(3) if he is *bound* under the terms of the mortgage to make further advances whether he has notice or not of the subsequent mortgages.

The right of a subsequent encumbrancer to tack on his own mortgage to a prior mortgage by acquiring the legal estate of the prior mortgagee and thus to gain priority over the intermediate incumbrances, has been abolished.(2)

In this country, it was held as early as the year 1869, that the principle of the English law of mortgage enabling a mortgagee to tack on to his mortgage any further liability of the mortgagor to him was not recognised in India (3) When the Transfer of Property Act was passed in the year 1882 S. 80 (now S. 93) expressly provided that there shall be no tacking by a subsequent mortgagee paying off a prior mortgage. As to the tacking of further *advances* made by a prior mortgagee, the same section also provided that there shall be no such tacking except in the case specified in this section, namely, where the prior mortgage *fixes a maximum* to be specified thereby and the subsequent mortgagee advances money *with notice* of the prior mortgage.

It will thus be seen that while under the English law a further advance by a prior mortgagee can, in certain circumstances, be tacked on to the mortgage *independently of any question whether the prior mortgage expresses a maximum to be advanced or whether the subsequent mortgagee has notice of the terms of the prior mortgage*, a further advance by a prior mortgagee cannot under this Act, be tacked on to the mortgage, unless the mortgage *expresses a maximum* to be advanced and unless the subsequent mortgagee had, at the time of his mortgage *notice* of the prior mortgage.

2. Scope of the section.

It is a general principle of law that where the equities are equal the first in time shall prevail *qui prior est tempore, potior est jure* (1) This rule has been enacted in S. 48 with reference to *transfer of property* in general terms. It provides that where a person purports to create by transfer, at different times, rights in or over the same immovable property and such rights cannot all exist or be exercised to their full extent together, each later created right shall in the absence of a special contract or reservation binding the earlier transferee, be subject to the rights previously created. The same general rule is recognised by S. 93 which provides negatively that a mortgagee making a subsequent advance to the mortgagor whether with or without notice of an intermediate mortgage shall not thereby acquire any priority in respect of his security for such subsequent advance. But this is made subject to the rule laid down in this section (2) This section is thus an exception to the general rule stated above(3) and enables a prior mortgagee to tack on to his mortgage a further advance made by him and thus gain priority over an intermediate incumbrance —

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2. See sub-section (3) to S. 94 of the Law of Property Act, 1925.

3. (1869) 2 Beng LR App 45 (45) (DB) ** (1870) 14 Suth WR 491 (492) (DB)

[See also (1883) 7 Bom 526 (529) (DB) (Case arising before Transfer of Property Act)]

Section 79 — Note 2

1. "He who is first in point of time is more powerful in law."

2. (1912) 17 Ind Cas 927 (929) (DB) (Cal).

3. AIR 1920 Pat 251 (254) (DB) ** (1912) 17 Ind Cas 927 (929) (DB) (Cal)

(1) if the prior mortgage is one made to secure future advance, the performance of an engagement or the balance of a running account and expresses the maximum to be secured thereby, *and*

(2) if the subsequent incumbrancer has *notice* of the prior mortgage.(4)

The section has been based on the dissenting judgment of Lord Cranworth in *Hopkinson* v *Rolt*.(5) where his Lordship observed as follows :

> "Mortgages are but contracts, and when once the rights of parties under them are defined and understood, it is impossible to say that any rule regulating their priority is unjust If the law is once laid down and understood, that a person advancing money on a second mortgage, *with notice of a prior* mortgage covering future as well as present debts, will be postponed to the first mortgagee, to the whole extent covered or capable of being covered by the prior security, he has nothing to complain of He is aware, when he advances his money, of the imperfect nature of his security and acts at his peril."

3. "To secure future advances."

Section 58, Cl (a) provides that a mortgage may be made to secure a loan advanced or *to be advanced* or an existing or *future* debt Where a future advance is made it attaches itself, as it were, to the mortgage so as to put it in the same position as if it had been made when the mortgage was originally created.(1)

In a mortgage made to secure future advances, the consideration is expressly agreed to be paid, either in whole or in part in future Such a mortgage is essentially different from the one where the consideration though payable immediately is in fact paid in future The words "future advances" are general and will include all advances made in pursuance of the mortgage contract at any time It is not necessary that the parties should specify the time when the advances are to be made at the time of the mortgage.

4. "The performance of an engagement."

Section 58, Cl. (a) provides that a mortgage can be made for the purpose of securing the "performance of an engagement which may give rise to a pecuniary liability"

A partition deed provided that the common family debts should be discharged by the respective sharers to whom they fell as per schedule of the deed, and that if any sharer failed to discharge the debts falling to his share, his properties should be liable for such debts and for the losses that might happen to the family It was held that the provision was a mortgage for securing the performance of an engagement within the meaning of this section.(1)

4-A. Balance of a running account.

It will be noticed that the section applies also to a mortgage to secure the *balance of* a running account It will depend on the construction of the mortgage bond and the circumstances in each case whether the mortgage is to secure the balance due on the date of the mortgage or the balance that may be found due from time to time up to a certain limit. In the undermentioned case,(1) a mortgage was executed in respect of an overdraft account with a bank and the amount secured was

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4. AIR 1955 Cal 194 (199, 204) (DB) (Section 93 is thus complementary to S 79) ** (1912) 17 Ind Cas 931 (932) (DB) (Cal) ** AIR 1921 Mad 459 (460) (DB) ** (1912) 17 Ind Cas 927 (930) (DB) (Cal) ** AIR 1920 Pat 251 (254) (DB) (Obiter.)

5. (1861) 9 HLC 514 (539, 540) : 11 ER 829.

Section 79 — Note 3

1. (1861) 9 HLC 514 (543) 11 ER 829, Hopkinson v Rolt (Per Lord Cranworth.)

Section 79 — Note 4

1. AIR 1921 Mad 459 (460) (DB).

Section 79 — Note 4A

1. AIR 1943 Pat 301 (303, 304) . 22 Pat 213 (DB) (Claton's case (1816) 1 Mer 572 and In re

expressed to be Rs. 15,000. At the date of the mortgage, the amount due from the mortgagor was about Rs. 7,500. The question arose in the case whether the mortgage security would enure in respect of sums overdrawn after the date on which the balance due from the mortgagor exceeded Rs. 15,000. The contention on behalf of the mortgagor was that the security would not apply to such sums and that the payments made by him after the above date must be adjusted towards the balance due on that date, and if such balance was found to have been entirely discharged in this manner, the bank would not be entitled to a *mortgage* decree in regard to the surplus amount but only to a personal decree On construing the mortgage deed and taking into consideration the conduct of the parties and the circumstances of the case, it was held that this contention was not tenable and that the mortgage would be good in respect of a balance of Rs 15,000 whenever the balance might be struck, that the mortgage was intended to be a continuing security for such balance and not merely for the amount that was due from the mortgagor at the date of the mortgage but that the bank was not entitled to a mortgage decree for any amount in excess of Rs 15,000

5. "Expresses the maximum to be secured thereby."

The section has no application unless the prior mortgage expresses a maximum amount up to which the advances are to be made.(1) In *The Imperial Bank v U Rai Gyaw Thu and Co*.(2) it was observed by their Lordships of the Privy Council :

> "The words of S 79 mean that the mortgage there referred to must express a maximum The words 'to secure further advances,' etc denominate the different classes of mortgages, but to bring them under S 79 they must have the common feature of a maximum expressed

It is not, however, necessary that a definite figure should be expressly mentioned as the maximum to be secured by the mortgage It is sufficient if the maximum is expressed in such terms that the definite figure can be determined when required. A took a lease from B for a period of nine years on 14th June, 1900 for a certain annual rental As security for the payment of the annual rent and interest on defaulted instalments A mortgaged his immovable property to B on the same date. Subsequently, A mortgaged the same property to C on 12th October 1900 In a suit brought by B on his mortgage the question for determination was whether the mortgage to him expressed the maximum to be secured thereby within the meaning of this section It was held that the aggregate rent payable under the lease could be determined by a simple arithmetical calculation and that on the principle that "*that is certain which can be made certain*" the mortgage did express the maximum to be secured by it (3) Where the bank extends overdraft facility to a party up to Rs 2,50,000/ on security of present and future goods and informs the Tax Authorities that the maximum limit applicable will be Rs. 3,50,000/- the Bank is not liable for damages for not honouring the cheques drawn in excess of Rs 2,50,000/- because the security was only in respect of future advances which might or might not be made by the Bank.(4) In the undermentioned case(5) a partition deed between brothers, A and B, provided as follows :

> "The common family debts should be discharged by the respective sharers to whom they fell as per schedule of the document, and that, if any sharer failed to discharge accordingly, such sharer's properties' should be liable for such debts and for the losses that might happen to the family"

It was held that the document read with the schedule specified the maximum secured by the

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Medewe's Trust, (1859) 28 LJ Ch 891 Distinguished — Deeley v Lloyd's Bank) (1910) Ch 648 and Henniker v. Wigg, (1869) 4 QB 792, **Followed.**)

Section 79 — Note 5

1. AIR 1955 Cal 194 (204) (DB) ** AIR 1938 All 473 (476) (DB)
2. **AIR 1923 PC 211 (215) : 1 Rang 637 : 50 Ind App 283.**
3. (1912) 17 Ind Cas 931 (932) (DB) (Cal).
   [**See also** AIR 1931 Pat 33 (36) 9 Pat 816 (DB) (17 Ind Cas 931 Followed)
4. AIR 1972 Mad 275 (277, 278) : 85 Mad LW 246 (DB).
5. AIR 1921 Mad 459 (460, 461) (DB).

document and that the reference to losses would not impair the adequacy of the specification of the maximum.

See also Note 4A.

6. "In respect of all advances."

Section 93 provides that "except in the case provided for by S. 79, no mortgagee making a *subsequent advance* to the mortgagor . . . . shall thereby acquire any priority in respect of his security for such subsequent advance." In *The Imperial Bank of India v U Rai Gyan Thu and Co.*,(1) their Lordships of the Privy Council held that the word "subsequent" in that section, must, from the context, be taken to mean subsequent to the intermediate mortgage and that an advance when made after another mortgage is granted becomes a "subsequent advance." The words "in respect of all advances" in this section must be construed in view of S 93 and the word "advance" must be understood as meaning a "subsequent advance" as explained above It has accordingly been held that this section has been enacted with a view to protect a prior mortgage by giving him priority over a subsequent mortgage with respect to advances made by him *after* the subsequent mortgage and that it has no application where no advances are made by the prior mortgagee after the creation of the subsequent mortgage (2) Where, therefore, a mortgagee under a mortgage to secure future advances, sues merely in respect of advances made *previous* to a subsequent mortgage, this section will have no application to the case;(3) the matter would be governed by the general rule of priority enacted in S 48 and the plaintiff would be entitled to recover the amount so advanced in priority to the subsequent mortgagee. A made on 27-3-1925 a mortgage, by deposit of title deeds, with B to secure advances "up to the limit of Rs 1,25,000 together with interest" On 20 12-1926, A made a subsequent mortgage in favour of C. B sued on his mortgage for the advances made by him *before* 20-12-1926 amounting to Rupees 1,25,000 and interest thereon It was held that S 79 had no application as no advances were made after the subsequent mortgage and that B was entitled to recover as claimed not only the principal but also the interest (4)

See also the undermentioned case.(5)

7. "Not exceeding the maximum."

Under this section, the subsequent mortgage will be postponed to the prior mortgage *only in respect of advances or debits not exceeding the maximum* expressed by the prior mortgage (1) If the

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Section 79 — Note 6

1. **AIR 1923 PC 211 (215) : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283.**
2. AIR 1938 All 473 (476) (DB) ** AIR 1920 Pat 251 (254) (DB)
3. AIR 1920 Pat 251 (254) (DB).
4. AIR 1938 All 473 (476) (DB).
5. AIR 1958 Mad 132 (133) ILR (1958) Mad 15 (DB). (A depositing title deeds with S I Bank at Coimbatore and placing amount of loan secured in fixed deposit in same bank — Fixed deposit receipt deposited with branch of same bank at S and facility of operating current account to the extent of amount lying in fixed deposit obtained — Subsequent mortgage by deposit of title deeds over same property in favour of C Bank — Dues under current account adjusted by S I Bank by transferring fixed deposit amount — Both banks obtaining decrees on their mortgages — **Held,** that debt due to S branch had been wiped out — Suit of S I Bank was not, therefore, in respect of money due to S branch — Equitable mortgage in favour of S I Bank could not be deemed to be one to secure future advances Mortgage in favour of C Bank being subsequent, it was not entitled to priority)

Section 79 — Note 7

1. AIR 1965 Mad 266 (278) ILR (1964) 1 Mad 1012 (Where only a part of the mortgage money not exceeding the maximum, is advanced, the mortgage is good security for the part advanced.) ** (1912) 17 Ind Cas 927 (929, 930) (DB) (Cal) ** AIR 1920 Pat 251 (254) (DB).

advances made by the prior mortgagee after the subsequent mortgage exceed the maximum expressed by the prior mortgage the advances exceeding the maximum will not have priority over the subsequent mortgage.

8. Notice.

Unlike the English law, the question whether the *prior* mortgagee has or has not notice of the subsequent mortgage when he makes the further advance is immaterial under this section The material question is whether the *subsequent* mortgagee has notice of the prior mortgage at the date of the subsequent mortgage.

Section 3 provides that "a person is said to have notice of a fact when he actually knows that fact or when, but for wilful abstention from an inquiry or search which he ought to have made or gross negligence, he would have known it" It was held by the Privy Council in the undermentioned case(1) that if a mortgagee taking a mortgage in a place where he knows that mortgages by deposit of title deeds are legal and usual, does not ascertain whether the title deeds were already pledged, his failure to so ascertain is such abstention from an inquiry which he ought to have made or such negligence as to infer notice in terms of S. 3.

Where a mortgage for future advances was executed on 28-9-1930 and registered on 11-10-1930, and a subsequent mortgage was executed on 12-10-1930 and registered the same day it was held that it could not be said except from evidence *aliunde*, that the subsequent mortgagee could have, when the mortgagor negotiated for the loan, discovered by the most diligent search in the Registrar's office, the fact of the prior mortgage and cannot, therefore, be said to have had notice(2). The decision was before the amendment of S 3 by the addition of the Explanation thereto which provides that a person acquiring any interest in property will be *deemed* to have notice of any prior transaction with reference to that property which is required by law to be registered from the date of the registration. It is conceived that the decision would be different under the present law

9. Charge.

In *Sesha Iyer v. Srinivasa*(1) the High Court of Madras applied this section to the case of a charge created by a partition deed executed between brothers See Notes on S 100

10. Further advance made after sale of equity of redemption.

This section deals only with the postponement of the rights of a subsequent *mortgagee* in respect of advances made after the subsequent mortgage but in pursuance of a maximum fixed in the prior mortgage It has no application of any kind where a mortgagee advances amounts to the mortgagor after the equity of redemption has passed into the hands of a *purchaser* of the mortgagor's right Thus, if A is the mortgagee and B the mortgagor and B himself sells away his equity of redemption, or his equity of redemption if sold in Court auction to C and then A makes a further advance to B, he cannot get any priority or other right in respect of advance as against C.(1) unless the conduct of C were such as to operate as an estoppel(2).

Section 79 — Note 8

1. **AIR 1923 PC 211 (216) : 50 Ind App 283.** (Mortgagee in Akyab failing to k for title deeds would be imputed with notice of prior equitable mortgage)

   Also see S. 3, Note 32 and S. 78, Note 9

2. **(1912) 17 Ind Cas 927 (930) (DB) (Cal).**

Section 79 — Note 9

1. **AIR 1921 Mad 459 (461) (DB).**

Section 79 — Note 10

1. **(1909) 3 Ind Cas 44 (45) (DB) (All) ** (1901) 23 All 429 (431) (DB)**
2. **(1888) 12 Bom 33 (35, 36) (DB)**

80. TACKING ABOLISHED.— [*Repealed by S. 41 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).*]

In their Report the Special Committee observe :

"As the principle of 'tacking' is akin to subrogation, we propose to number S. 80 as S. 93, so as to place it after the section which refers to subrogation."

Marshalling and Contribution

^[**81. MARSHALLING SECURITIES.—** If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rigts of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.]

[A] Section 81 was substituted for the original section by Section 42 of the Transfer of Property (Amendment) Act, 1929 (20 of 1929).

Synopsis

1. **Doctrine of marshalling.** See Notes 1 and 2 on S. 56.
2. **Against whom right of marshalling is available.**
2A. **Time for making application for marshalling of assets.**
3. **Marshalling distinguished from equitable rule of apportionment.**
4. **"Two or more properties."** See Note 5 on S. 56
5. **"Mortgages them to one person."**
6. **"Then mortgages one or more of the properties to another person."**
7. **"Subsequent mortgagee."**
8. **Right is available to purchaser in execution of decree on second mortgage.**
9. **"In the absence of a contract to the contrary."** See Note 8 on S. 56.
10. **"So far as the same will extend."**
11. **"But not so as to prejudice the rights of the prior mortgagee."**
12. **"Or of any person who has for consideration acquired an interest in any of the properties."** See Note 2 on this section and Note 14 on S. 56.
12A. **Executing Court when can give effect to right of marsalling.** See Note 12 on S. 56.
13. **Effect of notice of prior mortgage.**

1. Doctrine of marshalling.

See Notes 1 and 2 on S. 56. See also the case noted below(1).

2. Against whom right of marshalling is available.

As has been seen in Note 1 on S. 56, a right of marshalling is a right which a person who has *one* fund out of which to satisfy his demands has to *compel the person who has that fund and*

Section 81 — Note 1

1. AIR 1949 Mad 384 (385) (Maintenance decree charging items 1 to 42 belonging to D — P purchasing some of these items from D — Indemnity clause in sale deed charging certain other items viz. 30, 31, 32 and 34 for amount of loss that might accrue to P if the items sold to him were sold in execution of maintenance decree — P paying a certain amount to avert such sale and then suing for contribution from owners of other items — The owners of other items are entitled, "on the principle of marshalling contained in S. 81 to insist" that he must first proceed against items 30, 31, 32 and 34 which are given as security and then only proceed against the other items for the balance.)

Section 81 — Note 2

another out of which to satisfy his demands, to resort to the other fund first. In other words, a right of marshalling by a subsequent incumbrancer is enforceable not only against the *mortgagor* but also *against the prior incumbrancer*. In the undermentioned case(1) it was observed by Srinivasa Iyengar, J., that the right of the subsequent mortgagee under this section is enforceable only against the mortgagor and not *against the mortgagee*. It is submitted that this view is against the very principle underlying the doctrine of marshalling and is not correct.

But the right is not enforceable against any person *other* than the mortgagor and the prior mortgageed(2). Suppose x and y are mortgaged to A and x is subsequently mortgaged to B and y is mortgaged or sold to C for valuable consideration. B has no equity to throw the whole of A's mortgage on C's estate and so destroy C's security(3). If B were to compel A to proceed against y first, it would prejudice C, and this cannot be allowed under this section, for the right of marshalling cannot be exercised so as to prejudice the rights of any person who has for consideration acquired any interest in any of the properties. It has consequently been held in the undermentioned case(4) that as between the transferees of the different items of the mortgaged properties there is no right of marshalling. A contrary view has been expressed, however, by the Rangoon High Court in the case noted below(5), that where M mortgages first, properties x and y to R, then sells x to K and subsequently mortgages y to L, L can exercise the right of marshalling so as to compel R to proceed against K's property first. It is submitted that this view is not correct. Their Lordships observed that this course would not prejudice the *mortgagee*, but they have failed to note that such a course would prejudice a person (K) who has for consideration acquired an interest in the properties and could not be allowed under the terms of the section.

See also Note 14 on S. 56.

2A. Time for making application for marshalling of assets.

A puisne mortgagee who has not made an application for marshalling of assets at the time of preliminary decree in the suit by the first mortgagee can make such an application at the time when the first mortgagee proceeds to apply for final decree(1).

3. Marshalling distinguished from equitable rule of apportionment.

It has been seen in Note 2 that the right of marshalling cannot be exercised against any person other than the *mortgagor* and the prior mortgagee. It is not available against another mortgagee of the other property. In such a case, however, the debt is to be apportioned according to the value of the two properties(1). It has been held in the undermentioned case(2) that this is in accordance with

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1. AIR 1928 Mad 500 (502) : 51 Mad 648 (DB).
2. (1901) 49 WR (Eng) 236 (236) : 83 LT 500 (501), Baghoni v. Cavalli.
3. AIR 1949 Nag 155 (158) : ILR (1948) Nag 395 (Items X and B [illegible] X and then A alone mortgaged to Y — Y cannot claim right of marshalling against person purchasing B in execution of money decree against mortgagor) ** [illegible] 20 Beav 614, Gibson v. Seogrim. (Per Romilly, M.R.)
4. (1842) 62 ER 944 (948) : 1 Y and C Ch 401, Barnes v. Racaster ** AIR [illegible] (200) : 54 Mad 59 (DB) (Second mortgagee has no right against subsequent purchaser) ** (1898) 2 Cal WN 397 (402) (DB) (Second mortgagee has no right against later mortgagee) ** (1893) 62 LJ Ch 804 (8, 3) : (1894) 2 Ch 54 [illegible] ** AIR 1932 Mad 196 (198) ** (1869) 17 WR (Eng) 355 (356), Wellesley v. Lord Mornington. (Barnes v. Racaster, (1842) 62 ER 944, Followed.)
5. AIR 1937 Rang 220 (223) : 1937 Rang LR 13 (DB).

Section 81 — Note 2A

1. 1936 Mad WN 851 (852).

Section 81 — Note 3

1. See the cases cited under Note 2.
2. AIR 1932 Mad 196 (197).

the equitable rule of rateable apportionment, which prevails in England, and which is applicable in the country as being in accordance with justice, equity and good conscience. The right given by that rule is to have the equity of redemption of two mortgaged properties jointly mortgaged to A, rateably apportioned as between pusine mortgagees. This right, according to the said decision, is not strictly one of contribution, inasmuch as a right of contribution is a right given to a *mortgagor* and the right of rateable apportionment is a right of one subsequent mortgagee of one item of certain mortgaged properties againt a subsequent mortgagee of another item of such properties.

4. "Two or more properties."

See Note 5 on section 56.

5. "Mortgages them to one person."

A "mortgage" is the transfer of an interest in specific *immovable property*(1). This section, therefore, applies only to mortgages of immovable property and not to hypothecation of movable property(2). The section cannot also apply to case where the prior mortgage is of both *immovable and movable* properties(3). The reason is that the doctrine of marshalling can be applied only to "two funds standing upon an equal footing"(4) and it cannot be said that a security of movable property is on the same footing as a security of immovable property, inasmuch as the rights and liabilities of a mortgagee of immovable property are not the same as those of a person to whom movable properties have been hypothecated(5).

See also Note 6 on section 56.

6. "Then mortgages one or more of the properties to another person."

The doctrine of marshalling applies only when the contending creditors are creditors of the *same person*. When *A* and *B* execute a mortgage of properties *X* and *Y* in favour of *C* and then *A* alone executes a mortgage of property *Y* in favour of *D*, the doctrine of marshalling cannot be applied and *D* cannot compel *C* to proceed first against property *X*(1). As observed by the Special Committee in their Report "It is well established that in order that the doctrine of "marshalling" can be applied there must be two funds or securities both originally *the property of the same owner* and the debts must be *the debts of the same person*."

Again, the person claiming the right under this section must be a subsequent *mortgagee*(2). An attaching creditor(3) or a lessee(4) of the property cannot claim any right of marshalling. See also S. 56, Note 7.

7. "Subsequent mortgagee."

The old section gave a right of marshalling only to a *second* mortgagee and not to mortgagees subsequent to the second mortgagee. The present section is wider in that it applies to all subsequent mortgagees.

Section 81 — Note 5

1. See Section 58
2. AIR 1936 Rang 266 (267) : 14 Rang 198 (DB).
3. AIR 1936 Rang 266 (267) : 14 Rang 198 (DB).
4. (1886) 30 Ch D 192 (199) : 53 LT 737, Webb v. Smith
5. AIR 1936 Rang 266 (267) : 14 Rang 198 (DB).

Section 81 — Note 6

1. AIR 1962 Ker 106 (108) (DB) ** (1811) 34 ER 199 (201) : 11 RR 122, Ex parte Kendall ** AIR 1917 Mad 372 (372) (DB) ** (1889) 12 Mad 255 (259) (DB)
2. AIR 1955 Mad 208 (209).
3. (1881) 6 Cal 142 (148) (DB).
4. AIR 1926 Cal 525 (527) (DB).

A subsequent mortgagee does not cease to be so, for the purposes of this section by reason merely of the fact that he purchases the equity of redemption in the property mortgaged to him(1). In the undermentioned case(2), a second mortgagee of properties *A* and *B* which were included along with properties *C* and *D* in a prior mortgage purchased *A* and *B*, in execution of the decree obtained by him on his mortgage. Later on he obtained, by purchase, the interest of the first mortgagee and obtained a decree on the first mortgage. He then claimed to sell the items *C* and *D* first for the realisation of the mortgage-money. It was held that he was entitled to do so. The learned Judge observed :

> "The plaintiff, as a subsequent mortgagee before his purchase of the prior mortgage bond, was entitled to compel the sale of the properties not included in the subsequent mortgage before the sale of the mortgaged properties included in the second mortgage and when he purchase the rights of the prior mortgagee, he does not lose his rights to have the properties which he purchased in execution of the second mortgage decree excluded from the sale in execution of the first mortgage in the first instance. This is in accordance with the terms of S. 81 of the Transfer of Property Act. It must be so since the plaintiff has acquired the rights of prior mortgagee."

8. Right is available to purchaser in execution of decree on second mortgage.

In *Inderdawan Pershad v. Govind Lall Chowdhry*(1) it was held by the Calcutta High Court that a purchaser at a sale in execution of the second mortgage, purchasers not only the right of the mortgagor, but *all the rights of the mortgagee* acquired up to the sale, including the right of marshalling which the second mortgagee might have had, and that such purchaser could exercise the right of marshalling under this section. This view has been followed in the undermentioned cases(2), the Patna High Court observing(3) that the right of marshalling continues so long as the properties mortgaged to the second mortgagee are available to be sold in execution of a prior mortgage.

Section 81 — Note 7

1. AIR 1924 Pat 459 (463) : 3 Pat 522 (DB) ** AIR 1930 Mad 178 (180) ** AIR 1937 Rang 220 (223) : 1937 Rang LR 13 (DB).

   [**But see** AIR 1950 Dacca 9 (9) (DB) (Properties X and Y were mortgaged to A and then property Y was mortgaged to B. B obtained a decree for sale on his mortgage and purchased property Y in execution. A then sued on his mortgage impleading B and obtained a decree for sale. In execution of that decree B applied, ostensibly under S. 81 T.P. Act, that property X should be sold first. **Held,** that no question of marshalling arose. There was no other mortgage in existence.)

2. (1937) 42 Cal WN 502 (504).

Section 81 — Note 8

1. (1896) 23 Cal 790 (794) (DB).

2. AIR 1924 Pat 459 (463, 464) : 3 Pat 522 (DB) ** (1937) 42 Cal WN 502 (504) ** AIR 1930 Mad 178 (179).

   [**See also** (1912) 16 Mad 779 (779) (DB) (A mortgaging to B — Suit by subsequent mortgagee but B not party — Purchase by C in execution of certain property mortgaged to B — Sale of mortgaged property by A to B in satisfaction of first mortgage — Suit by B on the mortgage for sale stating that he did not desire to avail himself of sale in his favour — **Held,** B should first proceed against property not purchased by C, as a matter of equity.)

   [**But see** AIR 1950 Dacca 9 (9) (DB) (Properties X and Y mortgaged to A and then property mortgaged to B — B obtaining decree for sale on his mortgage and purchasing property Y in execution — A suing on his mortgage impleading B and obtaining decree — B in execution asking that property X should be sold first — **Held** no question of marshalling arose — There was no other mortgage in existence.)]

3. AIR 1924 Pat 459 (463) : 3 Pat 522 (DB).

9. "In the absence of a contract to the contrary."

See Note 8 on Section 56. See also the undermentioned case(1).

10. "So far as the same will extend".

X had a mortgage over properties *a*, *b* and *c*. The mortgagor subsequently executed a second mortgage over property *a*. *X* sued on his mortgage, obtained a decree and in satisfaction of the decree sold properties *b* and *c* and for balance still remaining due claimed to proceed against property *a*. It was held that the second mortgagee had no defence to the claim based on the doctrine of marshalling(1). The mortgagee *X* had recovered his debt in the first instance from properties *b* and *c* so far as the same extended, and property *a* was clearly liable for the balance due. See also the undermentioned case(2).

11. "But not so as to prejudice the rights of the prior mortgagee".

For a full discussion, see Note 10 on Section 56.

Where the prior mortgagee of items *a*, *b* and *c* could not include in his suit on the mortgage, item *c* owing to the conduct of the subsequent mortgagee of *a* and *b*, and, therefore, proceeded to enforce his mortgage only against *a* and *b*, it was held that the puisne mortgagee could not be allowed to claim as against the prior mortgagee that the latter should first proceed against *c*(1).

Where the mortgaged properties consisted of over two hundred items almost all of which were subject to incumbrances or alienations and many of which were complicated by the existence of rights of compensation for improvements in the alienees, it was held in the undermentioned case(2) that it would almost be impossible to try and work out the equities of all the incumbrancers and alienees in such circumstances by arranging the order of sale *without prejudice* to the first mortgagee and that therefore, the puisne incumbrancers should be directed to work out their own rights by way of suits for contribution.

Where a puisne incumbrancer has taken the mortgage expressly on condition of discharging a prior mortgage and has failed to do so, it has been held, he cannot invoke S. 81, as to do so would be to the manifest prejudice of the prior mortgagee(3).

12. "Or of any person who has for consideration acquired an interest in any of the properties."

See Note 2 on this section and Note 14 on Section 56.

12A. Executing Court when can give effect to right of marshalling.

See Note 12 on Section 56.

13. Effect of notice of prior mortgage.

Under the old section a second mortgagee who had *notice* of the prior mortgage could not

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Section 81 — Note 9

1. AIR 1962 Andh Pra 425 (430) (DB) (Subsequent mortgagee expressly undertaking to make some payment to prior mortgagee — Condition not fulfilled — Subsequent mortgagee cannot invoke S. 81.)

Section 81 — Note 10

1. (1910) 4 Sind LR 224 (224, 225) (DB)
2. 1887 All WN 192 (192) (DB) (Mortgage of property A stipulating that if debt not recovered from A, the mortgagee may realize from other property B — Subsequent mortgage to another — The mortgagee of B cannot claim that the prior mortgagee should first proceed against A.)

Section 81 — Note 11

1. AIR 1915 Mad 1203 (1204) (DB)
2. AIR 1943 Mad 705 (706) (DB)
3. AIR 1962 Andh Pra 425 (430) (DB)

claim the right of marshalling given by that section.(1) This condition as to notice was based on the observations of Lord Hardwicke, in *Lanoy v. Athol (Duke and Duchess of Athol)*(2) decided in the year 1742 to the following effect :

> "Suppose a person, who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, *who had no notice of the first*, the Court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, etc."

Latter English decisions, however, held that his condition was unnecessary(3). In cases not governed by this Act it was also held in this country, following the English law that the application of the doctrine did not depend upon any question of notice(4)

The section has now been amended by omitting the condition as to notice and bringing it in line with the English law.

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82. CONTRIBUTION TO MORTGAGE-DEBT.— [1][Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on hat date.]

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the [2][subsequent] mortgage.

Section 81 — Note 13

1. AIR 1929 All 309 (311) : 51 All 606 (DB) ** AIR 1916 Lah 219 (219) : 1916 Pun Re No. 86 (DB) ** AIR 1924 Pat 459 (464) : 3 Pat 522 (DB) ** AIR 1930 Mad 128 (129) ** AIR 1930 Pat 442 (447, 448) : 10 Pat 63 (DB) ** (1896) 23 Cal 790 (794) (DB) (Registration held not to amount to notice for the purposes of the section.) ** (1898) 2 Cal WN 397 (401) (DB) ** AIR 1926 Pat 94 (101) (DB) ** AIR 1917 Cal 830 (833) (DB) ** AIR 1914 Cal 828 (829) : 41 Cal 418 (DB) ** (1900) 24 Mad 96 (106) (DB) (**Overruled** on another point in AIR 1942 Mad 685 (FB).) ** (1913) 18 Ind Cas 199 (201) (DB) (Mad) ** AIR 1917 Mad 372 (373) (DB) ** AIR 1926 Mad 1144 (1145) ** (1911) 35 Bom 395 (406) (DB) ** AIR 1937 Mad 965 (966).
2. (1742) 26 ER 668 (669) : 2 Atk 444
3. (1893) 2 Ch 54 (73) : 62 LJ Ch 804, Flint v. Howard (Citing Gibson v. Seagrim, (1855) 20 Beav (614) ** (1803) 32 ER 402 (407, 408) : 7 RR 86, Aldrich v. Cooper
4. (1894) 18 Bom 160 (171, 172) (DB) (Per Bailey C.J., on difference of opinion between Telang and Jardine JJ.) ** (1896) 22 Bom 304 (314) (FB) ** (1902) 26 Bom 538 (543) (DB) ** 1895 Pun Re No. 65, p. 327 (329).

[A] *Substituted* for the original paragraph by the Transfer of Property (Amendment) Act, 1929 (20 of 1929), S. 43

[B] *Substituted* for the word "second", *ibid.*

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Property . . . . . belongs to two or more persons having distinct and separate rights of ownership therein."
4. Claim for contribution presupposes a common and equal liability.
(A) There must be a common liability.
(B) The liability must be equal.
4A. Puisne mortgagee's right to contribution.
5. Valuation should be as on the date of the mortgage.
6. Rate of contribution — How determined.
7. "In the absence of a contract to the contrary."
8. "Contract to the contrary" if enforceable by or against assignees of the property.
8A. Second paragraph.
9. Court selling property in particular order — Right of contribution not affected.
10. Marshalling, an exception to the rule of contribution.
11. Contribution distinguished from equitable rule of apportionment.
See Note 3 on Section 81.
12. Right of contribution is not a right to obtain apportionment in a mortgage suit.
13. A claim for contribution is a charge on the property.
14. Liability to contribute, whether personal.
15. Mortgage-debt not fully discharged — Claim for contribution.
16. Contribution arises both on voluntary and involuntary payments.
17. Right of redeeming co-mortgagor to claim contribution.
17A. Contribution towards costs.
18. Effect of acquisition of a portion of equity of redemption by mortgagee.
19. Effect of release by mortgagee of a portion of equity of redemption.
20. Effect of negligence or laches on the part of the mortgagee.
21. Contribution between life-tenant and reversioner.
22. Parties to suit for contribution.
23. Properties liable to contribute.
24. Failure to claim contribution in redemption suit, whether bars subsequent suit for contribution.
25. Plea that the plaintiff has no interest left in the property is no defence to the claim for contribution.
26. Interest on contribution amount.
27. Contribution suit is not cognizable by Small Cause Court.

1. Legislative changes.

The following changes were made in the section by S. 43 of the Transfer of Property (Amendment) Act, 20 of 1929.

(1) The present first paragraph was substituted for the old first paragraph which ran as follows :

> "Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage."

(2) In the last paragraph of the section the word "subsequent" was substituted for the word "second" befoer the word "mortgagee" See Note 7 on S 81.

The amendment is not, however, retrospective in its effect and, therefore, does not govern the cases arising before the amendment(1)

Section 82 — Note 1

1. AIR 1932 PC 74 (75) : 59 Ind App 106.

2. Scope of the section.

The section is based upon what is known as the doctrine of contribution in English law. As stated in Fisher on *Mortgages*, that doctrine and the doctrine of marshalling rest upon the principle that a fund which is equally liable with another to pay the debt, shall not escape because the creditor has been paid out of that other fund alone(1). The doctrine of contribution has been stated by Mr Justice Story as resting upon the principle enunciated by the maxim *qui sentit commodum, sentire debet et onus* (he who receives the advantage ought to suffer the burden). He observes:

> "The claim certainly has its foundation in the clearest principles of natural justice; for, as all are equally bound and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all, upon the maxim, '*qui sentit commodum, sentire debet et onus*.' And the doctrine has an equal foundation in morals; since no one ought to profit by another man's loss, where he himself has incurred a like responsibility. Any other rule would put it in the power of the creditor to select his victim; and, upon motives or mere caprice or favouritism, to make, a common burden a most gross personal oppression. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. And the creditor is always bound in conscience, although he is seldom bound by contract, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. It can be no matter of surprise, therefore, to find, that Courts of Equity, at a very early period, adopted and acted upon this salutary doctrine, as equally well founded in equity and morality. The ground of relief does not, therefore, stand upon any notion of mutual contract, express or implied, *between the sureties*, to indemnify each other in proportion (as has sometimes been argued), but it arises from principles of equity, independent of contract.(2)

This principle of law applies in many situations as between co-tenants and shares in common properties like partners, co-owners and coparceners. The basis of contribution in all such cases is not only the common ownership of property but also a common liability which was discharged by one(3).

Where part of the consideration of a sale was left with the vendee for redemption of mortgage but payment of the whole mortgage money was made by one of the co-vendees an equitable charge accrued against the property in favour of the vendee who discharged the mortgage(4).

Thus, where there are several joint debtors in respect of a common liability and one of them alone has discharged that liability, the person who has discharged it has a right, on this principle, to recover, from his co-obligors the excess he has paid over his share of the liability(5). The other co-

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Section 82 — Note 2

1. Fisher and Lightwood, Law of Mortgage, 7th Edn. (1931) page 567. ** 1953 BLR 707 (710) (DB).

   [See also AIR 1943 Mad 429 (436) : ILR (1943) Mad 531 (FB) ** (1897) 19 All 545 (548) (DB) ** (1911) 33 All 708 (722) (FB) ** (1909) 31 All 65 (67) (DB) ** (1901) 23 All 355 (359) (DB) ** AIR 1942 Mad 44 (46) (DB).]

2. Story, Equity Jurisprudence, (by A. E. Randall) 3rd Eng. Edn. 1920, Ch. VIII, S. 493, page 205.

   Also see the following cases :

   (1787) 29 ER 1184 (1185) : 1 Cox Eq Cas 318, Dering v. Earl of Winchelsea (Contribution is fixed on general principles of justice and does not spring from contract.) ** (1821) 22 RR 69 (76) : 3 Bligh 575 : 4 ER 712, Sterling v. Forrester (Do) ** (1873) 19 Suth WR 24 (25, 26) (DB) **** (1904) 26 All 407 (416) (FB) ** (1903) 26 Mad 686 (693) (FB) ** AIR 1915 Cal 334 (336) (DB) (Right of contribution is founded on justice, equity and good conscience — It does not arise from contract, although sometimes based on the theory of implied contract for contribution.)**

3. **AIR 1960 Mad 117 (119) : ILR (1960) Mad 24 (DB).**

4. **1938 Oudh WN 290 (295).**

5. **AIR 1954 Trav-Co 499 (503) : ILR (1954) Trav-Co 720.**

obligors also are, under the same principle, liable to contribute only in proportion to their shares of the common debt or obligation, from which follows a necessary corollary that no contribution can be claimed against a person who has paid more than his share of the liability(6). The rule of contribution thus works out the equities between the persons or the properties which are subject to a common obligation by making each person or property contribute rateably towards the liability(7). The rule is not peculiar to the law of mortgages. Whenever estates are subject to a common demand and that demand has been satisfied by the person interested in one of them, he has, under this rule, a right to call upon the other owners to contribute(8).

The liability for rateable contribution of the alienees of the properties mortgaged in the first instance and sold subsequently to different persons could be resisted only under Section 82, T P Act. In absence of a contract between the contributories it is not open to the Court on any equitable ground to rateably distribute the obligation for the mortgage debt amongst the parties without reference to Section 82(9).

Thus, the rule has been applied where one of the several co-sharers satisfies a demand for Government assessment on their land(10) or, where the property belonging to several owners is subject to a common charge for maintenance and that charge is satisfied by one of them(11).

Section 82 is only a codification of the general law of contribution in regard to mortgage debts. Principles can be applied when cases of contribution under general law are considered(12).

This section deals with the rule of contribution in relation to *mortgages*. Even before the enactment of the section, the rule of contribution applied by Courts of Equity in England, was applied by the Courts in India as a rule of justice, equity and good conscience (13). In this sense the section lays down no new principle of law(14) but only gives a statutory effect to the well-known principles referred to above(15).

The first part of the section deals with the case of a mortgage over the property owned by two or more persons in distinct and separate rights. The second part deals with a case where, out of two separate properties belonging to the same owner, one is mortgaged to secure one debt and subse-

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6. AIR 1915 Cal 334 (336) (DB) ** AIR 1926 Cal 657 (658) (DB).
7. ILR (1966) 2 Ker 388 (396) (DB). (Section 82 makes special provision overriding the general provision in S. 43 Contract Act.) ** AIR 1930 Oudh 260 (262) 5 Luck 727 (DB) ** AIR 1924 Pat 174 (175) (DB) (It does not touch the question of personal liability.)
8. (1901) 24 Mad 96 (107) (DB) (**Overruled** on another point in AIR 1942 Mad 685.) ** AIR 1942 Nag 111 (113) ILR (1942) Nag 393. (Decree by sadar lambardar paid by lambardar — Lambardar's right to compel contribution from his co-sharer arises under Ss. 82 and 95 read with S. 100.)
9. (1967) 1 Mad LJ 305 : 80 Mad LW 136
10. AIR 1965 Ker 55 (57) ** (1888) 11 Mad 452 (458) (DB) (One co-sharer paying revenue due on whole estate — He is entitled to a decree for contribution and to a charge on the land.) ** (1901) 24 Mad 96 (107, 108) (DB) ** (1903) 26 Mad 686 (701) (FB) ** (1912) 36 Mad 493 (494, 495) (DB) (He is entitled to a charge on land but not to a personal decree ** AIR 1920 Mad 739 (739, 740) (DB) ** AIR 1936 Mad 752 (773, 774) (DB).

    [See also AIR 1916 Mad 980 (982) : 39 Mad 795 (DB).]
11. AIR 1936 Mad 293 (294). (Section 82 applied.)
12. (1971) 2 Andh LT 265.
13. (1873) 19 Suth WR 24 (25, 26) (DB) ** (1882) 2 All 807 (809) (DB) ** (1874) 22 Suth WR 430 (431) (DB)

    [See also (1871) 16 Suth WR 78 (79) (DB) ** (1870) 14 Suth WR 480 (481) (DB).]
14. (1904) 26 All 407 (416) (FB).
15. (1911) 33 All 708 (716) (FB).

quently both are mortgaged to secure another debt The property which is subject to both the debts is held liable to contribute rateably to the second debt only after deducting the amount of the former debt from the value of the property out of which it has been paid. In both cases the right of contribution is available only against persons who stand in the position of co-mortgagors or their successors-in-interest or against the same property subject to two different mortgages(16). The last paragraph saves the right of marshalling secured to subsequent mortgagees by S 81, from the operation of this rule

In order that the rule of contribution enacted by the first paragraph of this section may apply it is essential that—

(1) there is property in which two or more persons had distinct and specific rights of ownership (see Note 3),

(2) such property is subject to a mortgage (see Note 4), and

(3) there is no contract to the contrary (see Note 7).

When all these three circumstances are present, the section lays down that all the different shares in, or the parts of the property mortgaged, *are liable to contribute rateably to the debt* secured by the mortgage These are the statutory conditions which give rise to a claim for contribution and when a case is fully covered by these conditions the Courts cannot introduce any extraneous equitable principles to modify the liability to contribute imposed by this section(17). Similarly the fact that the mortgage-debt has passed into a decree does not prevent the application of the rule in the section and, therefore where a mortgagee sells a portion of the mortgaged property in execution of a decree for sale obtained on his mortgage and the owner thereof sets aside the sale by depositing the decretal amount together with the amount of necessary compensation to the auction-purchaser under O 21, R 89, Civil Procedure Code, 1908, such owner can claim contribution under this section in respect of the mortgage amount he has paid though not for the amount of compensation to be paid to the auction-purchaser(18).

The joint and several liability of each of the co judgment-debtors is quite different from their liability inter se (i e mutual liability) Where consequent on the mortgage decree being passed against two judgment-debtors one of them was held to be 'debtor' within the meaning of the Bombay Debtors' Relief Act and his liability was scaled down and the decree holder recovered entire decretal dues from the other judgment debtor the joint and several liability of the judgment debtors would be discharged by the payment of the amount as scaled down but his liability for contribution could not be affected merely by the discharge of the joint and several liability(19)

Both S 43, Contract Act and this section deal with the question of contribution But S 43 of the Contract Act deals with contract generally while this section applies to mortgages Where the

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16. AIR 1960 Mad 117 (119) : ILR (1960) Mad 24 (DB)

17. **AIR 1930 PC 183 (185) : 52 All 358 : 57 Ind App 189** ** 1953 BLJR 707 (710) (DB) ** AIR 1937 Pat 628 (629) 16 Pat 557 (DB) ** AIR 1936 Oudh 169 (170) 11 Luck 697 (DB).

    [See also AIR 1918 Mad 1012 (1015) (DB) (Sections 69 and 70 Contract Act do not affect the claim for contribution under S 82, T.P Act.)]

18. **AIR 1932 PC 99 (101)** ** AIR 1957 Trav Co 59 (60) (DB) ** AIR 1934 Mad 189 (190) (Compensation paid to auction-purchaser does not come under S 82 as it is not a charge on the property.) ** AIR 1914 All 330 (332) : 36 All 272 (DB).

    [See AIR 1943 Mad 429 (433) : ILR (1943) Mad 531 (FB). (Sale of mortgaged property set aside under O 21, R 89 Compensation payable to auction purchaser and poundage fee chargeable from mortgagor are not expenses properly incurred within S 95 No claim for contribution can be made in respect of these amounts – Per Patanjali Sastri, J, in Order of Reference)]

19. AIR 1977 Kant 135 (136) : (1977) 1 Kant LJ 196 (DB).

right to contribution arises out of a mortgage this section must exclude S 43, Contract Act(20).

Though the Act is not extended to the Punjab, the general principles underlying the section are applied to cases arising in that State(21).

It has been held that the principle underlying this section can be applied in cases under the U.P Encumbered Estates Act (XXV of 1934), as there is no specific provision in that Act(22)

In a suit for recovery of the contribution on the charge of the mortgaged properties it was held that the limitation period started on the date of payment of money(23)

3. "Property . . . . . belongs to two or more persons having distinct and separate rights of ownership therein."

The rule of contribution as enunciated in this section before it was amended in 1929, referred only to cases where "several properties, whether of one or several owners" were mortgaged to secure one debt. In *Rajah of Vizianagaram v Rajah Setrucherla*(1) the question was raised but not decided, whether this wording referred to cases of mortgages of *separate plots* respectively owned by separate owners in severalty or included also cases of mortgages of *distinct shares in one property*, severally owned by two or more co-owners as tenants-in-common with unity of possession. It was, however, observed that though the wording could not directly apply to the case of co-owners of undivided several shares with unity of possession, the principle of the section would govern the case Similarly, some cases applied this section as it stood before the amendment, to cases where *one* property originally was subsequently held by several owners in distinct and separate shares either by reason of the death of the mortgagor(2), or by reason of partition(3) or by transfer of shares in the mortgaged property(4). The Special Committee was, therefore, of the opinion that this

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20. AIR 1952 SC 47 (50) : 1952 SCR 179.

21. AIR 1953 SC 1 (2) : 1953 SCR 243 : ILR (1952) Punj 495 ** AIR 1949 EP 254 (256) (DB) (There is no principle of equity, justice and good conscience on the basis of which a person who is entitled to be reimbursed in respect of a certain payment is entitled to claim in a Court of law not only the amount that he paid but also the benefits which he gained by redeeming a previous mortgage) ** AIR 1933 Lah 374 (375) (DB)

22. AIR 1943 All 334 (336) ILR (1943) All 669 (DB) (The principle of apportionment contained in this section is not overriden by the provisions of S 9(5)(a) of the Encumbered Estates Act.)

[See also AIR 1948 All 349 (350, 351) (DB) (When it is found that one of the joint debtors has not contributed any property belonging to himself as part of the mortgage security, it follows that his liability would be nil and that the mortgagor or mortgagors who are the owners of the property which has been secured under the mortgage will be liable for the payment of the entire debt This is the principle to be followed in determining the liability of joint debtors under sub-section (5) of S 9 of the U P Encumbered Estates Act in all cases of mortgage debts.)]

23. AIR 1983 Kant 13 : (1982) 2 Kant LJ 72.

Section 82 — Note 3

1. (1903) 26 Mad 686 (709) (FB).

2. (1908) 12 Cal WN 745 (746) (DB).

[But see (1905) 9 Cal WN 865 (867) (DB). (Mortgage decree — Payment by one of several representatives of deceased mortgagor Provisions of S 82 do not apply to such a case)]

3. (1903) 4 Ind Cas 872 (872) (DB) (Mad).

4. AIR 1918 Mad 1012 (1013) (DB) ** AIR 1921 All 323 (324) : 43 All 589 (DB). (Sale in execution of a decree against mortgagor) ** AIR 1915 Cal 759 (762) (DB). (Decree by puisne mortgagee — Auction-purchaser in execution of that decree, of a portion of mort-

section ought to cover a case, not only where several properties were mortgaged but also where the mortgaged property was subsequently sub-divided into distinct and separate portions, and the liability of the co-sharers was distinct and several, and not joint(5). The first paragraph of the section was, therefore, redrafted accordingly. The section now covers all cases, whether of a mortgage of several properties owned by several owners or of one property the title to which becomes severed after the mortgage(6).

Where the property which is the subject-matter of the mortgage belongs exclusively to one of the joint debtors, his property alone is liable for the payment of the entire debt and until a personal decree under O. 34, R. 6, Civil P.C. is obtained by the mortgagee the question of the liability of the other joint debtor for the payment of the debt will not arise(7).

4. Claim for contribution presupposes a common and equal liability.

As seen in Note 2, the doctrine of contribution rests on the principle that a fund *which is equally liable with another to pay the debt* shall not escape because the creditor has been paid out of that other fund alone. The doctrine, therefore, assumes that two estates A and B comprised in the same security are both *equally liable* to pay the debt. Thus, there are two conditions to be satisfied before a claim for contribution can be sustained—

(A) There must be a common liability to pay on all the properties, and

(B) Such liability must be *equal* in degree in respect of each property.

(A) There must be a common liability.

The old section spoke of contribution where "several properties" were mortgaged to secure "one" debt. Under the present section contribution arises where "property subject to a mortgage" belongs to two or more persons having distinct and separate rights of ownership therein. Such portions or shares are, under this section, liable to contribute rateably towards "the debt secured by the mortgage." Thus, the present section also presupposes the existence of a common liability in the form of the mortgage-debt equally secured by all the properties(1). It is, therefore, necessary to prove that such a common liability exists in respect of the property from which contribution is

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gaged property can claim contribution if he satisfies the mortgage decree.) ** (1880) 2 All 807 (809) (DB). (Auction-purchasers of portions of a mortgaged property are liable to contribute.) ** (1877) 1 All 455 (456) (DB). (Auction-purchaser of a share in mortgaged property who has paid off the whole mortgage debt can claim contribution from the other mortgagors.) ** (1895) 20 Bom 615 (616, 617) (DB). (Auction purchaser of a share of mortgaged property is liable to contribute.) ** AIR 1921 All 301 (304) : 43 All 539 (DB). ** (1905) 2 All LJ 698 (700) ** (1901) 23 All 355 (359) (DB).

5. See the report of the Special Committee.

6. AIR 1967 Ker 77 (78). (Mortgagor transferring part of mortgaged property subject to the mortgage and retaining rest — Prima facie rule is that mortgage debt should be borne rateably between them.) ** AIR 1962 Pat 236 (241) (DB). ** (1947) 52 Mys HCR 118 (120) (DB). (Sale in Court auction — AIR 1921 All 323 : Rel. on.) ** AIR 1943 Mad 429 (434) : ILR (1943) Mad 531 (FB). ** AIR 1942 Mad 685 (686) : ILR (1943) Mad 96 (FB). ** AIR 1935 Mad 390 (393). (Part purchaser of mortgaged properties can claim contribution.)

7. AIR 1948 All 349 (350, 351) (DB).

Section 82 — Note 4

1. AIR 1936 Mad 500 (502). (A person can only be a co-mortgagor with another person in respect of the same obligation or debt which they are jointly liable to discharge, that is they must be bound by the contract as promisors in respect of the same performance.) ** AIR 1933 All 929 (932) (DB). (Right of contribution presupposes joint liability.) ** AIR 1928 Cal 593 (596) : 55 Cal 1193 (DB). (Common liability is the essence of right of contribution.)

claimed(2) and consequently, if no such common liability exists, there can be no contribution(3).

(B) The liability must be equal.

Even if there exists a common liability to pay, contribution cannot be claimed unless each of the properties is liable in *equal degree* to pay the common liability(4). Thus where a mortgagor of properties *X* and *Y* transfers, by way of a lease or a mortgage, property *X* and retains property *Y*, the latter is *primarily* liable to discharge mortgage-debt on both *X* and *Y*. Hence, if the mortgagor himself or his personal representative pays the entire debt, there can be no contribution from *X*(5). On the other hand, if the mortgagee enforces his debt against the property *X*, the transferee is entitled to be *exonerated* at the expense of property *Y*(6). In some decisions(7), however, it has been held that a subsequent mortgagee of *X* will be entitled to *contribution from Y* in such cases.

4A. Puisne mortgage's right to contribution.

A mortgages *x* and *y* to *B*. *A* then mortgages *x* alone to *C*. The property *x* is sold under *B*'s mortgage and the mortgage is completely discharged. Can *C* claim contribution from *y* in order to realise the mortgage-money due to him?

This case is not strictly covered by the wording of the section. Because, the first paragraph of the section in terms refers to *owners* of the mortgaged property. The paragraph does not refer to persons whose right in respect of the property does not amount to ownership. As regards the second paragraph, it refers to contribution in respect of a *puisne* mortgage and not of a *prior* mortgage as in the above illustration. The third paragraph does no touch the point. However, though the case is not covered by the terms of the section, it has been held that *C* will be entitled to contribution in such cases(1). It is doubtful how far this view can be sustained in view of the dicta of the Privy Council

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2. **AIR 1934 PC 98 (100) : 61 Ind App 185 : 13 Pat 310.**
3. AIR 1925 Oudh 215 (219) (DB) ** (1858) 9 Ir Ch R 57, Re Kelly
   [**See also** AIR 1915 Cal 278 (279) (DB) (Mutuality is the test of contribution.)]
4. (1882) 21 Ch D 583 (588) : 31 WR (Eng) 211, In re : Dunlop, Dunlop v. Dunlop ** AIR 1929 Pat 664 (675) : 8 Pat 585 (DB) (Right of contribution can arise where persons are equally bound and equally relieved.)
5. AIR 1919 Oudh 241 (244) : 21 Oudh Cas 360 (DB) ** (1907) 2 Ch 465 (470) : 76 LJ Ch 689, In re : Darby's Estate, Rendall v. Darby
6. (1869) 4 Ir R Eq 15, Ker v. Ker.
7. These cases are noted and considered in Note 4-A.

Section 82 — Note 4-A

1. AIR 1966 Ker 139 (141) (Mortgage on four items — Mortgagor selling three items to some persons and creating possessory mortgage on item four in favour of A — Earlier mortgage not disclosed to any of them — Suit on original mortgage on all four items — A paying entire debt to save his subsequent mortgage on item four — A can claim contribution pro rata from other items included in earlier mortgage — He was not bound to pay entire mortgage, nor item in his possession bound in equity to pay it — His liability was only to pay proportionate share towards mortgage debt.) ** AIR 1958 Ker 386 (389) : ILR (1957) Ker 598 (DB) ** AIR 1944 Mad 276 (276) (The fact that the puisne mortgagee does not redeem the earlier mortgage cannot preclude him from suing for contribution when the earlier mortgage is satisfied by execution sale of the property mortgaged to him.) **** AIR 1942 Mad 685 (687) : ILR (1943) Mad 96 (FB).** (If a first mortgagee does not cause the whole of the hypotheca to be sold for satisfying his mortgage, the second mortgagee has the right to call upon the holder of the unsold portion to contribute his share of the principal debt. Approving AIR 1935 Mad 456.) ** AIR 1935 Mad 456 (458)

   [**See also** AIR 1949 Nag 155 (158) : ILR (1948) Nag 595 (Items 1 and 2 mortgaged first to A and then item 1 alone mortgaged to B — Item 2 sold in execution of money decree against mortgagor and purchased by C — Item 1 sold in execution of B's puisne mortgage

in *Ganeshilal v. Charan Singh*(2) that as the Act prescribes the conditions in which contribution is payable it is not proper to introduce into the matter any extrinsic principle to modify the statutory provisions.

The following illustrations are based on the hypothesis that a *puisne* mortgagee of one of the items subject to a prior mortgage can claim contribution in respect of the prior mortgage

Illustrations.

(1) *A* mortgages x and y to *B* and then x and z to *C*. The property x is sold under *B*'s mortgage and the mortgage is fully satisfied out of the sale proceeds. *C* then sues for the sale of property z in enforcement of his mortgage. He can claim in such a suit a decree to the effect that in case the sale proceeds of z are not sufficient to cover the mortgage-money due to him, he must have contribution from y. Such a claim would not be premature nor would its inclusion make the suit bad for misjoinder of causes of action(3).

(2) Suppose, in the above illustration, properties x, z and p constitute the subject matter of the subsequent mortgage in favour of *C*. The property x is sold under *B*'s mortgage and p is sold for arrears of revenue, so that *C* is only left with z as security for his money. In this suit for sale of z he claims contribution from y. It is contended that as he did not avoid the revenue sale of p he cannot claim contribution from y. The contention is not tenable and where *C* was not bound to pay the revenue in respect of p, his failure to pay such revenue will not affect his right of contribution from y(4).

(3) If two estates are mortgaged to a person and both are subject to separate second mortgages the Court will apportion the first mortgage between the subsequent mortgagees(5).

5. Valuation should be as on the date of the mortgage.

Before the amendment of the section in 1929 there was a conflict of opinions on the question whether for the purposes of contribution, the value of the different properties (where some have been transferred subsequent to the mortgage) should be calculated as at the date of the original mortgage or as at the date of the subsequent transfer. Some cases held that the valuation should be as at the date of the mortgage irrespective of the price paid by a subsequent transferee of the mortgaged property(1), while other cases held, that it should be as at the date of the subsequent transfer(2). The section was silent on the point. The amendment of the section has now set at rest the said conflict by providing that the valuation should be as *at the date of mortgage*. Under the present section, therefore, the material date for assessing the value of the property is the date of the mortgage and not the date of the subsequent transfer(3).

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decree and purchased by D — D cannot claim marshalling and contend that the whole of A's prior mortgage must be paid out of item 2 i.e. (the item not mortgaged to B from whom he claims) as C is a purchaser for valuable consideration and marshalling under S. 81 cannot be claimed against such purchaser. Case is governed by S. 82 and items 1 and 2 are liable to contribute rateably to the discharge of A's first mortgagee.)]

2. **AIR 1930 PC 183 (185) : 57 Ind App 189.**
3. AIR 1944 Mad 276 (277)
4. AIR 1944 Mad 276 (278)
5. (1957) 2 Andh WR 385 (388)

Section 82 — Note 5

1. (1905) 27 All 549 (551) (DB) ** (1903) 26 All 72 (77) (DB) ** AIR 1914 All 330 (331, 332) 36 All 272 (DB) ** AIR 1924 All 365 (369), 46 All 286 (DB) ** AIR 1926 Rang 266 (266, 267) : 6 Rang 417 (DB).

   [See also (1909) 3 Ind Cas 311 (314) (DB) (Cal) ** AIR 1917 Cal 82 (83) (DB) (Obiter).]

2. **(1901) 26 Bom 88 (98) (SB).** (Date of sale.) ** (1869) 12 Suth WR 291 (293) (DB) (Date of the auction sale.)

   [See also (1910) 33 Mad 211 (215) (DB) (Valuation at date of sale by consent of parties.)]

3. AIR 1975 Mad 92 (95) 87 Mad LW 736 (DB) ** AIR 1962 Pat 236 (240) (DB) ** AIR

In the undermentioned case(4) the purchaser of one of the mortgaged properties claimed contribution and adduced evidence of the value of the property as at the date of the sale. It was held that though the valuation ought to be, as at the date of the mortgage, where the person claiming contribution adduces to show the value of the property at the time he purchased it, it lay on the other side to prove that the value of the property at the date of the mortgage was different.

6. Rate of contribution — How determined.

The method of computation under the section is a matter of law. The matter has been dealt with by statute and the Court cannot, in the face of the statutory provision, have recourse to equitable principles, however, fair they may appear to be at first sight(1). In the absence of a contract to the contrary the several properties or portions of property mortgaged are liable to contribute *rateably* to the debt secured by the mortgage according to the *value* of the properties on the date of mortgage(2). The value referred to in the section is the actual *market-value* of the property(3) and not the price paid for it by any subsequent purchaser, whether in a private or in an execution sale(4). Where the mortgaged property is land, the Government revenue may be taken as a measure of profits yielded every year and may thus afford a measure for calculating the value of the property(5), but this is not always a correct criterion of actual value(6) and, therefore, cannot be accepted, without more, as the only method for ascertaining he market-value of the property(7).

The rate of contribution is determined by first ascertaining the actual market-value of the property and then distributing the total amount of mortgage-money over the several properties in the proportion of their values. Thus, if two properties *x* and *y* of the market-value of Rs. 1,000 and Rs. 1,500, respectively, are mortgaged for a debt of Rs. 1,000, the rateable share to be borne by the properties would be in the proportion of 1,000 : 1,500, i.e., in the proportion of 2 : 3 and the amounts for which *x* and *y* would be liable would be Rs. 400 and Rs. 600 respectively.

Where any of the properties morgaged is already subject to a prior mortgage or charge, the mode of ascertaining its share of liability is to deduct the amount of such mortgage or charge from the market-value of that particular property and to treat the remaining sum as the market-vale of that item for the purpose of finding out the rate of contribution(8).

Illustration

Properties x and y are mortgaged to secure a debt of Rs. 1,000. The market-values of x and y are Rs. 1,000 and Rs. 1,500 respectively, y is already mortgaged for Rs. 500. According to the rule stated

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1943 Mad 429 (434) : ILR (1943) Mad 531 (FB) ** AIR 1939 All 86 (87) ** AIR 1942 Mad 44 (47) (DB).

4. AIR 1916 All 190 (191) (DB).

Section 82 — Note 6

1. AIR 1952 SC 47 (50, 51) : 1952 SCR 179.
2. AIR 1957 SC 48 (49, 52) : 1952 SCR 179 ** 1956 BLJR 749 (753) ** AIR 1948 All 349 (350) (DB). In the case of a mortgage debt the proportion in which the property is owned by the joint debtors is an important consideration.)
3. (1870) 13 Moo Ind App 404 (408) (PC). (Government revenue assessed on a village may not always be a correct criterion of its actual value.)
4. AIR 1917 All 357 (358) (DB).

   [See also AIR 1933 All 929 (930) (DB).]
5. (1897) 19 All 545 (550) (DB). (18 years' revenue assumed to be the fair value of the villages.)
6. (1870) 13 Moo Ind App 404 (408) (PC) ** (1876) 25 Suth WR 388 (389) (DB).
7. (1873) 20 Suth WR 163 (163) (DB). (Zamindar's collection would be better evidence of the actual present relative values of the mouzas.)
8. AIR 1952 Mys 99 (102). ILR (1952) Mys 259 (DB) ** AIR 1917 All 357 (358) (DB).

above the amount of Rs. 500 will be deducted from Rs 1,500, the value of y, and Rs 1,000 will be taken as its value for determining its share of liability Thus, the proportion would be 1000 1000 i e , equal, and the respective liability will therefore be Rs 500

It is supposed in the above illustration that the prior mortgage is on property y alone But it may happen that the prior mortgage is not only on y but also on some other properties which are not included in the second mortgage Prior to the amendment in 1929 there was some doubt in such a case, as to whether the amount to be deducted from the market-value of such property was the *total* amount of the prior debt or only a rateable portion of it The expression used in the section before the amendment was "the amount of any other encumbrance" and it was held that this expression had a wider connotation than the term "mortgage"(9) and that the amount to be deducted should be the *total* amount due on the prior mortgage(10) In *Faquir Chand v Aziz Ahmad*(11) their Lordships of the Privy Council declared the above mode of calculation to be erroneous and held that the correct mode was first, to assess, according to the rule of contribution, the rateable share of liability attributed to the property concerned and then deduct such amount from the value of the property The substitution, in the present section of the words, "mortgage or charge" for the word "encumbrance" which occurred before has also made the position clear Where therefore any of the properties mortgaged is already subject to a prior mortgage along with some other properties not included in the second mortgage the amount of the prior mortgage to be deducted from the value of the property is the *proportionate* mortgage money payable by that property according to the rule of contribution under the prior mortgage and not the total amount of debt due under it

Illustration

Properties x and y of the market value of Rs 1 000 and Rs 1 500 respectively are mortgaged to secure a debt of Rs 1 000 Property y is already subject to a prior mortgage for Rs 600 along with another property x of the market value of Rs 300 To find out the value of y for the purpose of contribution under the mortgage of Rs 1,000 its share of liability under the prior mortgage will have to be determined first Properties y and z are liable to pay Rs 600 under the prior mortgage in the proportion of 1,500 . 300, i e , 5 1, and the rateable liability on each according to such proportion is Rs 500 and Rs 100 respectively Thus the value of y for the purpose of contribution towards the second mortgage will be Rs 1500 less Rs 500 (not Rs 600 the total amount of the prior mortgage) The rate of contribution of x and y, therefore will be in the proportion of 1000 1000, i e equal Each property will have to contribute Rs 500 The fact that the prior mortgage *has recovered* from the owner of property z any particular amount in respect of his mortgage, does not affect the mode of valuation as stated above for the purposes of the second mortgage(12).

Where, however, the amount payable by the property under the prior mortgage or charge *exceeds* its market-value, it is obvious that the value of such property for the purpose of contribution under the second mortgage is nil and the entire burden of the latter debt rests on the remaining properties(13).

In a suit for contribution, the owner of a property can claim as contribution only the amount he had paid in excess of his own proportionate share of liability and nothing more Thus, if the proportionate liabilities of wo properties x and y of market-value of Rs 1,000 and Rs 1,500 respectively are Rs. 400 and Rs 600 respectively and property *x is sold in execution of the mortgage decree for Rs 1,000 the owner of property* x can claim, as contribution from property y only the amount of Rs 600 (i e Rs 1,000 less his liability Rs 400) A property which is subject to a mortgage rarely fetches in auction sale of its real value It is usually sold for much less than its fair value But even if for certain reasons the property fetches more than its market value it is the

AIR 1928 All 241 (246) 50 All 569 (DB) ** **AIR 1932 PC 74 (75) : 59 Ind App 106.**

10. AIR 1928 All 241 (246) 50 All 569 (DB) ** AIR 1930 Pat 607 (609, 610) (DB)

11. AIR 1932 PC 74 (75) : 59 Ind App 106. (Reversing AIR 1928 All 241 on this point)

12. (1897) 19 All 545 (554, 556) (DB).

13. (1911) 33 All 387 (390) (DB) ** AIR 1931 All 625 (627) (DB)

market-value that must be considered in determining the amount which the owner is entitled to claim as contribution. He is not entitled to treat the market-value as the value for the purpose of determining the amount of his liability and at the same time, adopt some other value which is much higher than the market-value for the purpose of determining the amount which he ought to be considered as having paid in discharge of the mortgage and on the basis of which he is entitled to claim contribution. The owner cannot make a profit out of the auction sale and claim the difference between the sale price and his liability to pay, as contribution from the owner of the other property. Such a claim was made and properly disallowed in *Magniram v Mehdi Hussain*(**14**) the facts of which were as follows : Properties *x* and *y* of the admited market-value of Rs. 20,000 and Rs. 6,000 resepectively were mortgaged for Rs. 8,000. The properties were subsequently sold to *A* and *B* respectively. The mortgagee obtained a decree on his mortgage and sold property *y* in execution for Rs. 21,000 for which it was purchased by *A*. This amount completely satisfied the mortgage. *B* sued *A* for contribution alleging that out of the mortgage-debt his property *y* was rateably liable to pay only Rs 5,000 and property *x* was liable for Rs. 16,000 and that, by the auction sale, his property having paid Rs. 21,000 he was entitled to claim Rupees 16,000, the difference between the auction price and his liability, as contribution from *A*. It was held that this method of calculation was wrong as it assumed two different values of property, one for assessing the liability and another for calculating the amount of contribution The correct way was to take the market value as the only value for both the purposes and to deduct the proportionate share of the liability from its value. Thus, in this case, Rs 6,000 was the value of the property *y*, the liability assessed rateably on this basis on *y* was Rs. 5,000 and therefore the real excess paid by *y* was only Rs. 1,000 This was the amount which *B* could claim from *A* and was decreed to him. It was found as a fact, that *A* the purchaser, in order to save his property *x*, had paid not only the fair market-value of *y* but also much more in order to satisfy the debt completely. This fact was also taken into consideration and in so doing the Court observed as follows :

See also the undermentioned cases(**15**).

> "A claim like the present for contribution is an equitable claim and in determining the amount of it we must take an equitable view of all the circumstances attending the case and must not give effect to what is only an apparent and not the real state of things."

7. "In the absence of a contract to the contrary".

In England parties are entitled to contract themselves out of the right of contribution(**1**). The same principle is enacted in this section. It is, therefore, open to the parties to contract that there shall be no contribution in the particular case or that they should contribute in a particular manner(**2**).

There is a difference of opinion as to whether the "contract to the contrary" must be a contract to which the *mortgagee* is a party or whether it may be a contract *between the owners of the mort-*

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14. (1904) 31 Cal 95 (104) (DB).

15. (1880) 6 Cal LR 336 (343 344) (DB) ** (1911) 12 Ind Cas 182 (183) (DB) (All).

Section 82 — Note 7

1. (1879) 10 Ch D 460 (464, 465) 27 WR (Eng) 388 48 LJ Ch 217 40 LT 359, Leonino v Leonino.

2. **AIR 1952 SC 47 (50) : 1952 SCR 179.** (There being no contract to the contrary, only remedy was under S 92 of the Transfer of Property Act read with S 82) ** AIR 1928 All 241 (247) : 50 All 586 (DB) (**Reversed** on another point in AIR 1932 PC 74 — Parties to the transaction are free to lay down any different rule of contribution for themselves) ** AIR 1936 Mad 901 (903). (**Overruled** in AIR 1943 Mad 429) ** (1858) 53 ER 808 (809) 26 Beav 33 4 Jur (NS) 1009 : 6 WR (Eng) 763 : 122 RR 12, Stringer v Harper. (Mortgage specifying one property as primarily security for the debt — No contribution)

gaged properties themselves. It was held in some cases(3) before the decision of the Privy Council in *Ganeshi Lal v. Charan Singh*(4) that a "contract to the contrary" within the meaning of this section must mean a contract to which the mortgagee is a party. In *Ganeshi Lal's case*(5) A mortgaged properties *x* and *y* to *B*. He then sold *x* to *C*, directing him to pay off the mortgage from out of the sale consideration. Subsequently, *y* was sold in Court auction in execution of a money decree against *A* and was purchased by *D*. Thereafter, *C* paid off the mortgage and sued *D* for contribution. The High Court of Allahabad held that a contract to the "contrary" within S. 82 should be a contract between the mortgagor and the mortgagee, that the agreement between the vendor and the vendee to pay off the mortgage was not such a contract and that *D*, not being a party to the contract between *A* and *C*, could not take advantage of it and therefore, could not escape the liability to contribute under the section. The decision was affirmed by their Lordships of the Privy Council, but not on the ground that the contract set up was not a contract to the contrary. Their Lordships proceeded on the view that the benefit of the contract between the vendor and the vendee could not be claimed by a person not a party to the contract unless such benefit had been assigned to him in law or equity.

Ganeshi Lal's case(6) has been regarded in the undermentioned case(7) as negativing the view that a "contract to the contrary" within the meaning of this section must be one to which the mortgagee is a party. In *Khalesan-fi-sabit v. Narendra Nath*(8) it was observed as follows:

> "From the terms in which S. 82, Transfer of Property Act, is expressed, there [illegible] concluding that a "contract to the contrary" mentioned therein is a contract between [illegible] and the mortgagee. The term is very general and may refer to any contract [illegible] it would appear that the mortgagee has no interest at all in the question of contribution between the various parts of the property. Insofar as he is concerned, he is entitled to proceed against any portion of the property or any part of it to realise the amount due to him. If [illegible] he acquires the equity of redemption in part of property but in his capacity as [illegible] he is not interested and, therefore, there seems to be no reason why he should be a necessary party to any contract which involves the right of contribution between various portions of the property mortgaged."

But in the undermentioned cases(9) (even after *Ganeshi Lal's case*) it has been held that the "contract to the contrary must be one between the mortgagor and the mortgagee. But even according to this view a contract excluding the right of contribution will be *prima facie* binding on the actual parties to the contract even though the mortgagee is not a party to the contract(10). (See for further discussion Note 8.)

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3. AIR 1925 Nag 160 (1) (160) ** (1901) 24 Mad 85 (93) (DB) ** (1926) 96 Ind Cas 765 (766) (DB) (All).
4. **AIR 1930 PC 183 (185) : 57 Ind App 189.** (On appeal from AIR 1926 All 752.)
5. **AIR 1930 PC 183 (185) : 57 Ind App 189.**
6. **AIR 1930 PC 183 (185) : 57 Ind App 189.**
7. AIR 1937 Pat 628 (630) : 16 Pat 557 (DB) : (AIR 1936 Mad 110 and AIR 1936 All 258 Referred on.)
8. AIR 1936 All 258 (263) : 58 All 548
9. AIR 1964 Ker 256 (258) : ILR (1964) 1 Ker 526 ** (1960) Andh LT 168 (169) (Contract to contrary which is between purchaser at auction sale and executing Court [illegible] mortgagors cannot exclude operation of S. 82. AIR 1955 [illegible] **Dist.** ** AIR 1956 Mad 293 (297) : ILR (1956) Mad 914 (DB) ** AIR 1949 Mad 192 (DB) ** AIR 1949 Mad 384 (385) ****AIR 1943 Mad 429 (437) : ILR (1943) Mad 531 (FB).** AIR 1936 Mad [illegible] and AIR 1932 Mad 218. Approved. AIR 1936 Mad 106. AIR 1936 Mad 898. AIR 1936 Mad 901 and AIR 1941 Mad 66. **Overruled.**) ** 1936 Mad WN 859 (862) ** AIR 1931 Nag 172 (172) : 27 Nag LR 258 ** AIR 1931 All 546 (547) ** AIR 1932 Mad [illegible] ** AIR 1936 Mad 113 (115)
10. AIR 1956 Mad 293 (297) : ILR (1956) Mad 914 (DB) : AIR 1943 Mad 429 (FB) [illegible] ** **AIR 1943 Mad 429 (436) : ILR (1943) Mad 531 (FB)** (24 Mad 83 Followed.)

A contract excluding the right of contribution may be express or implied Thus, there will be an implied contract to the contrary in the following cases :

(a) A contract between the mortgagor and his transferee of a portion of the property that the latter should pay off the entire mortgage implies contract that the vendor's property is not liable to contribute towards the mortgage(**11**).

(b) An undertaking by the transferor-mortgagor that he will himself discharge the mortgage, implies a contract that the property transferred is not liable to contribute to the mortgage-debt(**12**).

(c) Where, of two mortgagors *A* and *B*, *B* takes the whole of the mortgage money, there is an implied contract that *A's* property is not liable to contribute towards the debt(**13**).

(d) Where one of the mortgagors is merely a surety for the others, there is an implied contract that the former is not liable to contribute towards the debt(**14**).

(e) Where the mortgagor sells a part of the mortgaged property *free of incumbrances*, there is an implied contract that that part is not liable to contribute(**15**)

See also the undermentioned cases(**16**).

It has been held that from the mere fact that properties were purchased in Court auction subject to subsisting mortgage, the Court cannot infer a contract to the contrary so as to disentitle the purchaser who pays off the common charge from claiming contribution from the other co-mortgagors(**17**).

8. "Contract to the contrary", if enforceable by or against assignees of the property.

The right of contribution exists only when there is no contract to the contrary. Where there is such a contract, there is no right of contribution as provided by this section, and the parties to the contract are governed by the *contract itself*(**1**) There is a conflict of decisions on the question whether a contract excluding the right of contribution under this section is enforceable against the transferees of the mortgaged property. In a Full Bench decision of the Madras High Court(**2**) it has been held that where the *mortgagee* is a party to such a contract, it will be a "contract to the contrary" within the meaning of this section and will run with the land, so that it will be binding on the transferee of the property irrespective of any question of notice But according to the above decision, if the mortgagee is not a party to the contract, it will not be covered by this section and will not run with the land Such a contract will, it has been held in the above decision, bind only the actual parties to the contract and will not affect a transferee of the property unless he agrees to be bound by the contract.

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11. AIR 1967 Ker 77 (78) ** AIR 1941 Mad 66 (66) (**Overruled** in AIR 1943 Mad 429 (FB) on another point) ** (1913) 20 Ind Cas 827 (828) (DB) (Mad).

[**But see** AIR 1918 Mad 1012 (1014) (DB) (Submitted not correct)]

12. AIR 1936 Mad 901 (903) (**Overruled** in AIR 1943 Mad 429 (FB) on another point)

13. AIR 1936 Mad 106 (111) 59 Mad 121 (DB) (**Overruled** in AIR 1943 Mad 429 (FB) on another point.)

14. AIR 1936 All 258 (264) : 58 All 548 (DB).

15. AIR 1929 Pat 664 (675) 8 Pat 585 (DB) ** AIR 1924 Mad 749 (753) (DB).

16. AIR 1927 Mad 1086 (1088) (DB) (Several properties mortgaged to secure one debt — Contract exempting owner of one property from liability — Other parties are bound to exempt that property.)

17. (1947) 52 Mys HCR 118 (120) (DB).

Section 82 — Note 8

1. AIR 1927 Mad 1086 (1088) (DB) ** AIR 1936 All 258 (264) : 58 All 548 (DB)
2. **AIR 1943 Mad 429 (436) : ILR (1943) Mad 531 (FB).**

But the trend of earlier case-law on this point was to a different effect. The view taken was that a contract between the owners of different portions of the mortgaged property, to which the mortgagee was not a party, and under which the whole burden of the mortgage was to fall on one of the portions, would amount to an obligation annexed to the ownership of the property within the meaning of S. 40 and would be binding on the transferee of the property with notice of the contract(3).

This view may be illustrated by the following illustrations.

Illustrations

(1) *D* mortgaged three items of property to *P*. Subsequently *D* sold item 1 to *A* in consideration of his undertaking to discharge the *whole* of the mortgage. *A* thereafter sold item 1 to *P* for a sum which did not suffice to discharge the mortgage. *P* sued to recover the balance from items 2 and 3 in the hands of *D*. D claimed that there was a contract to the contrary between himself and *A* that *D*'s properties were not liable to contribute. It was held that there was a contract to the contrary as pleaded and that the burden thereof was enforceable by *D* (who was a party to the contract) against the assignee from *A* with notice(4). See also the undermentioned cases to the same effect(5).

(2) A mortgagor of two items sells one item to *X free of the incumbrance*. He subsequently sells the other to *Y* who undertakes to discharge the whole of the debt. *Y* discharges the debt and claims contribution from *X*. He cannot do so. The contract by the mortgagor with *X* is a contract to the contrary, the burden of which is annexed to the ownership of the other item(6). But if the prior sale was *not free* of incumbrances the vendee cannot resist contribution even though the subsequent vendee had undertaken to pay the whole of the mortgage-debt(7).

So far as Madras is concerned, the Full Bench decision above referred to must be deemed to have superseded the earlier view.

The *benefit* of a contract (to which the mortgagee is not a party) cannot be enforced by a mere transferee of the property unless there is an assignment of such contract in his favour in law or in equity.

Illustrations

A mortgaged properties k and m to V. Subsequently *A* sold k to *S* who undertook to discharge the mortgage. In execution of a money decree against *Z* property m was thereafter sold and was purchased by *G* subject to the mortgage. *S* then paid off the mortgage and sued *G* for contribution. *G* pleaded that there was a contract to the contrary between *A* and *S* which freed property m from the right of contribution. It was held by their Lordships of the Privy Council that though there was a contract to the contrary between *A* and *S*, *G* could not, as assignee of the property from *A*, claim the benefit of the contract as he was not a party to the contract and as the benefit of the contract was not assigned to him in law or in equity(8). See also he undermentioned cases to the same effect(9).

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3. AIR 1933 Mad 715 (719) (DB). (Obligation under contract for contribution is one annexed to the ownership of immovable property within S. 40.) ** AIR 1936 Mad 901 (903, 904) ** AIR 1927 Mad 1086 (1087) (DB).

   [See also AIR 1936 Mad 106 (111); 59 Mad 121 (DB). (In this case, however, no advertence was made to the question of notice.)]

4. AIR 1941 Mad 66 (66).

5. AIR 1936 Mad 901 (903, 904). (Purchaser with notice of equity stands in position of his vendor.) ** AIR 1936 All 258 (265); 58 All 548 (DB). (The observations of Niamatullah, J., suggesting that even a transferee with notice is not bound by the contract is, it is submitted, not correct.)

6. See AIR 1929 Pat 664 (675, 676); 8 Pat 585 (DB). (The decision does not expressly refer to the burden annexed to the ownership of the property, but is supportable on this ground, rather than on the various other principles referred to therein.)

7. (1878) 4 Cal 369 (372, 373) (DB).

8. AIR 1930 PC 183 (185) : 52 All 358 : 57 Ind App 189.

9. AIR 1918 Mad 1012 (1014) (DB). (By the mere fact of the subsequent purchase the

The above illustration presupposes that if the *benefit of the contract is assigned expressly or in equity* by *A* to *C*, *C* could claim such benefit. Thus, where *A* the mortgagor sells item 1 of the mortgaged property to *B* who undertakes to discharge the whole mortgage, and thereafter *A* sells item 2 of the mortgaged property to *C free of the incumbrance*, the benefit of the contract will, in equity, be deemed to be assigned to him, and he can therefore claim the benefit of such a contract(**10**)

8A. Second paragraph.

Under this paragraph it is not necessary that the two mortgages must have been executed by the same person(**1**).

9. Court selling property in particular order — Right of contribution not affected.

Where in execution of a mortgage-decree against several items of the mortgaged property, the Court in the exercise of its discretion under O 34 of the Civil Procedure Code, orders that the items should be sold in a particular order, such order does not affect the right of contribution between the various items(**1**). But where the order of sale is in pursuance of an *arrangement between the parties* that some of the items are primarily liable for the entire debt, the arrangement will be a "contract to the contrary" and consequently there may be no right to contribution(**2**).

10. Marshalling, an exception to the rule of contribution.

The last paragraph of this section provides that nothing in this section applies to a property liable under S 81 to the claim of a subsequent mortgagee. In other words, where the right of contribution comes in conflict with the right of marshalling, the right of marshalling will prevail. Suppose *A* the owner of properties *x* and *y* mortgages them both to *B*, and then mortgages *y* alone to *C*. In such a case, *C* is entitled, by virtue of the last paragraph to have the mortgage-debt to *B* satisfied out of property *x* so far as it will extend. In the absence of such a provision, properties *x* and *y* would be both liable to pay rateably to the mortgage-debt under this section and thus preju-

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purchaser does not get an implied transfer of the undertaking given to the vendor by the first purchaser.) ** AIR 1936 Mad 113 (115) (Contract between purchaser and mortgagor to pay the mortgagee — Persons not parties to such contract cannot take advantage of it.) ** (1910) 33 Mad 211 (214) (DB).

10. AIR 1936 Mad 898 (900) ** AIR 1938 Cal 618 (623) ILR (1938) 2 Cal 590 (DB) ** AIR 1937 Pat 628 (630) : 16 Pat 557 (DB)

[See also AIR 1933 All 929 (932) (DB) (Mortgagee of part of property free of incumbrance resisted suit for contribution by person who had purchased the other part subject to entire mortgage — * (1912) 9 All LJ 499 (502, 503) (DB) ** AIR 1940 Pat 119 (121) (DB) (The benefit of a contract between *A* and *B* can in the circumstances pointed out in AIR 1930 PC 183 pass to a third person.)]

Section 82 — Note 8A

1. AIR 1944 Mad 276 (278)

Section 82 — Note 9

1. AIR 1958 Ker 386 (397) ILR (1957) Ker 598 (DB) ** AIR 1919 Pat 533 (534) (DB)

[See also AIR 1935 Mad 456 (458).]

2. (1962) 6 Cal W N 583 (584, 585) (DB) (By consent of parties a mortgage decree was passed by which the incidence of the mortgage was thrown on item A in the first instance and item B was liable only if the former was not sufficient to satisfy the decree — Item A was sold and purchased by X — **Held**, that X could not claim contribution from B.)

[See also AIR 1955 Mad 557 (558) (No agreement between the parties, plaintiff himself being ex parte — One of the items directed to be sold last, on application by one of defendants — **Held**, there was no contract to the contrary.)]

dice the rights of the subsequent mortgagee *C*, whose security comprises only of property *x*(1)

The fact that a party to a suit cannot invoke the doctrine of marshalling does not mean that he loses his right of contribution. This right can be worked out in a separate suit between the parties(2).

11. Contribution distinguished from equitable rule of apportionment.

See Note 3 on Section 81.

12. Right of contribution is not a right to obtain apportionment in a mortgage suit.

The section merely determines the liability of the mortgagors *inter se*(1). It does not operate so as to split up the mortgage security(2). The mortgage security is entire and indivisible and except in exceptional circumstances the mortgagee cannot be compelled to break up the security. In a suit on the mortgage, the owners of the different portions of the mortgaged properties are not entitled to claim as a matter of right, on the strength of the liability to contribute under this section that the mortgage-debt should be apportioned between the various mortgaged properties and each of them should be allowed to redeem on payment of his rateable share thereon(3). For the same

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Section 82 — Note 10

1. AIR 1936 Mad 106 (111) : 59 Mad 121 (DB) (Per Venkatasubba Rao J. — **Reversed** on another point in AIR 1943 Mad 429.)

   [**See also** AIR 1949 Nag 155 (158) : ILR (1948) Nag 595 (Marshalling cannot be claimed against purchaser for valuable consideration — Hence, in such a case, the puisne mortgagee or person claiming under him cannot contend that the property covered by the puisne mortgage is not liable to contribute and that the entire prior mortgage amount must be paid out of the item not covered by the puisne mortgage.)]

   Also see S. 56, Note 2.

2. AIR 1938 Mad 503 (504)

Section 82 — Note 12

1. AIR 1950 Dacca 9 (10) (DB) (This right cannot be availed of against the mortgagee or the auction purchaser.) ** AIR 1938 Nag 79 (79) : ILR (1940) Nag 385 (As between mortgagor and mortgagee, there can be no question of contribution.) ** (1891) 18 Cal 320 (321) (DB) ** AIR 1935 Rang 26 (29) (DB) ** AIR 1940 Cal 60 (64) ** AIR 1918 Bom 181 (181) (DB) ** 1898 Bom PJ 213 (DB) ** AIR 1948 Pat 208 (210) : 26 Pat 97 (DB) (Right of contribution does not affect relations between mortgagor and mortgagee as such. — It operates only as between co-mortgagors. — It is not per se matter directly or constructively in issue in mortgage suit for sale.)

2. (1909) 1 Ind Cas 264 (276, 277) (DB) (Cal) ** AIR 1935 Rang 26 (29) (DB) ** (1891) 18 Cal 320 (321) (DB).

3. AIR 1951 Hyd 167 (167, 168) : ILR (1952) Hyd 23 (DB) (Second mortgage created on two properties by mortgagor — One of properties sold in execution of decree on first mortgage and was not available to second mortgagee — Later on mortgagor sold other property to another person — **Held**, second mortgagee was entitled to recover whole of debt from property sold by the mortgagor.) ** AIR 1949 Nag 146 (147) : ILR (1949) Nag 376 (Mortgagor cannot claim contribution in the suit for foreclosure but must file a separate suit.) ** (1891) 18 Cal 320 (321) (DB) ** AIR 1940 Cal 60 (64) ** (1907) 7 Cal LJ 274 (278) (DB) ** AIR 1927 Pat 117 (122) (DB) (Mortgagee cannot be required to split up security unless in law there has been severance of security.) ** 1895 Pun Re No. 75, p. 366 (368) (DB) ** **AIR 1940 Lah 370 (371) : ILR (1941) Lah 1 (FB)** ** AIR 1928 Sind 101 (103) : 22 Sind LR 243 ** AIR 1924 Pat 174 (175) (DB) ** AIR 1916 Pat 350 (352) ** AIR 1918 Bom 181 (181) (DB) ** (1906) 29 Mad 217 (221) (DB) (**Impliedly overruled** on another point in AIR 1942 PC 50.) ** AIR 1919 Cal 352 (356) (DB) ** AIR 1934 Cal 421 (424, 425) (DB) ** (1909) 1 Ind Cas 264 (276, 277) (DB) (Cal) ** (1882) 5 Mad 385 (386) (DB).

reason, the owner of the part of the equity of redemption cannot sue for partial redemption(4). In *Debendra Nath v. Mirza Abdul Samed Seroji*(5) their Lordships of the High Court of Calcutta observed :

> "The general rule unquestionably is that the mortgagee cannot be required at the instance of a purchaser of part of the premises to apportion his mortgage-debt among the several parts into which the property has been divided, and to look to each only for its proportionate share, unless circumstances have happened, the effect of which, in fact or in law, is to create a severance of the security."

The mortgagee is entitled to execute his mortgage decree against any of the mortgaged properties he pleases, and, if any question of equity arises between the different owners of the mortgaged properties, that equity can only be enforced in an independent suit for contribution and not in proceedings for execution(6).

13. A claim for contribution is a charge on the property.

The liability under this section to contribute is attached to the different shares or parts of the property mortgaged. Section 100 of the Act lays down that where immovable property of one party is, by act of parties or by operation of law, made security for the payment of money to another, the latter person is said to have a charge on the property. It is thus clear that the provisions of S. 82 read with S. 100 clearly give rise to a *charge* against such portions of the mortgaged property as have not discharged their proportionate share of the liability(1). A suit for contribution under this section is,

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[**See also** (1898) 21 Mad 369 (371) (DB). (Section 82 does not permit the redemption of a mortgage piecemeal.) ** AIR 1923 Pat 242 (246) : 2 Pat 335 (DB). (Mortgagee receiving half mortgage debt from owner of half the equity of redemption — This does not necessarily break the integrity of mortgage.)]

[**But see** (1883) 9 Cal 406 (410) (DB). (Mortgagee deliberately proceeding against one property in the hands of an auction-purchaser leaving eleven others comprised in the same mortgage in the hands of the mortgagor.)]

4. (1913) 16 Oudh Cas 199 (201, 202).

5. (1909) 1 Ind Cas 264 (276, 277) (DB) (Cal).

6. AIR 1958 Ker 386 (397) : ILR (1957) Ker 598 (DB) ** 1957 Andh LT 481 (486) ** AIR 1943 Mad 637 (639). (First mortgage in favour of A of three items and second mortgage of item 1 alone in A's favour — A obtaining decree on second mortgage and purchasing item 1 in execution — On date of sale suit on first mortgage pending and decree passed after sale — A held liable to contribute proportionately towards mortgage debt in respect of item 1 — Question of contribution held could not be gone into in execution proceedings.) ** AIR 1923 Pat 44 (45) (DB) ** (1907) 34 Cal 13 (17, 18) (DB).

[**See also** AIR 1950 All 53 (53) : ILR (1950) All 1150 (DB). (Though debtor may not get mortgage debt apportioned as between him and his co-debtors under provisions of U.P. Encumbered Estates Act that would not bar his remedy of suit for contribution under S. 82 of the T.P. Act when whole debt is recovered from him.) ** AIR 1926 Nag 446 (448). (Not incumbent on mortgagor to proceed against movable property first.) ** AIR 1923 Pat 199 (201) (DB). (Question of contribution between several puisne mortgagees is foreign to a mortgage suit.) ** AIR 1928 Rang 68 (69) : 5 Rang 764 (DB).]

Section 82 — Note 13

1. **AIR 1957 Mys 1 (2) : ILR (1956) Mys 129 (FB) ** AIR 1942 Mad 685 (686) : ILR (1943) Mad 96 (FB).** (Liability to contribute is liability imposed upon land and is not personal liability.) ** **AIR 1942 Oudh 449 (457) (FB).** (A co-mortgagor by paying the mortgage money acquires independently of S. 95 a charge under Ss. 82 and 100 in regard to the amount paid by him in respect of his co-mortgagors over their shares.) ** AIR 1930 Oudh 260 (262) : 5 Luck 727 (DB) ** **(1911) 33 All 708 (722) (FB).** (Per Banerji, J.) ** **(1904) 26 All 407 (444) (FB).** (Per Banerji, J.) ** AIR 1935 Oudh 245 (248) : 10 Luck 690 (DB).

therefore, a suit to enforce a charge and the limitation applicable to such a suit will be as provided by Art 132, Limitation Act of 1908(2) (See now Art. 62 of the 1963 Act.)

14. Liability to contribute, whether personal.

The liability to contribute is, as has been seen in Note 13, a *charge* upon the property(1) But can the owner of the part or share who pays in excess of his share, towards the mortgage-debt, claim apart from the provisions of this section, a *personal* relief under Ss 69 and 70 of the Contract Act, 1872, against those who have escaped payment One view is that no personal relief can be granted in such a case(2) Another view is that S 69 of the Contract Act, 1872, does not apply to a suit for contribution(3) The reason given is that that section contemplates only those cases where payment is made by a person under *no* legal liability to make it, and as the plaintiff claiming contribution, is bound under law to make the payment, S 69 does not apply(4) Some decisions have however, taken a contrary view, namely, that this section (S 69, Contract Act) applies to suits for contribution, where *both* the plaintiff and the defendant are liable for the money paid by the plaintiff(5) Whether S. 59 of the Contract Act applies or not, it has been held, a suit for contribution would fall within the scope of S 70 of the Contract Act(6) In the undermentioned case(7) where the mortgagee threatened to sell the land mortgaged to him and one of the co-sharers paid up the mortgage-debt to prevent the property from being sold, it was held that his suit for contribution fell within the scope of S 70 of the Contract Act and that he was entitled to a personal relief against the owner of the property liable to contribute In *Kedar Lal v Hari Lal*(8) it has been held by their Lordships of the Supreme Court that when the right to contribution arises out of a mortgage, S 82 will exclude the applicability of S 43 of the Contract Act unless there is a contract to the contrary

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[**But see** ILR (1966) 2 Ker 388 (394) (DB) (It is doubtful whether S 82 gives the redeeming co-mortgagor a charge within S. 100)]

2. **(1911) 33 All 708 (723) (FB).** (Per Banerji, J.)

Section 82 — Note 14

1. **(1911) 33 All 708 (722) (FB).**
2. AIR 1950 Pat 174 (177) 28 Pat 955 (DB) (The owner of the properties has an option either to pay his rateable share or to allow it to be realised out of the properties ** AIR 1929 All 696 (698) (DB)
3. AIR 1949 Pat 522 (524) 28 Pat 325 (DB) ** AIR 1916 Mad 980 (981, 982) 39 Mad 795 (DB) ** AIR 1918 Mad 1012 (1015) (DB)
4. **AIR 1916 Mad 980 (981, 982) : 39 Mad 795 (DB).**
5. AIR 1914 Cal 208 (209) (DB) (Where a co-judgment-debtor purchases a rent decree such a purchase is equivalent to paying off the decree and the purchaser is entitled to contribution under S 69 of the Contract Act) ** AIR 1914 Cal 672 (673) (DB) (Rent decree against A and B — B transferring his share to C — A paying decretal amount C held liable to contribute under Ss 69 and 70 Contract Act) ** AIR 1928 All 298 (298) 50 All 428 (One of the mortgagors paying mortgage amount — Suit by him against his co-mortgagor for contribution — Suit held based on an implied contract for reimbursement)

   [**See** (1910) 5 Ind Cas 779 (781) (DB) (Cal) (Where a co-mortgagor pays off the decretal amount and sets aside the execution sale he cannot get personal decree for contribution under S 69 But where a co mortgagor prevents the sale of the mortgaged property in execution, he is entitled to it.)]
6. Pollock and Mulla, Indian Contract and Specific Relief Acts 6th Edn , pp 390 and 395 ** AIR 1949 Pat 522 (525) 28 Pat 325 (DB) ** AIR 1931 Pat 394 (399) 10 Pat 528 (DB) (Though Fazl Ali, J , was inclined to agree that case was covered by S 69 Contract Act he preferred to rest his decision on S. 70.)
7. **1888 All WN 10 (10) (DB).**
8. **AIR 1952 SC 47 (50) : 1952 SCR 179.**

The decisions abovementioned holding that the mortgagor paying in excess of his share can claim personal relief against others, therefore, require re-consideration.

Though a personal decree for contribution may be passed against any of the persons who are themselves mortgagors, it was held in the undermentioned cases(9) that it could not be passed against an auction-purchaser of the title of one of the mortgagors.

15. Mortgage-debt not fully discharged — Claim for contribution.

It has been seen already that where properties *X*, *Y* and *Z* *are mortgaged for a debt, and the owner of X* has paid towards the mortgage more than the amount attributable to it, the liability to *Y* and *Z* to contribute towards the excess so paid, in proportion to their value, is a charge upon *Y* and *Z* to contribute towards the excess so paid, in proportion to their value, is a charge upon *Y* and *Z*. This charge will obviously arise the moment such excess is paid(1), and the right to enforce such charge must ordinarily arise at the same time. There has, however, been a difference of opinion on the point. According to one view, the right to contribution and the right to *enforce* such charge does not arise until the *whole* mortgage is discharged(2). The contrary view is that the right to enforce the contribution will arise whether the whole mortgage is discharged or not(3). Some of the cases holding the first view rest upon the provisions of S. 95 as it stood prior to the amendment of 1929, it being assumed that the doctrine of contribution under this section is the same as the doctrine of subrogation underlying S. 95. Other cases rest their view on Art. 99 of the Limitation Act of 1877. The old S. 95 provided that where one co-mortgagor *redeemed* the mortgage, he had a charge on the shares of the other co-mortgagors for their proportion of the expenses of redemption. And it was held under that section, that the word "redeemed" showed that the section did not apply unless the whole mortgage-debt was discharged. Again Art. 99 of the Limitation Act of 1877 provided, in the first column thereof, the limitation for a suit for contribution by a party who had paid the *whole amount* due under a joint decree, while in the third column it provided that time ran from the date of the plaintiff's payment in *excess* of his share. There was naturally a conflict of opinions under that article whether a suit for contribution was barred if a portion of the common debt was paid more than three years before suit and the balance within three years after the suit(4). The old Art. 99 has been remodelled under the Limitation Act (Act 9 of 1908) (now Art. 48 of the Act 36 of 1963) by the substitution of the words "the whole or more than his share of the amount due" for the words "the whole amount due", thus showing that a suit for contribution (not being the enforcement of a charge therefor) will lie even if the whole amount due has not been discharged. Section 95 of this Act read with S. 92, on the other hand, has made it clear that a right of *subrogation* does not arise until the mortgage is *redeemed in full*. There is no such provision in S. 82 corresponding to the last paragraph of S. 95. It is, therefore, clear that a suit for contribution by enforcing the charge is

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9. AIR 1924 Nag 238 (240) (Purchasers of mortgagor's title are not personally liable to pay mortgage debt.) ** AIR 1947 Mad 86 (87).

Section 82 — Note 15

1. AIR 1930 Oudh 260 (263) : 5 Luck 727 (DB) (It is not essential to the accrual of this right that the whole of the debt should have been satisfied.)

   [See (1904) 26 All 407 (445) (FB). (Per Banerji, J.)]

2. **(1904) 26 All 407 (433, 445) (FB).** (Per Full Bench Banerji, J., dissenting S. 95 of the Transfer of Property Act was relied on for this view.) ** (1909) 31 All 65 (66, 67) (DB). (It is not necessary that the mortgage debt should have been satisfied wholly out of the plaintiff's property.) ** AIR 1934 Pat 612 (614) : 13 Pat 356 (DB).

   [See also (1897) 20 Mad 23 (24) (DB) (Article 99 of the Limitation Act (1908) was relied on.) **** (1911) 33 All 708 (717, 718) (FB).]**

3. AIR 1947 Mad 86 (87) **** (1903) 26 Mad 686 (716, 717) (FB).**

4. **See** the AIR Commentaries on the Limitation Act 7th (1997) Edn., Art. 48, Note 1

maintainable even if the whole mortgage is not discharged in full(5), though a right of *subrogation* cannot be claimed until it is fully redeemed.

16. Contribution arises both on voluntary and involuntary payments.

A distinction is sometimes sought to be made between involuntary and voluntary payment of the common liability and it has been held that a right of contribution arises only where the claimant has *voluntarily* paid the debt(1) But on principle no such distinction can be made The right of contribution arises, with equal force and validity, both in the case where the claimant has himself paid the amount to avert a legal process, and in the case where such payment has been enforced by the execution sale of the claimant's property. The reason is that the right of contribution does not depend upon is based on the ground that the claimant's property has paid more than what it was liable for and then the defendant has been benefited by the payment(2)

17. Right of redeeming co-mortgagor to claim contribution.

The old S. 95 provided that where one of the several mortgagors redeemed the mortgaged property and obtained possession thereof, he had a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession. Though the section spoke of redemption and obtaining possession, which suggested that its application was confined only to usufructuary mortgages, it was held by their Lordships of the Privy Council in *Ahmad Wali Khan v Shamsul Jahan Begum*(1) that the section should be construed as being applicable to all kinds of mortgages Relying upon this interpretation of the section by the Judicial Committee, one set of cases held that a co-mortgagor redeeming the mortgaged property obtained, in all kinds of mortgages, a charge under S 95 over the shares of other mortgagors for the expenses of redemption(2) A contrary view was held in other cases namely that the section did not apply except in cases of the redemption of usufructuary mortgages and that, in cases of other kinds of mortgages, the redeeming co-mortgagor had a charge by the joint operation of Ss 82 and 100 of the Act, which was independent of S 95(3) According to a third class of

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5. AIR 1942 Bom 95 (97) (DB) (Section 82 may apply even while the mortgage is still subsisting.)

Section 82 — Note 16

1. (1901) 24 Mad 96 (107) (DB) (**Overruled** in AIR 1942 Mad 685 (FB))
2. **AIR 1942 Mad 685 (687) : ILR (1943) Mad 96 (FB).** (There is no distinction in principle between a case where the payment in respect of which contribution is claimed is made to avert a legal process and a case in which payment is enforced by the sale of the property itself 24 Mad 96 **Overruled.**) ** **(1904) 26 All 407 (435) (FB)** ** **(1903) 26 Mad 686 (693) (FB)** ** **AIR 1942 Oudh 449 (457) (FB)** ** AIR 1939 Oudh 260 (264) 5 Luck 727 (DB) ** AIR 1916 All 130 (131) 38 All 92 (DB) ** AIR 1915 Cal 759 (762) (DB)

   [**See** AIR 1944 Mad 276 (276) (The fact that the puisne mortgagee did not redeem the earlier mortgage cannot preclude him from suing for contribution when the earlier mortgage was satisfied by execution sale of the property mortgaged to him AIR 1942 Mad 685, **Followed.**)]

Section 82 — Note 17

1. **(1906) 28 All 482 (487) : 33 Ind App 81 (PC).**
2. **AIR 1931 Cal 251 (253, 256) : 58 Cal 1167 (FB)** ** AIR 1928 All 241 (245) 50 All 569 (DB) (**Reversed** on another point in AIR 1932 PC 74) ** AIR 1925 Oudh 613 (613, 614) ** (1904) 26 All 227 (232, 233) (DB) ** (1906) 4 Cal LJ 79 (84, 85) (DB) (Co-mortgagor held entitled to a charge but not the assignees of the mokarari interest) ** AIR 1915 Cal 759 (762) (DB) (Purchaser of one co-mortgagor stands in same position if he redeems the mortgage)

   [**But see** (1905) 9 Cal WN 865 (867).]
3. AIR 1930 Oudh 260 (262, 263) 5 Luck 727 (DB) ** **(1903) 26 Mad 686 (710) (FB)** **

cases, the doctrine of *subrogation* applied to the case of a redeeming co-mortgagor who, on such redemption, stepped into the shoes of the mortgagee whom he redeemed, having all the latter's rights against the other co-mortgagors(4). Yet another group of cases held that the doctrine of subrogation had nothing to do in this case and that a redeeming co-mortgagor was at the most only a charge-holder(5). This conflict of opinions as regards the rights of the redeeming co-mortgagor gave rise to a difference of opinion, among other things, as regards the starting point of limitation for the suit by the mortgagor to enforce his right under Art. 132, Limitation Act (1908) (see now Art. 62 of the 1963 Act). Those cases which held that he was merely a charge-holder held that limitation started from the date of *payment or redemption* of the mortgage(6), while those cases which held that he was a subrogee, held that the limitation started *from the date when the mortgage-debt* redeemed by him became due(7).

(1911) 33 All 708 (723) (FB) ** (1902) 26 Bom 379 (385) (DB). (Right of contribution is recognised in case of co-mortgagors in S. 82, Transfer of Property Act.)

[**See also (1904) 26 All 407 (44, 445) (FB).** (Per Banerji, J.) ** (1906) 9 Oudh Cas 259 (265, 266) (DB).]

4. AIR 1933 All 21 (28, 29) : 54 All 975 (DB) ** AIR 1921 Cal 166 (169) (DB). (Note — This case even though **overruled** in AIR 1931 Cal 251 (FB) is still good law after the amendment in 1929.) ** (1881) 4 All 58 (60) (DB). (Case before T.P. Act.) ** (1909) 31 All 166 (169) (DB). (No difference in principle between the case of a subsequent mortgagee or a purchaser of equity of redemption and that of a co-mortgagor who satisfies a prior mortgage.) ** (1886) 8 All 295 (300) (DB). (Redeeming co-mortgagor is a mortgagee and suit against him is governed by Art. 148, Limitation Act.) ** AIR 1915 All 95 (96) : 37 All 101 (DB) ** (1879) 2 Mad 223 (225) (DB) ** AIR 1934 Nag 97 (98, 99) : 30 Nag LR 1 (DB). (Case arising before amendment of 1929.) ** AIR 1925 Lah 651 (652) ** AIR 1924 Oudh 85 (88, 89) (DB).

[**See also** AIR 1919 Oudh 39 (42) : 22 Oudh Cas 278. (For the purposes of contribution he has got all the rights of the mortgagee.) ** AIR 1920 Oudh 204 (211) (DB).]

5. **AIR 1931 Cal 251 (256) : 58 Cal 1167 (FB) ** (1903) 26 Mad 686 (710, 711) (FB)** AIR 1936 Mad 500 (502) ** AIR 1928 All 241 (245) : 50 All 569 (DB) ** (1910) 5 Ind Cas 165 (168) (DB) (Cal). (The redeeming co-mortgagor is not placed in the position of the mortgagee for all purposes.) ** (1904) 1 All LJ 276 (278) (DB) ** (1902) 26 Bom 500 (504) (DB). (The redeeming co-mortgagor gets a charge and not a mortgage — He is not a mortgagee.) ** AIR 1927 Oudh 552 (552) : 2 Luck 686 (DB) ** AIR 1923 Lah 129 (130) (DB) ** AIR 1919 Oudh 267 (269) : 22 Oudh Cas 112. (The redeeming co-mortgagor only gets a charge but is not entitled to set up in defence a covenant which was only enforceable as between the mortgagors and the mortgagees.) ** (1906) All WN 179 (179).

[**See also** AIR 1927 Oudh 347 (349) : 2 Luck 618. (Redeeming co-mortgagor becomes merely a charge holder and not a mortgagee. — Hence, a suit by co-mortgagor to recover his share from redeeming co-mortgagor is governed by Art. 144 and not by Art. 148.) ** 1892 Bom PJ 412 (DB). (Redeeming mortgagor becomes alienor.) ** 1881 Bom PJ 57 (DB) (Do.) ** AIR 1922 Bom 150 (151) : 46 Bom 213 (DB) (Do.) ** **(1884) 8 Bom 497 (500) (DB) (Do.)**]

6. AIR 1928 All 241 (245) : 50 All 569 (DB) **** AIR 1931 Cal 251 (256, 257) : 58 Cal 1167 (FB).** (Change introduced by amending Act of 1929 explained.) ** AIR 1936 Mad 500 (502) ** AIR 1927 Oudh 552 (553) : 2 Luck 686 (DB) ** AIR 1925 Oudh 613 (614) ** (1904) 26 All 227 (233) (DB) ** AIR 1930 Oudh 260 (264) : 5 Luck 727 (DB) ** AIR 1935 Oudh 245 (250) : 10 Luck 690 (DB) ** (1904) 1 All LJ 276 (278) (DB). (Article 132 and not Art. 147 applies.) ** AIR 1932 All 250 (251) (DB). (Case under the old section.)

[**See also (1906) 28 All 743 (746) (DB). (Case of annuity charged on land.)** ** (1909) 4 Ind Cas 872 (872) (DB) (Mad).]

7. AIR 1921 Cal 166 (169) (DB). (Note — This case even though **overruled** in AIR 1931 Cal 251 (FB), is still good law after the amendment in 1929.)

The Transfer of Property (Amendment) Act of 1929 removed this conflict of opinion by adding a new S. 92 and by suitably amending S 95 of the Act By these amendments, the Legislature gave statutory recognition to the view that a redeeming co-mortgagor was *subrogated* to the position of the mortgagee redeemed by him Thus, under the present S 92, a redeeming co-mortgagor has the same rights as regards the redemption, foreclosure or sale of the mortgaged property, as the mortgagee whose mortgage he redeems(8), and hence, now a suit by the redeeming mortgagor *to enforce his rights as subrogee* must be brought by him under Art 132 Limitation Act, 1908 (now Art. 62 of the 1963 Act) within 12 years from the due date of the mortgage redeemed by him and not from the date of payment(9) In the Punjab, where the Act is not applicable the equitable doctrine of subrogation has all along been applied to the case of the redeeming co-mortgagor(10)

The effect of the enactment of the new section is that a co-mortgagor who redeems the mortgage gets all the rights as regards foreclosure, redemption or sale of the mortgaged property as were enjoyed by the mortgagee himself He is substituted in the place of the mortgagee, which is legally a better position than that of a mere charge-holder, which he may get under the joint operation of Ss. 82 and 100

A and *B* were co-owners of certain property *B* sold his share to *C* leaving a portion of the consideration in the hands of *C* with direction to pay it to a mortgagee in possession *C* converted the possessory mortgage into simple mortgage and entered into possession and thus redeemed it It was held that the payment made by *C* to the mortgagee was merely as the agent of his vendor *B* and therefore, he could not claim any contribution under S 82 in his own right from *A*(11)

Section 95 and this section are not mutually exclusive There seems to be nothing to prevent a redeeming co-mortgagor, from claiming at his option rights given to him under S 95 or those given to him by this section(12) Even if his rights to sue on the original mortgage by virtue of his right of subrogation may be barred by limitation, there appears to be nothing to prevent his enforcing his charge for contribution under this section within 12 years of *the date of payment* in excess of his share(13).

See also Section 92, Note 15 and Section 95, Note 1

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8. ILR (1966) 2 Ker 388 (398) (DB) ** (1947) 52 Mys HCR 118 (120) (DB) (Properties purchased in Court auction subject to subsisting mortgage — Purchaser paying off common charge not disentitled from claiming contribution from other co-mortgagors.) ** **AIR 1931 Cal 251 (252) : 58 Cal 1167 (FB)** ** AIR 1938 Lah 184 (186) ILR (1938) Lah 103 (DB)

   [See also AIR 1935 Oudh 245 (248) : 10 Luck 690 (DB).]

9. See the AIR Commentaries on the Limitation Act 7th (1997) Edn Art 72 Notes 10 and 14.

10. AIR 1949 East Punj 254 (256) (DB) (Redemption by one co-mortgagor — Amount paid for redemption for less than amount actually due — Other co-mortgagors can claim their share by paying proportionate shares of amount actually paid for redemption — Redeeming co-mortgagor is not entitled under subrogation to claim advantages and benefits which he may personally derive by act of redemption.) ** AIR 1938 Lah 184 (186) ILR (1938) Lah 103 (DB) ** AIR 1941 Lah 421 (422).

11. AIR 1951 All 596 (598) (DB).

12. AIR 1965 Ker 55 (57) ** AIR 1964 Ker 256 (257, 258) ILR (1964) 1 Ker 526 (Subrogation is only an additional remedy available to a person entitled to contribution and the availability of that remedy is no bar to suit for contribution.) ** AIR 1958 Ker 386 (392) ILR (1957) Ker 598 (DB) ** **AIR 1957 Mys 1 (2) : ILR (1956) Mys 129 (FB)** ** AIR 1950 Pat 174 (178) 28 Pat 955 (DB) (Section 82 has not been abrogated by S 92.) ** AIR 1949 Pat 522 (523, 524) 28 Pat 325 (DB) ** **AIR 1942 Oudh 449 (457, 458) (FB).** (Per Agarwala J.) ** AIR 1945 Pat 192 (196) 23 Pat 953 (DB) (Charge arises in favour of redeeming co-mortgagor, when he makes the payment.)

13. AIR 1964 Bom 284 (286) ILR (1965) Bom 1 ** AIR 1958 Ker 386 (392) ILR (1957) Ker 598 (DB) ** **AIR 1950 Pat 174 (177) : 28 Pat 955 (DB)**

17A. Contribution towards costs.

Where the decree made the mortgagor and the mortgage security liable for costs as well, contribution is to be allowed for those costs also(1)

The amount of poundage incurred in saving the property by having the sale, set aside under Order 21, Rule 89, C PC can be recovered as contribution from the co-judgment debtors though the same does not come under Section 82(2).

18. Effect of acquisition of a portion of equity of redemption by mortgagee.

Where the mortgagee himself purchases a portion of the mortgaged property, such purchase will extinguish that portion of the mortgage-debt which is chargeable by way of contribution on the portion purchased by him, that is to say, the portion of the debt which bears the same ratio to the whole amount of the debt as the value of the portion purchased bears to the whole of the property mortgaged(1). There is no difference in principle whether the purchase by the mortgagee is in

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[See AIR 1942 Oudh 449 (458) (FB). (Co-mortgagor by paying mortgage money gets rights of original mortgagee under S 92 and also acqhires a fresh charge — Limitation for suit by co-mortgagor for contribution is 12 years from date of payment and not from date when original mortgage money became payable.)]

Section 82 — Note 17A

1. AIR 1958 Ker 386 (398) : ILR (1957) Ker 598 (DB).
2. AIR 1978 All 412 : 1978 All LJ 628

Section 82 — Note 18

1. AIR 1968 Bom 106 (111) (DB) (Sale under decree in mortgage suit — Mortgagee purchasing entire property — Purchaser of portion of property from mortgagor not impleaded in suit — Right of purchaser to redeem is limited to portion of property purchased by him — Ratable amount of mortgage debt payable by him of portion is to be decided in accordance with principles of S 82) ** AIR 1966 Andh Pra 154 (155 156) (DB) ** AIR 1959 Ker 112 (113) (DB) ** AIR 1958 Mys 43 (48) ILR (1957) Mys 277 (DB) ** AIR 1953 Mad 873 (874) ** AIR 1947 Mad 277 (278) (DB) (AIR 1939 Mad 393 and AIR 1920 Mad 375 (FB), Rel on.) ** AIR 1944 Pat 179 (182) 22 Pat 637 (DB) (Three brothers A, B and C owning a village in equal shares — A mortgaging his 1/3rd share to X — Second mortgage of whole village in favour of X — Mortgage by C of his 1/3rd share in favour of X — X sued on the second mortgage and obtained a preliminary decree for sale — In the meanwhile X had sued on the first and third mortgaes and had purchased 1/3rd shares of A and C in the village in execution of mortgage decree's obtained against A and C — X applying for final decree for sale on second mortgage — B contending that the mortgage debt was satisfied to the extent of 2/3rd by the mortgagee's purchase and, therefore, his 1/3rd share was only liable for 1/3rd of the mortgage debt **Held**, that as X had purchased 1/3rd share of A free of all incumbrances in execution of his prior mortgage decree that share was not available for the debt on second mortgage and the whole debt was recoverable from the remaining shares of B and C — But as 1/3rd share of C was purchased by X in execution of decree on the third mortgage, half of the debt became discharged and, therefore, half of the debt was recoverable from B's 1/3rd share) **** (1900) 22 All 284 (293) (FB).** (Purchased by mortgagee at auction sale) **** (1897) 20 All 23 (31, 32) (FB)** ** (1875) 15 Beng LR 303 (305) (DB) ** (1879) 4 Cal 475 (481, 482)(DB) ** (1889) 13 Bom 45 (49) (DB) ** (1903) 26 All 72 (75, 76) (DB) ** (1911) 10 Ind Cas 235 (235) (All). (Purchased by mortgagee at auction sale) ** (1911) 33 All 434 (435) (DB) (Do) ** AIR 1922 All 405 (406) 44 All 708 (DB) ** AIR 1939 All 86 (87). (Mortgagee purchasing part of the mortgaged property — Entire liability under the mortgage is not thereby wiped off) ** (1901) 26 Bom 88 (95) (DB) ** (1906) 4 Cal LJ 195 (197) (DB) ** (1906) 4 Cal LJ 317 (319) (DB) ** AIR 1932 Cal 319 (320) 59 Cal 76 (DB) ** (1908) 31 Mad 419 (424) (DB) **** AIR 1920 Mad 375 (378) : 43 Mad 372 (FB). (Overruling** 12 Ind Cas 130) ** AIR 1925 Mad 483 (484) (DB) ** AIR 1927 Mad 560 (562) (Purchaser of equity of redemption of one of the mortgaged properties obtaining assignment of mortgagee's

execution of a decree or is by way of private sale(2)

The principle has, however, no application where the mortgagee purchases a portion of the mortgaged property *free of incumbrances*, in other words the mortgagee need not abate any portion of his debt where he has paid the full market-value of the portion purchased, and not merely the value of the equity of redemption in it(3) In such a case there would really be an implied "contract to the contrary" that the property so purchased is not liable to contribute(4)

The rule requiring the mortgagee to abate portion of his debt in proportion to the value of

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right — Mortgage is not destroyed but the mortgage debt is proportionately reduced) ** AIR 1931 Mad 552 (553) (But there must be a valid sale to apply this principle) ** AIR 1927 Oudh 542 (543) (DB) ** AIR 1937 Oudh 284 (285) 13 Luck 122 (Mortgage of three plots to A by B — Sale of two of them by B to C — A obtaining decree for sale of all plots and purchasing himself — C not impleaded in suit — C selling two plots to D — Obstruction to possession of A by D — Suit by A against B and D for proportionate amount of mortgage money by sale of two plots — Suit held maintainable — A held should be required to give credit for proportionate value of one plot only) ** AIR 1940 Pat 420 (422) 19 Pat 524 (DB) ** AIR 1928 Rang 266 (266) 6 Rang 417 (DB) ** AIR 1933 Lah 374 (375) (DB) ** **(1896) 22 Bom 304 (313) (FB)** ** AIR 1916 Mad 1080 (1081) (DB) ** AIR 1937 Mad 965 (967) (Mortgagee acquiring equity of redemption by private sale in his favour by mortgagor) ** AIR 1916 Pat 249 (249) 1 Pat LJ 228 (DB)

[See 1905 Pun Re No 91, p 279 (281) 1906 Pun LR No 44 p 133 (135 136) (DB) (Mortgagee allowing one of the co-mortgagors to create further charge in his favour — Effect is practically same as purchase.)]

Also see S. 60, Notes 23 and 44

The following cases to the contrary are no longer good law

(1897) 19 All 196 (199) (Sale of portion of mortgaged property under a decree not on the mortgage — Mortgage not thereby extinguished but mortgagee bound to take into account the full value of the property purchased by him) ** (1895) All W N 1 (1) (DB) (Do) ** (1875) 24 Suth WR 83 (84 85) (DB) ** AIR 1921 Nag 96 (96) (Mortgagee purchasing a portion of the mortgaged property for low price with his burden on it must be considered to have paid the mortgage) ** AIR 1947 Mad 277 (278) (DB)

2. AIR 1943 Mad 637 (638) (First mortgage in favour of A of three items and second mortgage of item 1 alone in A's favour — A obtaining decree on second mortgage and purchasing item 1 in execution — A obtaining decree on first mortgage and seeking to execute it against the remaining items — **Held**, that in absence of any intention express or implied to keep his mortgagee rights in respect of second mortgage alive A was bound to contribute proportionate amount of the prior mortgage debt in respect of item 1 — But there was no automatic discharge of debt by reason of A's liability to contribute AIR 1942 Mad 44, Relied on) ** (1908) 8 Cal LJ 92 (93) (DB) ** (1910) 6 Ind Cas 842 (845) (DB) (Cal) ** AIR 1942 Mad 44 (46 47) (DB) (Section 82 was held not directly applicable but principle was held applicable.)

[See also AIR 1952 Trav-Co 487 (491) ILR (1952) Trav Co 115 (DB) (Subsequent mortgagee obtaining decree on his mortgage and purchasing in execution mortgaged property subject to prior mortgage — Prior mortgagee obtaining decree on his mortgage — Debt directed to be realised personally from mortgagor — Puisne mortgagee purchasing decree obtained by prior mortgagee and taking out execution — By purchase of equity of redemption decree held was extinguished pro tanto) ** AIR 1942 All 104 (107) (DB) (Purchase of half share by mortgagee in Court auction extinguishes mortgage to that extent and breaks up integrity of mortgage.)]

3. ILR (1954) Mys 116 (118) (DB) ** AIR 1944 Pat 179 (182) 22 Pat 637 (DB) ** (1901) 24 Mad 96 (111, 112, 113) (DB) ** (1910) 6 Ind Cas 842 (844 845) (DB) (Cal) ** (1895) 18 All 31 (33) ** (1881) 3 All 682 (686 688) (DB) ** (1910) 4 Sind LR 224 (225) (DB)

4. See Note 7.

property purchased by him may be enforced in the very suit brought by the mortgagee to recover his mortgage-debt The rateable liability on the remaining portion should be determined under this section and decree for that amount alone should be passed(5). In the undermentioned cases(6) where the mortgagee acquired a portion of equity of redemption and sued for sale of the remaining property for the balance of the debt, it was held that the decree ordering the sale of the property without fixing the proportionate liability on the property under this section was improper. In case a mortgagee purchases a portion of equity of redemption *after* the passing of decree on his mortgage, it has been held that he cannot execute his decree for the recovery of the entire debt. As the mortgagee is entitled to recover only a proportionate share of the debt, all that the executing Court can do is to proceed against the remaining property for the amount remaining due after the proportionate abatement of the debt(7) In the undermentioned case(8) *A* executed a first mortgage of properties *x* *y* and *z* in favour of *B* and also a second mortgage of property *x* *B* obtained a decree on his second mortgage and in execution purchased property *x* during the pendency of his suit on the first mortgage. *B* obtained a decree on the first mortgage and sought to execute the decree by sale of properties *y* and *z*. It was held that *B* could execute the entire decree against the remaining properties not purchased by him and that it was not open to *A* to contend that *B* could only recover the proportionate amount of the debt on the first mortgage. Any question as to equity for contribution as between *A* and *B* could not be gone in execution proceedings

19. Effect of release by mortgagee of a portion of equity of redemption.

As has been seen in the Notes on S 60, a mortgagee is entitled to release from his mortgage security any part of the mortgaged property without abating any portion of his mortgage-debt(1) But the owners of parts of the equity of redemption cannot be deprived of their right of contribution by such release on the part of the mortgagee(2).

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5. AIR 1958 Mys 43 (48) ILR (1957) Mys 277 (DB) (To pass preliminary decree for entire amount claimed and to direct the Court to enquire into value of property and to give deduction in final decree is not proper) ** 1942 NLJ 289 (291) (DB)

6. AIR 1916 Pat 249 (249) : 1 Pat LJ 228 (DB).

7. AIR 1923 Pat 490 (491) 2 Pat 715 (DB) ** AIR 1932 Cal 319 (320) 59 Cal 76 (DB) ** AIR 1920 All 129 (131) 42 All 544 (DB) ** AIR 1934 Mad 250 (251) ** (1906) 4 Cal LJ 195 (197) (DB) ** (1906) 4 Cal LJ 317 (319) (DB).

   [See also AIR 1952 Trav Co 487 (491) ILR (1952) Trav-Co 115 (DB) (Vesting of part of equity of redemption in the mortgagee is tantamount to discharge of proportionate part of mortgage debt — Execution Court can go into question of extent to which decree has been satisfied) ** (1913) 20 Ind Cas 825 (825) (DB) (Mad) ** (1883) 13 Cal LR 272 (273 274) (DB) (Execution allowed only for the proportionate share of the debt)]

   Also see S. 60, Note 44.

   [But see AIR 1936 Cal 537 (540)]

8. AIR 1943 Mad 637 (639).

Section 82 — Note 19

1. See Notes 43 on S 60 AIR 1958 Andh Pra 598 (602) ILR (1957) Andh Pra 790 (DB) ** AIR 1955 Mad 439 (442) (DB).

   [See however AIR 1953 Trav-Co 283 (284, 285) ILR (1953) Trav-Co 206 (DB) (No release of a portion of a mortgage debt and no merger of interest of mortgagor and mortgagee in respect of the portion — Owner of the portion of the mortgaged property cannot claim rateable abatement of mortgage money.)]

2. AIR 1918 Mad 1030 (1033) : 40 Mad 968 (FB) ** AIR 1955 Mad 557 (558) ** 1954 Ker LT 752 (754) (DB) ** AIR 1953 Assam 82 (83, 84) ILR (1952) 4 Assam 118 ** AIR 1936 Mad 293 (294) ** 1932 Mad WN 1343 (1344, 1345) (DB) ** AIR 1932 All 246 (247) (DB) (Obiter) ** AIR 1931 Nag 44 (45) 27 Nag LR 4. (The observations to the

A mortgagee is not prevented by reason of a release of a portion of the property from the mortgage security, from proceeding personally against the mortgagor (where such remedy is available) in case the remaining property is insufficient to satisfy his claim(3)

20. Effect of negligence or laches on the part of the mortgagee.

It has been held in the undermentioned cases(1) that a mortgagee or charge-holder who has got a charge on two properties but who allows by his negligence or laches his remedy against one of the properties to be barred, cannot claim to recover the whole amount from the other property This view, it is submitted, is not correct If, as has been seen in Note 43 on S 60 a mortgagee is entitled to *release* any part of the mortgaged property from his security and enforce the whole claim against the other properties, there does not seem to be any reason why the same principle should not apply where the mortgagee chooses to allow his remedy against a particular property to be barred by limitation.

On the assumption, therefore, that the mortgagee in such a case has recovered the whole of the debt from some of the properties only, it will be clear that the owners of those properties can recover contribution from the properties, even though the mortgagee may have lost his remedy against them by reason of limitation(2) In the case noted below(3), a prior mortgagee, *A* of properties *x* and *y* sued on his mortgage without impleading a subsequent mortgagee, *B*, as a party to the suit and obtained a decree *B* thereafter obtained a decree on his mortgage and in execution of the decree got *y* sold, and *C* became the purchaser thereof The owner of property *x* paid off the prior mortgage-decree and at that time, *A's* remedy against *B* was barred by limitation He then claimed contribution against *C* It was held that he was not entitled to do so on the ground that *A's* remedy having been barred against *B*, he and *C*, the purchaser in execution of his decree were no longer liable to pay *A's* debt or decree The decision, it is submitted does not appear to be correct The fact that *A's remedy is barred* against *B* does not *extinguish B's liability* The sale in execution of *B's* decree can only be subject to the liability of *A's* mortgage When this liability which is common to the properties *x* and *y* is paid off from *x*, there appears to be no reason why *y* should become free from the liability to contribute.

effect that mortgagee's failure to implead the purchaser might prejudice the other defendants by rendering the suit for contribution less likely to succeed submitted not correct)
** **AIR 1942 PC 50 (53) : 69 Ind App 98.**

[**See also** AIR 1947 Oudh 122 (126) 22 Luck 37 (Release of part of charged property from charge — Charge-holder can recover entire amount from remaining property — Charge-holder is not concerned with such matters as contribution)]

[**But see** AIR 1931 All 625 (627) (DB) (The obiter remarks as regards the effect of release by mortgagee based on 6 Ind Cas 842 are no longer good law)]

3. **See** the AIR Commentaries on the Code of Civil Procedure 10th (1985) Edn O 34, R 6 Note 10.

[**See also** AIR 1924 Cal 209 (211) 50 Cal 718 (DB) (Release of one of several joint judgment-debtors does not affect the decree-holder's right to proceed against the other judgment-debtors)]

Section 82 — Note 20

1. AIR 1941 Oudh 203 (204) (Case of maintenance charge) ** AIR 1920 Bom 306 (307) 44 Bom 223 (DB) (Impliedly **overruled** on another point in AIR 1942 PC 50)

[**See also** AIR 1934 Cal 421 (424 425) (DB) (No laches or negligence on the part of the mortgagee — He can enforce whole claim against some properties only though claim against others barred.)]

2. AIR 1958 Ker 386 (397) ILR (1957) Ker 598 (DB) ** AIR 1915 Mad 675 (678) 39 Mad 288 (DB) ** AIR 1927 Cal 665 (667) (DB).

3. AIR 1929 Pat 94 (95) (DB)

21. Contribution between life-tenant and reversioner.

See the undermentioned case(1).

22. Parties to suit for contribution.

The right to claim compensation may be successfully asserted even as against a person who ought to have been but was not joined as a party defendant by the mortgagee in his action to enforce the security(1). But in a suit for contribution, all the persons liable to contribute should be made parties(2). It is only when such persons are properly before the Court that the value of the different items of property can be ascertained and a decree finally settling all disputes can be made(3). In *James v. Achiabar Singh*(4), where the plaintiff deliberately left out one of the contributors, the suit was dismissed.

But in such a suit the liability of each party must be determined in proportion to his interest and provided for separately(5).

23. Properties liable to contribute.

Where properties *A*, *B*, *C* and *D* are mortgaged to secure a debt, and properties *A* and *B* are sold for the realisation of the debt, the owner of a *A* can claim contribution only from the properties *C* and *D*; he cannot claim any contribution from the property *B*, inasmuch as a right of contribution obviously can be only against properties which have *not* contributed to the debt, and not against properties which have contributed to it(1).

Again, where some of the properties mortgaged to secure the common debt, are already subject to a prior mortgage, and such properties are sold in execution of the decree obtained on that mortgage, the sale is free of the second mortgage, and such properties are not liable for contribution as far as the claim arising under the second mortgage is concerned, the burden of satisfying the whole mortgage-debt falls entirely on the remaining mortgage properties(2). The burden of proof

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Section 82 — Note 21

1. AIR 1916 Cal 465 (471) (DB) (Principle upon which calculation is made in such cases in England and America adopted.)

Section 82 — Note 22

1. AIR 1958 Ker 386 (397) : ILR (1957) Ker 598 (DB).
2. AIR 1916 All 190 (191) (DB) (Suit for contribution — All persons in whom mortgage property vests are necessary parties.)

   [See also (1866) 3 Mad HCR 187 (188) (DB) (One of co-debtors satisfying whole debt — Cause of action for contribution accrues against all at one and the same time — Contributories may all be included as defendants in one suit.) ** (1890) 12 All 110 (114) (DB)]

   [But see (1873) 5 NWPHCR 215 (216) (DB) (Ordinarily claims for contribution should be brought in separate suits against individual contributors, but in special cases this rule may be departed from.)]
3. AIR 1916 All 190 (191) (DB) ** AIR 1940 Pat 119 (121) (DB).
4. AIR 1940 Pat 119 (121) (DB).
5. AIR 1915 Cal 334 (336) (DB) (Liability of different parties must be separately ascertained — A joint decree cannot be made in favour of the plaintiff against the defendants) ** AIR 1931 All 625 (626) (DB) ** (1877) 1 All 455 (456) (DB) ** (1873) 5 NWPHCR 215 (216) (DB) ** (1866) 3 Mad HCR 187 (188) (DB) ** 1864 Suth WR Gap No 303 (303) (DB) ** (1890) 12 all 110 (114) (DB)

Section 82 — Note 23

1. (1897) 19 All 545 (548) (DB).

   [See also AIR 1922 All 352 (354) . 44 All 146 (DB) ** AIR 1921 All 323 (324) · 43 All 589 (DB)]
2. (1897) 19 All 545 (549) (DB) ** (1910) 32 All 612 (618) : 37 Ind App 182 (PC). (Affirm-

that some of the mortgaged properties have been completely absorbed in satisfaction of the prior mortgages is upon the plaintiff suing for contribution. If the plaintiff fails to prove that some of the properties are so absorbed, he is bound to bring each and every item of the property into the hotchpot in order to enable the liability of each of the properties to be determined(3). If the plaintiff voluntarily relinquishes his claim for contribution from some of the properties, he cannot thereby seek to enhance the burden on the other properties(4). Though a claim for contribution is lost against those properties which are absorbed in satisfaction of *prior* mortgage, it is not lost against those portions of the properties which are sold in execution of a decree obtained on a subsequent mortgage(5) or in execution of a simple money decree against mortgagors(6). The reason is that in such cases the sale is not free of the incumbrance, but only subject to it.

24. Failure to claim contribution in redemption suit, whether bars subsequent suit for contribution.

The failure to claim contribution in a suit for redemption will not bar a subsequent suit for contribution on the principle of *res judicata*(1). In *Raghavachari v. Venkatanarayana Reddi*(2), the Court in execution of the mortgage-decree, directed the properties to be sold in a particular order. The plaintiff, a co-mortgagor, in order to avert the sale of his properties, paid the entire amount of the mortgage-decree and instituted a suit for contribution. The defence was that if contribution was allowed the order of the Court would be nullified. It was held that the plaintiff's right to contribution was not barred by *res judicata* as it was not necessary for the Court in the previous litigation to determine the question of contribution. See also the undermentioned case(3) to the same effect.

Nor is a suit for contribution on the failure to claim contribution in a redemption suit barred by the provisions of O. 2, R. 2 of the Code of Civil Procedure. That rule bars a subsequent suit only when the claim in the subsequent suit is based on the cause of action on which the earlier suit is based. As will be clear from the discussion above, the causes for action for a suit for redemption and a suit for contribution are entirely different(4).

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ing 28 All 593.) ** (1906) 3 All LJ 441 (444) (DB) ** AIR 1922 All 495 (496) : 44 All 488 (DB) ** AIR 1931 All 625 (627) (DB) ** AIR 192, All 350 (350) : 43 All 42 (DB) ** (1907) 29 All 233 (235) (DB). (It is immaterial whether the purchaser is a stranger or the mortgagee himself.) ** AIR 1918 Pat 522 (523) (DB).

[See AIR 1924 All 929 (931, 932) (DB). (Foreclosure of one property.)]

3. AIR 1931 All 625 (627, 628) (DB).

[See also AIR 1936 Mad 644 (645). (Liability of properties is rateable and a suit on all properties mortgaged must be brought.)]

4. AIR 1931 All 625 (627, 628) (DB).

5. AIR 1944 Pat 179 (182) : 22 Pat 637 (DB) ** AIR 1929 All 309 (31.) : 51 All 606 (DB).

6. AIR 1921 All 323 (324) : 43 All 589 (DB) ** (1895) 20 Bom 615 (617) (DB). (Purchaser held liable though he was not made party to mortgagee's suit.) ** (1903) 25 All 446 (458) (DB).

Section 82 — Note 24

1. AIR 1929 All 696 (697) (DB).

[See also AIR 1958 Ker 386 (397) : ILR (1957) Ker 598 (DB). (Suit on mortgage — No attempt to determine liabilities of defendants inter se — No bar to claim for contribution.)]

2. AIR 1935 Mad 456 (458). (6 Cal WN 583, Distinguished.)

3. AIR 1919 Pat 533 (534) (DB). (Direction for sale of properties in particular order. Decree satisfied on sale of some items — Liability of the remaining properties to contribute, held not barred.)

4. AIR 1929 All 696 (697) (DB).

25. Plea that the plaintiff has no interest left in the property is no defence to the claim for contribution.

The fact that the plaintiff in a suit for contribution has no interest in the property *at the time* of the suit is not a valid defence to the claim The reason is obvious The claim for contribution rests on the fact that the plaintiff has made a payment or an amount is realised from his property which *exceeds* his share of liability and that the persons against whom such claim is made have either *not paid* their share of liability or if paid, have *paid less* than what was their due share. The question of liability does not thus depend upon whether the person claiming contribution still continues to be the owner of the property or not Thus, where the properties of both *A* and *B* were subject to one mortgage-debt and *A* paid Rs 3,700 towards the discharge of that common liability, the fact that *A had subsequently, i e , after the payment was made, sold his property was* held not to be a bar to *A*'s claiming contribution from *B* in respect of the amount paid by him(**1**)

26. Interest on contribution amount.

In *Kambala Venkanna v Goreti Veeraraju*(**1**), it has been held that interest on the contribution amount can be awarded on equitable considerations. Madhavan Nair, J., in that case observed .

> "Even if the payment of interest does not come under any specific provision of law, still if general equitable considerations justify award of the same, it is quite open to the Courts to award it, is a principle which cannot be disputed In my opinion equitable consideration require in a case like the present that interest should be awarded to the plaintiff on the contribution amount The claim being founded in equity, it is left to the Court to decide the rate of interest that should be awarded and the time from which it should be awarded."

See also the undermentioned case(**2**), where the funds which had escaped contribution were charged with interest upon the principal sums which they were bound to contribute.

27. Contribution suit is not cognizable by Small Cause Court.

Article 42 of the second schedule to the Provincial Small Cause Courts Act, 1887, provides that a suit by one of several joint mortgagors of immovable property for contribution in respect of money paid by him for the redemption of the mortgaged property is not cognizable by the Court of Small Causes.

It has been held by the High Court of Allahabad in the undermentioned case(**1**) dissenting from a previous case of the same Court(**2**) that a suit by mortgagor who has paid more than his share of the mortgage amount, for personal reimbursement from the other mortgagors is not a "suit for contribution" within the meaning of Article 42 of the said Act and is, therefore, cognizable by a Court of Small Causes See also the undermentioned case(**3**).

Section 82 — Note 25

1. AIR 1930 Oudh 260 (264) : 5 Luck 727 (DB).

Section 82 — Note 26

1. AIR 1936 Mad 910 (912) : ILR (1937) Mad 35.
2. (1880) 34 Ch D 391 (394, 395) 56 LJ Ch 451 56 LT 86 35 WR (Eng) 513, Ashworth v. Munn

   [**See also** (1912) 9 All LJ 499 (503) (DB) ((1886) LR 34 Ch D 391, Re on)]

Section 82 — Note 27

1. AIR 1928 All 298 (298) 50 All 428 (Suit held based on an implied contract for reimbursement and thus based on the provisions of S 69, Contract Act — Suit not brought under any of the sections of T P Act — Suit, therefore, held not covered by Art 42 of the Provincial Small Cause Courts Act.)
2. AIR 1915 All 143 (144).
3. AIR 1928 Cal 593 (594, 596) · 55 Cal 1193 (DB) (Per Cuming, J.— Suit is cognizable by Court of Small Causes — Mukerji, J contra)

83. POWER TO DEPOSIT IN COURT MONEY DUE ON MORTGAGE.— At any time after the principal money [A][payable in respect of any mortgage has become due] and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Right to money deposited by mortgagor.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed [B][and all documents in his possession or power relating to the mortgaged property], apply for and receive the money, and the mortgage-deed [C][and all such other documents] so deposited shall be delivered to the mortgagor or such other person as aforesaid.

[C][Where the mortagee is in possession of the mortgaged property, the Court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished.]

[A] *Substituted* for the words "has become payable" by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 44.

[B] *Substituted* for the words "if then in his possession or power" by Act XX of 1929, S. 44.

[C] Inserted, ibid.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Nature of procedure under the section.
4. Section applies to charges.
5. "At any time after the principal money payable in respect of any mortgage has become due".
6. "Before a suit for redemption of the mortgaged property is barred".
7. "The mortgagor, or any other person entitled to institute such suit".
8. Deposit must be unconditional.
9. Deposit after suit.
10. Deposit in redemption suit.
11. Suit for redemption without previous deposit.
12. Mortgagee's suit after deposit but before receipt of notice.
13. Title to money deposited until withdrawal by mortgagee.
14. "In any Court in which he might have instituted such suit".
15. "To the account of the mortgagee".
16. Minor mortgagee.
17. "The amount remaining due on the mortgage".
18. "The Court shall thereupon cause written notice of deposit to be served on the mortgagee".
19. "Verified in manner prescribed by law for the verification of plaints".
20. Mortgagee must accept deposit in full discharge of amount due.
21. "On depositing in the same Court the mortgage-deed and all documents in his possession or power relating to the mortgaged property".
22. The third paragraph.
23. Security bond, if can be taken under the section.

1. Legislative changes.

The words "payable in respect of any mortgage has become due" were substituted for the words "has become payable" occurring after the words "at any time after the principal money", by S 44 of the Transfer of Property (Amendment) Act, XX of 1929 This was in conformity with the similar changes introduced in Ss 60 and 67 (See Note 5)

In the second paragraph, the words "and all documents in his possession or power relating to the mortgaged property" were substituted for the words "if then in his possession or power" and the words "and all such other documents" were added after the word "mortgage-deed" occurring for the second time in the paragraph, by the same S 44 of the Transfer of Property (Amendment) Act, XX of 1929 This was also in conformity with the similar amendment made in S 60 (See Note 21)

The whole of the third paragraph was newly added, by the above section of the amending Act (See Note 22).

2. Scope of the section.

This section is a survival of the repealed Bengal Regulations I of 1798 and 17 of 1806(1). The former allowed the mortgagor, in order to save the property which had been mortgaged by way of conditional sale, to make a deposit in Court *within the time fixed in the deed of mortgage* for the repayment of the mortgage-debt(2). The latter extended this period of one year from the date of the application by the mortgagee to the Court under S 8 of the Regulation(3).

Under the present Act there are three remedies open to a mortgagor in respect of the redemption of the mortgaged property—

(a) he may *tender* the mortgage-money privately to the mortgagee under S 60;

(b) he may deposit the money in Court under this section, or

(c) he may *institute a suit* for redemption under S 91.

He can avail himself of any of these remedies and cannot be compelled to resort to any one remedy in particular(4). But remedies indicated by (a) and (b) have to be availed by the mortgagor before mortgagee has filed a suit for enforcement of mortgage(5).

The provision for making a deposit in Court is intended to remove the inconveniences that may result from a tender out of Court If a mortgagor makes a tender out of Court and the mortgagee denies the tender, the mortgagor may be defeated by false evidence But if he makes a deposit in Court the matter is proved for him by the record Thus, the deposit makes available to the mortgagor a sure mode of proof that he had made a tender(6).

Section 83 — Note 2

1. See the report of the Special Committee.

   See the undermentioned cases under the Regulations :

   (1866) 10 Moo Ind App 340 (348, 349) (PC) ** (1857-59) 7 Moo Ind App 323 (358, 359) (PC) ** 1862-64 Suth WR S p. No. 14 (14) (FB) ** (1867) Beng LR Sup Vol. 598 (600, 601) : 6 Suth WR 225 (227, 228) (FB) ** (1867) 8 Suth WR 223 (224) (DB) ** (1872) 17 Suth WR 342 (343) (DB) **** (1881) 3 All 653 (659) (FB)** ** (1884) 6 All 399 (401, 402) (DB) ** (1886) 8 All 182 (185) (DB) ** 1890 Pun Re No 107 page 314 (316) ** AIR 1915 Lah 228 (230) : 1915 Pun Re No. 83 (DB)

2. **(1866) 10 Moo Ind App 340 (348) (PC).**

3. **(1866) 10 Moo Ind App 340 (348) (PC)** ** (1867) 8 Suth WR 223 (224) (DB)

4. AIR 1955 Hyd 158 (159) ILR (1955) Hyd 147 (DB) ** AIR 1921 All 358 (360) : 43 All 95 (DB) ** (1901) 4 Oudh Cas 387 (394, 395) (DB)

5. AIR 1989 Ker 79 (79, 80) : 1987 Ker LJ 882.

6. **AIR 1926 Mad 601 (604) : 49 Mad 609 (FB).**

The section confers a special privilege on a mortgagor, which other debtors do not enjoy. The mortgagor must, therefore, strictly comply with the provisions of the section in order to claim benefit under it(7).

There was a stipulation in the mortgage deed that if the mortgaged amount is not repaid within stipulated period then mortgagee will be within his rights to get sale deed executed and mortgage deed would be treated as an assessment to sell. Mortgagor applied under S. 83 but the mortgagee refused to accept the amount. He raised the further plea that as per condition in the mortgage deed he was entitled to purchase the property. The proper course for the mortgagor in the facts of the present case would be to initiate regular civil proceedings(8).

In order that a deposit may be valid under this section, it is essential(9) that—

(a) it should be made after the principal money payable in respect of the mortgage has become due, and before a suit for redemption is barred (See Notes 5 and 6),

(b) it must be made by the mortgagor or by a person entitled to institute a suit for redemption of the mortgaged property (See Note7);

(c) it should be made in the Court in which the suit for redemption might have been instituted (See Note 14);

(d) it must be made to the account of the mortgagee (See Note 15), and

(e) the full amount due under the mortgage must be deposited (See Note 17).

Where the suit for redemption is barred by limitation, the application under S. 83 filed thereafter cannot be granted(10).

If on deposit of mortgage money in Court the mortgagee instead of accepting it raises a dispute, S. 83 would not entitle the Court to resolve the dispute and no further proceedings would be taken. The dispute has to be necessarily resolved in regular suit for redemption of mortgaged property. The intendment of S. 83 is to ensure that the mortgaged properties are released to the mortgagor without driving him to institute a suit for redemption(11).

It has been held in the undermentioned case(12) that the provisions of the Act as to tender and deposit are not intended to apply to cases where there are disputes between the parties as to the extent of the subsisting interest of the mortgagor in the equity of redemption, so as to compel the mortgagee to take upon himself the task of deciding such disputes rightly for himself at the risk of losing interest on the money due to him.

The section is wide enough to cover both types of mortgages simple and usufructuary(13).

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7. AIR 1928 All 311 (313) : 50 All 655 (DB) (A deposit not only to the credit of mortgagee but also to the credit of a third person who is not entitled to the mortgage money is not within the section and is invalid.) ** (1904) 26 All 291 (294) (DB) (Mortgagor making payment which involves the necessity of a decision of the Court as to rights of the parties other than the mortgagee cannot be regarded as having made the payment within the meaning of the section.) ** AIR 1918 Mad 88 (91) (DB) (Petition by mortgagor asking the Court to make the mortgagee liable for costs and grant other reliefs — Petition not contemplated by the section.)

8. 1998 (1) MPLJ 67 (68)

9. AIR 1937 All 706 (708).

10. 1995 (1) Mah LJ 738 (740).

11. AIR 2000 AP 371 (374) : 2000 (2) Andh LT 444.

12. (1912) 17 Ind Cas 368 (369) (DB) (Mad)

[But see AIR 1914 All 46 (48) : 36 All 36. (The facts were similar but it was assumed that S. 83 would apply.)]

13. AIR 1953 All 33 (35) (DB).

If a tenant is already in possession and he becomes a mortgagee of that property and if that mortgage is redeemed then, he would re-acquire the status of tenant. Putting an end to the tenancy rights by resorting to the contract that on redemption of mortgage tenancy shall cease, would be in breach of the provisions of Rent Control Laws, such contract cannot be enforced. Same would be the position vis-a-vis S. 83 of the T. P Act. Section 83 cannot have overriding effect on Rent Control Act **(14)**

See also the undermentioned case**(15)**.

3. Nature or procedure under the section.

The procedure provided by the section is a *summary* one**(1)**. The functions of the Court under the section, like those under the repealed Bengal Regulations**(2)** are merely *ministerial* and not *judicial*(3). Thus, it was held in the undermentioned case**(4)** that O 23, R. 3 of the Code of Civil Procedure did not apply to a compromise entered into pending proceedings under this section

Where money is deposited in Court for payment to the mortgagee who does not express his willingness to discharge the mortgage but files objections it is not open to the court to make any order on the points in dispute**(5)**.

It is not within the scope of S 83 for the Court to make an enquiry and ascertain the amount of mortgage For availing the facility provided by the statute, the mortgagor can avail the same when he voluntarily deposits the mortgage money which has become due. Therefore, the application by the mortgagor making a request to the Court to ask mortgagee to furnish correct account cannot be considered**(6)**.

As soon as the mortgagee refuses to accept the amount deposited by the mortgagor he should institute a suit for redemption with the plea that the entire mortgage dues have been deposited and the mortgage is redeemed**(7)**.

In the case noted below**(8)** it was held that it was not competent for a District Munsif dealing with proceedings under this section to make a reference to the High Court. The decision proceeded, however, on the view that S 141 did not apply so as to give a *substantive right* of reference to a party in any proceeding other than a suit.

4. Section applies to charges.

The section provides for the making of a deposit in the case of *mortgages*. It has been held in

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14. 1997 (1) MPLJ 412 (414, 419).

15 1963 All WR (HC) 399 (400). (Position of tenant under S 7-C U P (Temporary) Control of Rent and Eviction Act (3 of 1947) is not analogous to that of mortgagor under S 83, T P Act.)

Section 83 — Note 3

1. See the Report of the Special Committee (1890) 13 All 195 (199, 200) (DB) (By S 83 it was intended that a mortgage might be discharged by the mortgagor without any litigation.)

2. (1866) 10 Moo Ind App 340 (350) (PC) ** 1890 Pun Re No 107, p 314 (315).

3. 1895 All WN 145 (146, 147)

4. (1890) 13 Mad 316 (318) (DB) (Section 375 of he Code of 1882)

5. (1969) 2 Mys LJ 96 (1969) 19 Law Rep 202 ** (1983) 2 Mad LJ 207 (208) ** 1983 TNLJ 248 (249).

6. 1999 AIHC 2745 (2746) (Raj)

7. AIR 1974 Orissa 47 (48) : (1973) 2 Cut WR 1691

8. (1913) 36 Mad 16 (17) (DB).

the undermentioned cases(1) that the section would apply also to a charge created on immovable property This is also clear from S 100, as amended in 1929, which provides that all the provisions which apply to a simple mortgage shall, so far as may be, apply to a charge

5. "At any time after the principal money payable in respect of any mortgage has become due."

The right to make a deposit under the section can be exercised only after the principal money has *become due* and not before Under S 60, similarly, the mortgagor has a right to make a payment or tender of the mortgage-money, at any time after the principal money has become due Before the section was amended the words used were "after the principal money *has become payable* The word "payable" gave rise to a diversity of opinion In some cases it was held that when a day was appointed for the payment of a mortgage-debt and nothing more was stated, the presumption was that the day was appointed for the convenience of the mortgagor and that it was open to the mortgagor, if he liked, to pay the mortgage-debt at an earlier date A contrary view was taken in other cases and the general principle that the rights of redemption and foreclosure are co-extensive was strictly followed. In order to remove the doubt caused by the use of the word "payble" the word "due" has been substituted and it is now clear that the persons mentioned in the section cannot proceed under this section as long as time fixed for payment of the mortgage debt has not expired A deposit made before the expiry of such time will be considered premature(1).

The section presupposes that a person who proposes to take action under the section has a *valid right to redeem* and is not attempting to exercise his right of redemption in a manner contrary to the provisions of the contract between himself and the mortgagee(2). Thus in the undermentioned case(3), a consent decree passed between the parties provided that if the mortgagor made default in payment of the amount fixed by the decree on a certain date the mortgagee would be entitled to take possession of the mortgaged property The mortgagor made default but the mortgagee was not given possession Before the mortgagee could recover possession the mortgagor deposited the mortgage-money in Court It was held that according to the consent decree the right to redeem could accrue, when default was made only after the mortgagor had given possession to the mortgagee and as he did not give such possession, the deposit was premature

In the undermentioned case(4) a mortgage deed provided that it should be a simple mortgage for five years, that after the period the mortgagee was to have the option of retaining the deed as a simple mortgage deed or of obtaining possession of the mortgaged property, and that if he entered into possession there was to be no redemption for ten years after he had obtained possession The mortgagor did not redeem within five years but as soon as the mortgagee sued for possession soon after five years had expired, the mortgagor made a deposit under this section It was held that he could do so on the ground, firstly, that until the mortgagee had indicated his intention he was not in a position to know whether the mortgagee intended to retain his rights as a mortgagee under the simple mortgage or to utilize the advantage of the possession clause and secondly that although the deed distinctly stated that no redemption should take place for ten years *after the mortgagee had taken possession*, yet there was nothing to prevent the mortgagor from redeeming at any time when the mortgagee was not in actual possession

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Section 83 — Note 4

1. AIR 1949 Mad 615 (615) ** AIR 1935 Oudh 93 (94) 10 Luck 350 (DB) (Maintenance charged on immovable property)

Section 83 — Note 5

1. See the Report of the Special Committee on S. 60.
2. (1912) 35 Mad 209 (215) (DB).
3. (1902) 26 Bom 312 (316) (DB).
   [See (1912) 35 Mad 209 (214 215) (DB) (26 Bom 312, Foll)]
4. AIR 1920 Oudh 311 (311)

In the case noted below(5) there was a stipulation in the mortgage deed that the mortgage could be discharged only by payment *beyond the fruit season* The mortgagor deposited the amount while the fruit season was on It was held that the deposit was not invalid and it was open to the mortgagee to wait till the fruit season was over before he withdrew the amount.

6. "Before a suit for redemption of the mortgaged property is barred."

Suit for redemption of mortgages are governed by Art 61(a) of the Limitation Act, which provides a period of 30 years from the date when the right to redeem accrues As to when a right to redeem accrues, see Note 18 on Article 61 of AIR Commentaries on the Limitation Act, 7th (1997) Edn.

7. "The mortgagor, or any other person entitled to institute such suit."

The term "mortgagor" includes persons deriving title from him(1). Such persons will, therefore, be entitled to make a deposit under the section.

The persons, other than the mortgagor, who are entitled to institute a suit for redemption of the mortgaged property are enumerated in S 91(2). Such persons also will be entitled to make the deposit under this section(3).

A person in whose favour there is a mere agreement to sell the mortgaged property has no interest in such property and does not come under any of the categories of persons enumerated in S. 91 and is not, therefore, entitled to make a deposit under this section(4).

A mortgagee accepting and taking out the money deposited without any objection cannot subsequently dispute the right of the person, making such deposit, to redeem the property mortgaged and must, by such acceptance, be taken to have admitted the right of the person to redeem the property(5).

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5. AIR 1941 Cal 18 (18, 19).

Section 83 — Note 7

1. See Section 59-A.

2. AIR 1926 Mad 597 (598) ** AIR 1923 Mad 533 (534) : 47 Mad 7 (DB)

3. AIR 1923 Mad 533 (534) 47 Mad 7 (DB) (An assignee of a portion of the mortgagor's interest) ** AIR 1915 Lah 228 (231) 1915 Pun Re No 83 (DB) (Owner of a share only in the equity of redemption) ** (1905) 27 All 178 (179 180) (DB) (Purchaser of a portion of equity of redemption) ** AIR 1917 All 401 (401) 39 All 719 (DB) (Purchaser of the share of a co-mortgagor.)

   [See also AIR 1934 Pat 127 (131) 13 Pat 111 (DB) (**Overruled** on another point in AIR 1940 Pat 385)]

4. AIR 1926 Mad 597 (598, 600) (AIR 1917 Mad 517. **Dissented from.**)

   Also see S 91, Note 9

5. (1904) 1 All LJ 590 (592 593) (Money deposited by a subsequent mortgagee — Prior mortgagee accepting money but refusing to give possession under the usufructuary mortgage on the ground that the mortgage in favour of the subsequent mortgagee is invalid — Prior mortgagee cannot do so.)

   [See also AIR 1942 Bom 227 (231) (DB) (A mortgaging property to C and leaving part of consideration with C to redeem prior mortgagee B — C depositing money in Court under S 83 and B accepting amount in full satisfaction of his mortgage claim — Subsequently, B trying to sell land under this money decree — Contention by C that property should be sold subject to his prior charge acquired by subrogation under S 92 Para I — **Held** that B could not contend that deposit was not made by C on his own behalf but on behalf of A and as B accepted C's deposit as made by a person entitled under S 91 to sue for redemption C could claim suborgation under S 92 Para I to B's right although there was no registered agreement as to suborgation as required under S 92 Para III)]

Where the mortgagor or other person is a minor, the persons entrusted with the care of such minor desiring to take the benefit of this section should get a guardian *ad litem* appointed by the Court to take proceedings under the section on behalf of the minor **(6)**

See also Notes on section 91.

8. Deposit must be unconditional.

As has been seen in Note 2 the deposit under this section is only a special kind of tender, i.e. a tender through Court**(1)** designed to make available to the mortgagor a sure mode of proof of the fact that he has made a tender**(2)**.

A tender must be *unconditional***(3)**. It follows that a valid deposit must also be unconditional**(4)**. A deposit is conditional if the person depositing money under this section denies the right of the person claiming the money to withdraw it**(5)**. Where, however, a mortgagor deposits money in Court but states in his petition that some money (on a different transaction) is due to him from the mortgagee and that he reserves his right to recover that money by a suit after the proceedings under this section are over, the deposit is not conditional**(6)**. A deposit accompanied with a requisition for the return of the documents which the mortgagee is under a duty to deposit in Court under this

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6. **(1903) 27 Bom 23 (30) (DB). (Obiter.)**

See also Notes on S. 103

Section 83 — Note 8

1. **AIR 1926 Mad 601 (604) : 49 Mad 609 (FB)** ** AIR 1938 Mad 405 (408) (DB) (Impliedly **Overruled** on another point in AIR 1946 Mad 542) ** **AIR 1918 Mad 1360 (1362) : 40 Mad 804 (FB)** (When notice of deposit is sent to mortgagee the mortgagee refuses to accept it, it amounts to tender through Court.) ** AIR 1918 Mad 498 (499) (DB) (Mere fact that notice is given by the Court to the mortgagee does not make the deposit any the less a valid tender.) ** AIR 1937 Mad 503 (506) (DB) (Per Tyabji J.)

2. **AIR 1926 Mad 601 (604) : 49 Mad 609 (FB).**

   [See also (1866) 10 Moo App 340 (349) (PC) (Case under Bengal Regulation XVII of 1806.) ** **(1857-59) 7 Moo Ind App 323 (358, 359) (PC).** (Do.) ** 1867 8 Suth WR 223 (225) (DB) (Do.)]

3. See Section 4, Note 5

4. 1968 MPLJ 451 (452) (DB) ** AIR 1935 Mad 222 (227) (A mortgagor cannot object to the mortgagee drawing the money deposited by the mortgagor under S. 83.) ** (1891) 14 Mad 49 (50) (DB) (Deposit with a condition that the mortgagee should produce certain specified documents before withdrawing the money is not valid.) ** AIR 1940 Pat 18 (19) (Deposit with a condition that the mortgagee shall not withdraw the money unless he **delivers khas possession is invalid.**)

   [See also 1862-64 Suth WR S p. No. 14 (14) (FB). (Case under Bengal Regulation XVII of 1806 — Deposit with a prayer that the money be kept in Court pending an enquiry into objections regarding the amount due — [Deposit is not valid.])]

5. (1898) 22 Bom 761 (764) (DB) (Case decided with reference to old Section 135.)

   See also *the undermentioned cases under the Bengal Regulation XVII of 1806 to the same effect :*

   (1857-59) 7 Moo Ind App 323 (359) (PC). (Deposit of the mortgage money, though made before the expiry of the year of grace after notice of foreclosure has been issued, if accompanied by a denial of the mortgagee's right to receive it, and with a threat of legal proceedings if he took it from the Court is not an unconditional tender, and is vitiated by the conditions under which it is made and cannot, therefore, prevent a foreclosure.) ** (1884) 6 All 399 (401, 402) (DB) (Do.) ** **(1867) Beng LR Sup Vol. 598 (600, 601) (FB).** (Do.)

6. **(1901) 4 Oudh Cas 355 (359).**

section, before he takes out the money deposited, is not conditional(7). But it will be conditional if the mortgagee is required to return documents which he is not bound to deposit under the section(8). A deposit will not be considered conditional when the person making the deposit, in his petition, prays for an issue of notice to the mortgagee, for cancellation of the mortgage deed and for a direction that the mortgagee should take the money deposited out of Court, inasmuch as, under the section itself, it is the duty of the Court to issue such notice and the duty of the mortgagee to do the rest of the things mentioned in the second paragraph(9).

The objection about deposit being conditional can be raised only by mortgagee(10).

Under the section *actual deposit* is necessary(11). A mere *application* in the Court for making a deposit will not have the effect of a deposit. Thus, where an application for making a deposit was made on 3-8-1910 but the actual deposit was made on 10-8-1910 and interest on the principal money was calculated up to 3-8-1910 only, it was held that the deposit was not valid, on the ground that it was insufficient and that interest ought to have been calculated up to 10-8-1910 when the actual deposit was made(12). But where an application for making deposit was made on 24-8-1946 but the mortgagor was unable to deposit the money in the Treasury till 27-8-1946 due to delay in issuing the challan by the Court it was held that the maxim *Actus curiae neminem gravabit* (an act of the Court shall prejudice no man) governed the case and the deposit on 27-8-1946 should be regarded as having been made on 24-8-1946 by applying to rule of *nunc pro tunc*(13).

9. Deposit after suit.

This section applies only to deposits made *before* a suit has been instituted on the mortgage, the general principle being that a tender of money must be made before the creditor institutes a suit for such money(1). Deposits into Court *after* the institution of a suit by the creditor to recover a debt are governed by the provisions of O 24 of the Code of Civil Procedure(2). The distinction between

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7. (1894) 17 Mad 267 (268) (DB) (Condition to return title deeds — See rules framed by the High Court in this respect) ** AIR 1924 Mad 559 (559, 560) (DB) (Do)

   [See also AIR 1916 Mad 1143 (1144).]

8. (1891) 14 Mad 49 (50) (DB) ** (1894) 17 Mad 267 (268) (DB) ** AIR 1916 Mad 1143 (1144).

   Also see Section 84, Note 5.

9. AIR 1924 Mad 559 (559, 560) (DB)

10. 1990 All LJ 815 (819).

11. AIR 1950 Madh B 72 (75) (Mere readiness to pay not sufficient)

12. AIR 1916 Mad 383 (384) (DB).

13. 1955 Andh WR 447 (449)

Section 38 — Note 9

1. 1963 Ker LT 1031 (1032) ** (1912) 35 Mad 209 (212, 213) (DB) ** AIR 1919 Mad 948 (949) (DB). (When a mortgage suit is instituted the amount due on the mortgage cannot be ascertained until the decree is passed providing for interest costs etc , which also must be included in the amount remaining due on the mortgage) ** AIR 1935 Oudh 93 (94) 10 Luck 350 (DB) (Deposit made after passing of preliminary decree held invalid.) ** AIR 1939 Mad 200 (201) (Deposit made after the filing of a plaint in a mortgage suit with inadequate Court-fee but before its representation with proper Court-fee is not valid)

2. 1963 Ker LT 1031 (1032) ** (1912) 35 Mad 209 (214) (DB) ** AIR 1918 Mad 1360 (1362, 1363) 40 Mad 804 ** AIR 1919 Mad 948 (949) (DB) ** AIR 1935 Oudh 93 (94, 95) 10 Luck 350 (DB). (Order 24 applies to mortgage suits) ** AIR 1939 Mad 200 (202) (In this case it was held that a deposit by the mortgagor after the institution fo a suit on a mortgage was not valid under O 24 as no notice of such deposit was given to the mortgagee and as the deposit did not include the costs of the suit)

this section and O. 24 of the Code is that unless the *entire* amount due on the mortgage is deposited interest does not, under this section, cease to run on the mortgage amount, whereas, under the provisions of O 24 interest will cease to run on the amount deposited whether such sum is in full discharge of the claim or falls short thereof

Where a suit has been instituted on the mortgage in one Court the fact that a deposit of the amount is thereafter made in another Court having jurisdiction over the mortgaged property will not be a valid deposit under this section(3).

The fact that the mortgagor had no *notice* of the institution of the suit will not affect the right of the mortgagee to proceed with the suit as instituted(4).

In *Sahib Chandra v. Lachmi Narain*(5) a mortgagee filed a suit for recovery of the *interest* due on a mortgage document and pending the final decision of that suit, the mortgagor made a deposit of the *principal* money which was due according to him, under this section Their Lordships of the Privy Council assumed that this section applied to the deposit, but came to the conclusion that the amount deposited was insufficient and that, therefore, interest did not cease to run Order 24 cannot obviously apply to such a deposit inasmuch as it was not made after the institution of any suit for the recovery of the principal amount of the mortgage

10. Deposit in redemption suit.

Where a mortgagor or other person mentioned in S 91 institutes a suit for redemption and then deposits the mortgage-money in Court the provisions of this section will not apply to such a deposit(1) nor will the provisions of O 24, Civil Procedure Code 1908 (S 376 of 1882 Code) apply as the suit is not one to *recovery any debt or damages*(2).

11. Suit for redemption without previous deposit.

A deposit under this section is not a condition precedent to a suit for redemption of the mortgaged property(1); and the Court cannot dismiss the suit on the ground that there was no previous deposit or that the deposit was insufficient(2). See also section 60, Note 4

Mortgagor is not bound to tender the amount before filing a suit for redemption(3).

Depositing mortgage money in the Court is one of the three ways the other two being tender under Section 60 or filing a suit under Section 91 available to the mortgagor before filing a redemption suit and he may choose any one(4).

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3. (1912) 35 Mad 209 (213) (DB) ** AIR 1919 Mad 948 (948 949) (DB)
4. (1912) 35 Mad 209 (214) (DB) ** AIR 1919 Mad 948 (949) (DB) (A deposit by the mortgagor after the institution of a suit by the mortgagee but before he received notice of such suit.)
5. **AIR 1929 PC 243 (244, 246) : 56 Ind App 339.**

Section 83 — Note 10

1. AIR 1962 Pat 203 (204) (Deposit in Court after preliminary decree for redemption)
2. (1899) 1 Bom LR 381 (383) (DB)

Section 83 — Note 11

1. **AIR 1921 All 353 (355) : 43 All 638 (FB)** ** AIR 1976 Pat 18 1976 BLJR 378 (DB) ** AIR 1921 All 71 (72) 43 All 424 (DB) ** AIR 1922 All 377 (377 378) 44 All 730 (DB) (Case under S 60, T P Act) ** AIR 1921 All 358 (359) 43 All 95 (DB) (Do)

   Also see Section 60, Note 4.
2. AIR 1930 All 523 (524) (DB) (No previous deposit) ** AIR 1921 All 71 (72) 43 All 424 (DB). (Insufficient deposit.)
3. AIR 1981 Bom 58.
4. AIR 1973 Pat 386 (389) : 1974 BLJR 81.

12. Mortgagee's suit after deposit but before receipt of notice.

Section 67 provides for the right of a mortgagee to obtain a decree for foreclosure or sale. As to the right of the mortgagee to carry on a suit for foreclosure or sale instituted after a deposit by the mortgagor in Court but before the receipt of notice of the deposit by the mortgagee, see Note 9 on Section 67.

13. Title to money deposited until withdrawal by mortgagee.

The money deposited under this section remains the property of the person making the deposit until it has been accepted by the mortgagee under the provisions of this section(**1**). The mere fact that such person has, after the deposit, sued for redemption, or even the fact that a decree has been passed in such suit will not affect this principle(**2**). But the position would be different where there is a *direction in the decree* that the mortgagee should withdraw the money deposited. In such a case, the withdrawal will be in execution of the decree and not under S. 83. The distinction between a withdrawal of the deposit under S. 83 and one in execution of the decree is that in the former case the mortgage is extinguished while in the latter case it is not.

In *Dalsingh v. Pitan Singh*(**3**) a mortgagor deposited the mortgage amount under S. 83 of this Act. The mortgagee refused to accept it and the mortgagor thereupon brought a suit for redemption. The suit was decreed, but there was no direction in the decree that the mortgagee should withdraw the amount. The mortgagee appealed from the decree and pending the appeal, he applied to withdraw the amount deposited. It was held by the Allahabad High Court that the withdrawal having been made under S. 83 and not in execution of the decree, the mortgage was extinguished and that the appeal by him became thereby incompetent. *Dalsingh's case*(**4**) was distinguished in *Subba Rao v. Balusu Buchi*(**5**). In that case also, the mortgagor had sued for redemption, after a deposit under this section, and had obtained a decree. But the decree *contained a direction* that the mortgagee may withdraw the amount. The mortgagee withdrew the amount subsequent to his filing an appeal against that decree. It was held by the High Court of Madras that the withdrawal was in *execution of the decree* and did not affect the right of appeal from the decree.

Where the mortgagor has paid into Court the sum ascertained by the first Court pending an appeal by the mortgagee as to the amount due, the mortgagor is entitled to credit for the amount paid though it lapsed to the Government through the failure of the mortgagee to take the money out of Court(**6**).

14. "In any Court in which he might have instituted such suit."

A deposit under this section must be made in the Court in which a suit for redemption of the mortgaged property might be instituted.

As to the question in what Court a suit for redemption may be instituted, see Ss. 15, 16 and 17 of the Code of Civil Procedure.

Section 83 — Note 13

1. AIR 1962 Mad 308 (309). ** 1950 Ker LT 538 (541). ** (1938) 42 Cal WN 1177 (1179) (The creditor of the mortgagee cannot attach it.). ** (1905) 29 Mad 232 (233) (DB) (Do.). ** AIR 1940 Pat 18 (19). ** AIR 1937 Pat 253 (254, 255) (The mere fact of making a deposit or tender does not merge the money in the mortgaged property and the money does not cease to be the property of the mortgagor.). ** (1903) 25 All 179 (183) (DB) (A Court has no jurisdiction to allow attachment of a deposit under S. 83, Transfer of Property Act, by the creditors of the mortgagee before the deposit is accepted by the mortgagee.)
2. AIR 1937 Pat 253 (256).
3. (1903) 25 All 179 (181, 182) (DB).
4. (1903) 25 All 179 (181, 182) (DB).
5. AIR 1923 Mad 533 (539) : 47 Mad 7 (DB).
6. (1912) 16 Cal WN 793 (796, 797) (PC).

15. "To the account of the mortgagee."

The deposit must be made "to the account of the *mortgagee*". If the person making the deposit, associates with the real mortgagee a third person who is not entitled to any share in the mortgage-money the deposit is invalid, as such association would make it impossible for the real mortgagee to take the money out of Court without the consent of such third person(1). Thus in *Debendra Mohan v. Sona Kunwar*(2) the Allahabad High Court observed

> "Payment under S. 83 must be a payment to the account of the mortgagee alone, so that the mortgagee may, on receipt of the notice of deposit, apply to the Court by petition and forthwith obtain payment without the concurrence or sanction of any other person. The section confers on mortgagors an exceptional privilege, which other debtors do not enjoy, of paying the amount of their debt into Court and so relieving themselves of any further liability. An exceptional privilege of the kind, however, must not be abused, and a mortgagor who does not strictly observe the provisions of the section, but makes a payment which involves the necessity of a decision of the Court as to the rights of parties other than the mortgagee, cannot be regarded as having made the payment within the meaning of the section."

The fact that the depositor acted in good faith in assuming that the third person was entitled to a share in the mortgage-money does not affect the question(3).

According to the provisions of S. 59-A the word "mortgagee" includes person who derive title from a mortgagee viz., his legal representatives and assign(4). Thus, a deposit made, where the mortgagee is dead to the account of his legal representatives, or where the mortgage has been transferred to the account of the transferee, will be a deposit made "to the account of the mortgagee". The mere fact that the legal representatives(5) of the mortgagee and his assignee(6) dispute each other's title does not render the deposit invalid. In many instances, however, owing to disputes among the legal representatives or the assignees the person desiring to make the deposit is not in a position to find out the real person entitled to the mortgage-money. In such cases, he may deposit the money in Court *to the account of the estate of the original mortgagee* with a request that the Court should pay it to the person who is entitled to recover it. If he had done this he has complied with the provisions of the section(7). If there is a dispute between the rival claimants it will be the business of the person properly entitled, to take steps to satisfy the Court that he is the person to

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Section 83 — Note 15

1. AIR 1928 All 311 (313) : 50 All 655 (DB). (Deposit in the name of mortgagee and his brother who was not co-mortgagee.) ** (1904) 26 All 291 (294) (DB). (Deposit in the name of the mortgagee and his pleader.) ** AIR 1939 Pat 415 (416) (DB). (A deposit in the names of the brothers and nephews who are really interested, as also in the name of the widow of the deceased, is not a good deposit because, the survivors of the joint family cannot withdraw the money without the permission of the widow though she had no interest in the mortgage-money.) ** (1900) 23 Mad 510 (512) (DB).
2. (1901) 26 All 291 (294) (DB).
3. AIR 1928 All 311 (313) : 50 All 655 (DB).
4. AIR 1924 Mad 453 (454) (DB). (A sub-mortgagee is an assignee of the mortgagee.) ** AIR 1938 All 423 (425) : ILR (1938) All 767 (FB).
5. AIR 1938 All 423 (425, 426) : ILR (1938) All 767 (FB) ** AIR 1924 Mad 559 (560) (DB) ** AIR 1923 Mad 354 (354) (DB). (Deposit to credit of mortgagee's heirs — Owing to quarrels among them, money not withdrawn — **Held**, interest ceased to run from date of deposit.)
6. AIR 1924 Mad 453 (454, 455) (DB). (A sub-mortgagee is an assignee and a deposit of money as payable both to the legal representative and the sub-mortgagee is a proper deposit.) ** AIR 1916 Oudh 292 (294) : 19 Oudh Cas 145.
7. AIR 1938 All 423 (425) : ILR (1938) All 767 (FB) ** AIR 1926 Mad 1087 (1087, 1088). (But where there is no such dispute, the mortgagor is not entitled to deposit it in Court and

whom the money should be paid(8). The functions of the Court being only ministerial, the Court will not make an enquiry or come to any decision upon the titles of the persons claiming(9), but will simply say that any person who can produce authority to withdraw the money might withdraw it(10). But, if instead of making the deposit to the account of the estate, it is made to the *account of certain named persons and if ultimately* it is found out that someone of them had no title to the money, the deposit will not be valid(11). Where a deposit was made to the account of certain co-mortgagees it was held in the undermentioned case(12), that if there was no dispute between the mortgagees it was not open to the mortgagor to ask the Court to determine who should receive the amount deposited. In the undermentioned case(13) money was deposited in the name of two mortgagees. One of the mortgagees made an application to the Court that the other mortgagee was not heard of for more than seven years and must be presumed to be dead and that he, the applicant, was entitled to the money. The lower Court held that it was not competent to decide the question. On appeal it was held by the High Court of Allahabad that the Court was competent to decide the question. See also section 84, Note 10.

16. Minor mortgagee.

The deposit under this section is, as has been seen in Note 8, only a form of tender and a tender to be effective must be made to an adult person(1), so that where the mortgagee is a minor the deposit will be bad unless some person is appointed gurdian *ad litem* for the minor(2). Section 103 provides for preliminary proceedings to be adopted by a person before making a tender or deposit when the mortgagee is a minor(3). It is necessary for such a person not only to apply for the

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ask the Court to determine as to who should receive it.) ** AIR 1916 Oudh 292 (294) : 19 Oudh Cas 145 ** 1885 All WN 328 (328) (DB) ** AIR 1934 Pat 622 (623) (DB) (Real mortgagee allowing the property to stand in the name of benamidars — Mortgagor making deposit in the name of the real mortgagee and the benamidars — Provisions of the section are complied with.)

[See also AIR 1918 Mad 1360 (1362) : 40 Mad 804 (FB). (A deposit is ordinarily made when the debtor is in doubt, as to who is the rightful claimant. The mortgagor wants to absolve himself from future liability by leaving it to Court to hand the money over to the true owner.)]

8. AIR 1938 All 423 (425) : ILR (1938) All 767 (FB).
9. AIR 1938 All 423 (426) : ILR (1938) All 767 (FB).
10. AIR 1938 All 423 (426) : ILR (1938) All 767 (FB).
11. AIR 1938 All 423 (426) : ILR (1938) All 767 (FB).
12. AIR 1926 Mad 1087 (1087, 1088).
13. AIR 1929 All 754 (755) : 51 All 1016 (DB).

Section 83 — Note 16

1. AIR 1938 Mad 405 (408) (DB). (**Impliedly Overruled** on another point in AIR 1946 Mad 542.)
2. (1903) 27 Bom 23 (28, 29) (DB) ** AIR 1925 Mad 1017 (1018, 1019) ** AIR 1914 Oudh 107 (108) : 16 Oudh Cas 261 ** AIR 1930 All 609 (610) (DB) (Substituted service to show cause why a person should not be appointed as guardian of minor mortgagee is improper — Deposit without formal order of appointment is invalid.) ** AIR 1926 All 665 (666) : 48 All 611 (DB) ** AIR 1938 Mad 405 (408) (DB) (In the case of minor mortgagee a deposit into Court becomes effective only from the date when he is properly represented by a guardian.)
3. AIR 1923 All 183 (184) : 45 All 273 (DB). (Confirming the view of Lindsay J., in AIR 1922 All 147 on Letters Patent Appeal.) ** (1903) 27 Bom 23 (27, 28) (DB) ** AIR 1914 Oudh 107 (108) : 16 Oudh Cas 261

[See however AIR 1928 All 311 (312) : 50 All 655 (DB) (Procedure in S. 103 is conse-

appointment of a guardian *ad litem* but also to see that one is appointed **(4)** The guardian *ad litem* must be appointed by an order of the Court and the person making the deposit cannot assume to himself the function of the Court **(5)** If a guardian *ad litem* is not appointed, the minor mortgagee is not bound by any proceedings taken against him **(6)** See also S 84, Note 10 and Section 103, Note 2

Where a guardian *ad litem* is appointed by the Court in a proceeding under S 83 it is open to the person making the deposit to pay up the difference of interest between the date of the original deposit and the date of the appointment of the guardian *ad litem*, on payment thereof the deposit will be valid from the latter date.**(7)**

17. "The amount remaining due on the mortgage."

A deposit under the section must be of the whole amount remaining due on the mortgage **(1)** The mere circumstance that the mortgagee had filed a suit in respect of a portion of the amount due at such date will not exonerate the mortgagor from his responsibility to deposit the full amount due **(2)** If the amount deposited is less even by a small amount the deposit is not proper**(3)** and interest will not cease to run *pro tanto* **(4)** Even a *bona fide* mistake in calculation will not excuse the person making a deposit from a strict compliance with the provisions of the section **(5)** If however, such person first makes an insufficient deposit and then as soon as he discovers his mistake makes a further deposit which covers the difference between the amount due on the date of second deposit and the amount of the original deposit, the provisions of the section are complied with *on the date of the second deposit* and the deposit is effective from that date **(6)** In the under

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quent upon the deposit having been made and not proceeding [illegible] deposit.)]

4. (1903) 27 Bom 23 (28, 29) (DB) ** AIR 1923 All 183 (184) : 45 All 273 (DB)
5. AIR 1914 Oudh 107 (108) : 16 Oudh Cas 261 ** AIR 1928 [illegible] 655 (DB)
6. AIR 1922 All 355 (355) : 44 All 64 (DB)
7. AIR 1923 All 183 (184) : 45 All 273 (DB)

Section 83 — Note 17

1. **AIR 1973 SC 45 (48) : 1973 U J (SC) 262.** Mesne profits cannot be [illegible] the deposit is not proper) ** **AIR 1929 PC 243 (246) : 51 All 686 : 56 Ind App 339** ** AIR [illegible] Mad 615 (615) (Mulgeni lease — These being notification for levy of enhanced assessment in future — **Held,** there had been no effective or real [illegible] assessment by Government and deposit under S 83 was not bad on grounds that [illegible] enhanced assessment.) ** (1905) 27 All 178 (181, 182) (DB) (After execution of a mortgage-deed mortgagor executing a simple money bond in favour of the mortgagee — Simple bond containing a condition that the mortgaged property shall not be redeemed until the bond was paid off — Mortgagee depositing money due on the mortgage only — **Held,** he could do so) ** (1902) 24 All 461 (463) (DB) (Where no stipulation or covenant has been made between the contracting parties as to the repayment of a sum borrowed the lender is entitled to decline to receive payment of a sum due to him in instalments and he can claim that the whole sum due be paid at one and the same time)
2. ILR (1953) 3 Raj 591 (598)
3. ILR (1953) 3 Raj 591 (597) ** AIR 1921 All 280 (281) (DB) ** AIR 1917 Mad 922 (923) (DB) ** AIR 1932 Nag 169 (70) : 28 Nag LR 149 (DB) ** (1903) 6 Oudh Cas 135 (140)
4. ILR (1953) 3 Raj 591 (597) ** (1903) 6 Oudh Cas 135 (140, 141) ** (1886) 8 All 502 (508) (DB).
5. AIR 1917 Mad 922 (923, 924) (DB) (Interest for the day of deposit not included in the amount deposited through *bona fide* mistake) ** AIR 1916 Oudh 279 (281) (Interest for one year not included in the amount deposited through *bona fide* mistake

   Also see Section 84, Note 7
6. (1904) 8 Cal WN 216 (218) (DB) ** (1886) 8 All 502 (508) (DB).

mentioned cases(7) where the mortgagor paid into Court the amount determined by the Court to be due, it was held that it was a good tender although it was ultimately found on appeal that the mortgagee was entitled to a larger amount.

The deposit of a *larger* sum than that due does not render the deposit invalid. It cannot be said in such a case that "the amount remaining due on the mortgage" has not been deposited within the meaning of the section, for the principle is *omne majus continent in se minus* (the greater includes the less).(8)

The amount remaining due includes not only the principal sum but also the whole of interest which has become due (9). Section 84 provides that when the full amount remaining due on the mortgage is deposited in Court, interest on the principal money ceases to run "as soon as the mortgagor or such other person as aforesaid *has done all that has to be done by him to enable the mortgagee to take such amount out of Court and the notice required by S. 83 has been served on the mortgagee*." The words "and the notice required by S. 83 has been served on the mortgagee" were inserted by S. 45 of the Transfer of Property (Amendment) Act XX of 1929. Before this amendment in that section it was held that the sufficiency of the deposit was to be determined on the date of the deposit and that if interest was calculated up to the date of the deposit and included in it, the deposit was sufficient and valid (10). See also the undermentioned case (11).

The addition of the words "and the notice required by S. 83 has been served on the mortgagee" shows that the mortgagee is now entitled to interest up to the date of service of the notice of deposit on him. The question, however, arises, whether it is necessary that *interest up to the date of service of notice of the deposit* should be calculated before hand and paid into Court along with the principal sum, or, whether it is a sufficient compliance with the section if interest is paid first up to the date of the deposit and then, after service of notice, further interest from the date of the deposit up to the date of service of notice. The question came up for decision before the Allahabad High Court in *Kushal Singh v. Ram Kishun*,(12) and the Court observed as follows:

> "By the amending Act XX of 1929 the words "and the notice required by S. 83 has been served on the mortgagee" have been added to para. 1 of S. 84 and the contention is that a deposit to be a valid and legal deposit has got to calculate the interest not only up-till the date of the deposit but up-till the date that the notice required by S. 83 has been served on the mortgagee. ... The submission on behalf of the plaintiff is that it is impossible to anticipate when notice would be served. For

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7. (1912) 16 Ind Cas 374 (375) (Cal) ** (1910) 11 Cal LJ 226 (234, 235).

8. AIR 1923 Mad 533 (534) : 47 Mad 7 (DB) (Mortgagee becoming owner of part of mortgaged property — Mortgagor depositing whole mortgage-debt.) ** AIR 1919 Cal 234 (235) ** AIR 1918 Mad 88 (90) (DB) ** (1601) 77 ER 232 (233, 234) : 5 Coke's Rep 114, Wade's Case (Followed in AIR 1918 Mad 88.) (1833) 110 ER 561 (561) : 4 B & Ad 546 Dean v. James (Do).

   Also see Section 84, Note 7.

9. (1889) 16 Cal 307 (309) (PC) ** AIR 1929 Cal 304 (305) (DB) ** (1886) 8 All 502 (508) (DB).

10. AIR 1917 Mad 922 (924) (DB) ** AIR 1939 Mad 503 (504) (Case before amending Act XX of 1929.) ** AIR 1923 All 24 (25) (DB).

11. AIR 1974 Orissa 196 (199) : 40 Cut LT 267 (Where a mortgage executed on 1-3-1966 was redeemable only in Chaitra month (13th March to 14th April) and usufructs thereof (from paddy yield) were to be appropriated for interest. **Held**, a deposit of principal sum by mortgagor on 4th April, 1967, complied with all legal requirements and was valid since paddy for 1966 would have been harvested by that year end, no interest was due on that deposit date and as such mortgagor had not deaulted to deposit interest outstanding. Thus he had done all necessary to enable the mortgagee to that amount out of Court.)

12. AIR 1937 All 706 (707, 708).

> it is conceivable that the notice may sometimes be served even after a year from the date of the deposit and from the time that process is issued to the defendant and if the law contemplated that a deposit would become an invalid deposit under S 83 if interest up till the date of the service of the notice was not included in the deposit it would throw an almost impossible burden on the applicant mortgagor and this is not what was contemplated I feel the force of the contention advanced on behalf of the plaintiff respondent and I hold the view that if the deposit is a valid deposit on the date on which it was made namely that if interest has been calculated up till the date of the deposit then all that the defendant can say when notice is served on him is that some more interest should be allowed to him and that that amount should also be paid to him The Court on such a plea will find out the amount of the interest and will direct the applicant mortgagor to pay that amount If the applicant mortgagor refuses to pay that amount the mortgagee opposite party might be entitled to refuse to accept the amount but he the mortgagee cannot refuse to keep the deposit on the ground that the initial deposit was short."

In the absence of any local custom or usage a mortgagee is not entitled to interest both for the day on which the money was advanced and the day on which the deposit is made He can claim interest for one of the two *days* **(13)** In the calculation of interest a fraction of a day will be treated as a whole day.**(14)**

Where a mortgage deed contains a *penal clause* in case of default of payment of the mortgage-debt within the prescribed period the mortgagee is entitled to claim only a reasonable compensation in case of such default In such a case it cannot be said that the whole of the amount calculated according to the penal clause is the amount remaining due on the mortgage The amount remaining due, in such a case, would be the amount which the Court ultimately considers as reasonable Therefore the person, making a deposit in such cases and the mortgagee in refusing a deposit as being insufficient always act in peril and one or the other may suffer by an adverse decision of the Court.**(15)** As observed by Varadachariar, J , in *Muthia Chettiar v Ramanathan* **(16)**

> 'The fact that for one reason or another there may be uncertainty or difference between the parties as to what the amount so due is cannot be held to preclude the operation of Ss 83 and 84 The difference between the parties may arise either on a question of fact as in cases of dispute as to part payment, or on a question of law like the validity of a penal provision in the document It is needless to say that the amount deposited by way of reasonable compensation under S 74 Contract Act will depend upon the discretion of the Court and either party to the proceedings under S 83 may run a certain amount of risk should it turn out that the Court in which a suit is subsequently brought takes one view or another as to the correctness of the amount deposited or the amount legally payable under the document This is an element of risk which many suitors run in various proceedings and does not seem to us sufficient in itself to lead to denying to the party who is ultimately found to have been right in his attitude the benefit of the deposit proceeding, the benefit of Section 84, Transfer of Property Act"

As to whether a mortgagee who in order to save the mortgaged property from sale for arrears of Government revenue payable by the mortgagor pays such arrears is entitled to add the amount so paid to the principal money for the purpose of ascertaining the total amount due, see section 72

Money paid by a mortgagee under S 171 Bengal Tenancy Act to protect the mortgaged property from a sale which is advertised to take place at the instance of the landlord in execution of a decree for rent, does not become part of the mortgage-money so as to entitle the mortgagee to treat it as included in the amount remaining due on his mortgage The reason is that the section

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13. (1903) 8 Cal WN 216 (217, 218) (DB) ** AIR 1917 Mad 922 (923) (DB)

14. AIR 1917 Mad 922 (923, 924) (DB)

15. AIR 1939 Mad 503 (504, 505) ** AIR 1922 Nag 199 (200) 18 Nag LR 47 ** AIR 1935 Mad 1072 (1073) (DB) ** AIR 1916 Mad 558 (559, 560) : 39 Mad 579 (DB)

[**See also** AIR 1932 Nag 169 (170, 171) 28 Nag LR 149 (DB) (Section does not require deposit of an amount calculated in accordance with the penal provision of the bond)

16. AIR 1935 Mad 1072 (1073) (DB)

itself creates a statutory mortgage for such amount in favour of the mortgagee, which gives him priority even over his own mortgage.(17)

A mortgagee who is entitled to possession under the terms of his mortgage is entitled to include in the amount remaining due costs of the suit to obtain possession (18) In the undermentioned case(19) a prior mortgagee obtained a decree on his mortgage without impleading the subsequent mortgagee The subsequent mortgagee deposited money under this section and claimed redemption The prior mortgagee claimed the costs of his suit, the costs of the final decree proceedings and the costs of execution It was held that since the subsequent mortgagee was not added as a party by the mortgagee to his suit, he could not be made liable for costs and that the deposit without the costs was sufficient.

Under S 76 Cl (g) there is a statutory liability on a mortgagee in possession to keep accounts of all sums received and spent by him as such mortgagee and to give the mortgagor, at his request a true copy of it In the undermentioned case(20) a mortgagor made a deposit but the mortgagee in possession refused to accept the deposit as being insufficient but without making any statement as to the realisations from the property It was held that the mortgagee could not keep the mortgagor guessing as to the income he derived from the mortgaged property and that the deposit was therefore valid for the purpose of stopping the running of interest In another case(21) a usufructuary mortgage deed provided that the mortgagee should take the income of the land in lieu of interest but that, if he was prevented from getting possession, interest would be charged at a certain rate The mortgagee got possession only of a portion of the land The mortgagor subsequently sold the property to a third person and the purchaser deposited only the principal amount The mortgagee claimed proportionate interest for the portion of the land of which he did not get possession It was held that when the stipulation about delivery of possession was broken the mortgagee s right was to claim the whole of the interest agreed upon The mortgagee was bound to give an account of the income he received from the mortgaged property Till this was done it was impossible for the purchaser to know whether any interest was due The deposit was, therefore, under the circumstances, held valid

As to the question whether a mortgagee is entitled to claim the value of improvements made by him on the mortgaged property along with the principal money as the amount remaining due on his mortgage, see S. 63-A and S. 72.

It may be noted that the Court in which proceedings under this section are taken cannot decide the question of the sufficiency or insufficiency of the deposit, its functions under the section being only ministerial and not judicial (22) That question can be decided in the subsequent suit instituted by the mortgagor or the mortgagee as the case may be

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17. AIR 1915 Cal 498 (500) (DB).
18. (1888) 1 CPLR 154 (155)
19. AIR 1936 Nag 128 (129, 130) : ILR (1936) Nag 9.
20. AIR 1927 Nag 138 (138) (Deposit and notice under S 83 must be regarded as clear demand for statement of accounts which the mortgagee is bound to comply under S 76(g))
21. AIR 1929 Cal 304 (306) (DB).
22. AIR 1955 Hyd 158 (159) ILR (1955) Hyd 147 (Once a tender is made it is not for the Court to decide whether the amount deposited is actually due to the creditors) ** AIR 1945 Mad 46 (46) (There is no provision in S 83, for an enquiry as to the sum due by the mortgagor to the mortgagees) ** AIR 1918 Mad 88 (92) (DB) (Per Napier, J) ** AIR 1926 Oudh 113 (115 116) (Distinction must be drawn between a deposit of the mortgage money under S 83 of the Transfer of Property Act, without any decree of the Court, and a deposit of the amount declared due under O 34 R 7 of the Code of Civil Procedure In the case of a deposit under S 83 there is no adjudication by the Court of the amount of mortgage money due The account has still to be taken If the mortgagee refuses to accept the money whether properly or improperly, the mortgagor comes into Court under O 34, R 7

Where a deposit is made under this section, all that the Court has to do is to pay the amount tendered to the mortgagee after completion of the prescribed formalities. It has no power to divert either the whole or part of the deposit to any other use **(23)**.

18. "The Court shall thereupon cause written notice of the deposit to be served on the mortgagee."

When a deposit is made under this section, it is the duty of the Court to cause a written notice of the deposit to be served on the mortgagee. It is no part of the duty of the person making the deposit *to get the service effected*. That duty is cast by the section on the Court **(1)**. The duty of the person is over when, after making the deposit, he applies for issue of notice, giving the correct address of the mortgagee,**(2)** and paying process fees **(3)**. The question is now, however, only academic. Under S. 84 as amended by the Act of 1929, interest ceases to run only on service of notice **(see S. 84, Note 11)**.

Although this section provides for a notice of the deposit of the money to the mortgagee, it does not either by implication or expressly provide that such a notice must be served on the mortgagee within the time stipulated in the mortgage deed for the deposit of the mortgage money in **order to make the deposit valid.(4)**

In the undermentioned case**(5)** a mortgage deed provided that the redemption thereof shall take place in the fallow season. The mortgagor deposited money in Court in the fallow season, but when notice of the deposit was served on the mortgagee, crops had been raised on the land. It was held that the deposit was valid and that the time taken in the service of notice would not affect its validity unless the mortgagor himself was responsible for the delay caused in the service of the notice.

Where the serving peon gives the notice under S. 83 to the mortgagee, where, he refuses to grant a receipt therefor, the notice must be taken to have been duly served, even if the peon fails to suspend a copy of the notice as required by O. 5, R. 17, C. P. C. **(6)**.

Where the mortgagee is a minor person, there cannot be any valid service of notice, unless a **guardian ad litem is not appointed.(7)**

19. "Verified in manner prescribed by law for the verification of plaints."

As to verification of plaints, see O. 6, R. 15 of the Code of Civil Procedure.

The provision that the petition should be verified in the manner prescribed for verification of plaints, does not, however, warrant the inference that the proceedings under the section are pro-

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asking to have an account taken and the amount due declared. [illegible] be expected to include in his claim anything which will be due to him up to the date fixed for redemption.)

23. AIR 1955 Hyd 158 (159) : ILR (1955) Hyd 147.

Section 83 — Note 18

1. AIR 1923 All 24 (25) (DB) ** (1921) 60 Ind Cas 454 (455) (DB) (Cal) (It is not necessary for the person making deposit to prove that the Court did its duty and served the notice on the mortgagee.)
2. AIR 1923 All 24 (25) (DB) ** AIR 1917 Mad 922 (924) (DB) ** (1910) 8 Ind Cas 763 (764) (DB) (Mad)

   Also see S. 84, Notes 10 and 11.
3. AIR 1917 Mad 922 (924) (DB)
4. AIR 1956 Pat 201 (202, 203).
5. AIR 1922 Oudh 17 (17)
6. AIR 1953 Pat 346 (350) (DB).
7. AIR 1959 Pat 457 (459).

ceedings in a regular suit or that the order made upon the petition has the force of a decree in a suit.(1) (See Note 3).

20. Mortgagee must accept deposit in full discharge of amount due.

The words "stating the amount then due on the mortgage and his willingness to accept the money so deposited in full discharge of such amount" make it clear that whatever may be the amount of the debt due according to the calculations of the mortgagee, he will have to accept the amount deposited (if he wishes to accept it at all) in *full* and not in partial discharge of the liability (1) The mere fact that the mortgagee has stated in his petition for withdrawal of the amount, that he reserves his right to recover further amounts due on the mortgage will not have the effect of preventing the mortgage-debt from being discharged in full (2) The Court, in fact, has no jurisdiction to allow the mortgagee to withdraw the amount upon any other condition unless the mortgagor's consent is obtained thereto (3) As was observed by their Lordships of the Privy Council in *Ramachandra Marwari v. Ranee Keshobati Kumari* :(4)

> "It was not contended it could not be contended with any show of reason that either the High Court or the Subordinate Judge had, save with the consent of the mortgagor or his representatives, any jurisdiction to permit the money deposited to be drawn out of Court on any terms other than those imposed by the statute."

As has been seen in Note 3, the object of the section is to enable a mortgage being discharged without any litigation(5) and though it may cause some disadvantage to the mortgagee it confers some benefit also on him inasmuch as he gets the money without any litigation (6)

Where the *person making the deposit consents* to the mortgagee drawing out the money deposited in part satisfaction of the amount due under the mortgage the withdrawal by the mortgagee will not operate as an extinguishment of the mortgage (7) as would be the case in the absence of such consent.

Section 83 — Note 19

1. (1890) 13 Mad 316 (318) (DB).

Section 83 — Note 20

1. AIR 1963 Pat 324 (325, 326) (Mortgagee accepting money deposited under S 83 — He cannot later claim damages on ground that he was not given possession of the mortgaged property) ** (1890) 13 All 195 (199, 200) (DB) ** **(1909) 36 Cal 840 (853, 855) : 36 Ind App 85 (PC)** ** (1903) 25 All 179 (180) (DB) ** AIR 1916 Oudh 279 (281) (The mortgagee is not bound to accept anything less than the full amount that is owing to him and he cannot be damnified by any mistake made by the mortgagor in making the tender There is no *ex media* in the matter ** (1901) 14 CPLR 49 (52) (Mortgagee is not bound to accept insufficient tender ** (1888) 1 CPLR 154 (156) (Do) ** AIR 1942 Mad 592 (594) (DB) (After the mortgagee accepts the tender under S 83 he is not entitled to claim any further relief as against the mortgagor or the person making the deposit)
2. (1890) 13 All 195 (200) (DB) (Statement in a petition for withdrawal that the mortgagee reserved his rights in respect of the money paid for arrears of revenue)
3. (1903) 25 All 179 (180) (DB).

   [See also (1849) 54 Mys HCR 136 (139) (It is not open to Court to decide or pass any order on any points of dispute in case the mortgagee files objections)]
4. **(1909) 36 Cal 840 (852, 853) : 36 Ind App 85 (PC).**
5. (1890) 13 All 195 (199) (DB)
6. See (1890) 13 All 195 (199, 200) (DB). (This section was passed not only in the interest of mortgagors but in the interest of mortgagees.)
7. (1910) 32 All 142 (144) (DB).

A mere deposit by itself does not extinguish the mortgage **(8)** It will be extinguished only in **two cases, namely —**

(1) by the mortgagee accepting the deposit in full satisfaction of the claim **(9)**

(2) by redemption of the mortgage by the mortgagor or other persons mentioned in S 91 in a **suit for redemption.(10)**

But, if the mortgagee does not accept the amount deposited and does not signify his willingness to accept the same in full discharge it is not obligatory on the Court to enquire as to whether the amount deposited by the mortgagor represents the correct amount due under the mortgage **(11)**

As was observed by their Lordships of the Allahabad High Court in *Ummadulai v. Abdul Rahim* :**(12)**

> The question is whether the making by a mortgagor of a deposit under S [illegible] of the Transfer of Property Act [illegible] discharges the mortgage in spite of the fact that the mortgagee has refused to accept the deposit. In our opinion that question can only be answered as it was answered by the lower appellate Court that the mortgage is not extinguished. The parties remain in the relationship to one another of mortgagor and mortgagee. It is for the mortgagor dissatisfied with the action of the mortgagee in refusing to accept the money deposited in full satisfaction of the mortgage to bring a suit for the enforcement of his legal rights. Unless and until he does so successfully the **mortgage still subsists."**

It follows that the refusal by the mortgagee to accept the deposit in full discharge of the mortgage will not make him where the mortgage is one with possession a trespasser from the date of such refusal **(13)** The only effect of the refusal is to render him liable to the consequences re

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8. 1979 (1) PRC (C) 103 (106) ** AIR 1962 Mad [illegible] ** AIR 1960 Pat 81 (52) (DB) ** AIR 1924 All 26 (28) : 45 All 592 ** (1907) 34 Cal 223 (228) (DB) ** (1907) 31 Bom 527 (533) (DB) ** AIR 1941 Cal 18 (19)

[But see 1905 27 All 178 (181) [illegible] (DB) The effect of deposit is to [illegible] discharge the mortgage fully. Thenceforth there is no [illegible] which **can be enforced or redeemed)**

9. AIR 1945 Cal 370 (374) ** AIR 1941 Cal 18 (19)

10. AIR 1924 All 26 (28) : 45 All 592 (DB)

[See also AIR 1967 Ker 247 (248) (FB) (Usufructuary mortgage — Redemption by one of mortgagors — Suit for redemption and separate possession by other co-mortgagor — Preliminary decree determining share of mortgage money due by plaintiff and requiring him to deposit that amount before seeking possession — Mortgagor depositing amount determined by Court under preliminary decree — Mortgage comes **to an end on the date. AIR 1963 SC 1041, Rel. on.)]**

11. (1983) 2 Mad LJ 207

12. AIR 1924 All 26 (28) : 45 All 592 (DB)

13. AIR 1968 Mad 394 (400) (DB) ** AIR 1960 Pat 81 (52) (DB) ** (1907) 31 Bom 527 (533) (DB) ** (1907) 34 Cal 223 (228) (DB) ** AIR 1925 Rang 13 (14) (2 Rang 182) ** AIR 1936 Cal 200 (202) (The suit which a mortgagor brings when the deposit is refused by the mortgagee or when the amount of the usufruct received by the mortgagee has satisfied the mortgage or where by such receipts he has overpaid himself is still a suit for redemption.)

[See also AIR 1915 Mad 654 (655) (DB) (In a suit by landlords against their tenants for ejectment and for arrears of rent the tenants pleaded that the transaction between the parties was only a mortgage by conditional sale that they had deposited the mortgage amount in Court under S 63 of the Transfer of Property Act and that as the plaintiffs (the mortgagees) had refused to receive the same from Court they were debarred from suing for any rent subsequent to the date of deposit and from ejecting the tenants. It was held that the mere deposit did not put an end to the tenancy and that the plaintiffs were entitled to decree for **possession and rent.)]**

ferred to in Ss 76(1) and 84 **(14)** The parties continue to have relationship of mortgagor and mortgagee **(15)** Nor is the mortgagor estopped from applying for relief under the Bengal Money-Lenders Act (1940) merely by reason of his deposit under this section **(16)** The relation of mortgagor and mortgagee ceases as soon as the mortgagor deposits the money in Court in pursuance of the Court's order in a redemption suit, and the possession of the mortgagee thereafter becomes wrongful possession.**(17)**

But, in case of mortgagee governed by Tranvancore Cochin Compensation for Tenants' Improvements Act, relation would cease only after compensation for improvements made by mortgagee is also deposited.**(18)**

The refusal by the mortgagee to accept the deposit puts an end to the proceedings under this section The Court has no jurisdiction to pay the money to the mortgagee subsequently unless there is a fresh tender by the mortgagor **(19)** So also where the mortgagee refuses to accept the deposit in full satisfaction of his mortgage the mere withdrawal of the deposit under different circumstances by him will not operate to discharge the mortgage **(20)** Also on refusal by mortgagee to accept the amount, the Court does not get jurisdiction to direct delivery of mortgaged property to mortgagor **(21)** But, in the undermentioned case**(22)** the High Court declined to interfere with the order of the subordinate Court directing delivery of mortgaged property, in exercise of revisional jurisdiction under S 115, C P. C when the mortgagee did not make the petition contemplated by paragraph 2 of S 83 in view of injustice and hardship that would be caused to the mortgagor.

Where the mortgagor sells the equity of redemption to a third person and the latter makes a deposit of the full amount in Court under this section, the mortgagee cannot refuse the deposit and

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14. AIR 1968 Mad 394 (400) (DB) (Suit by quondam mortgagor against quondam mortgagee — Limitation) ** AIR 1960 Pat 51 (52) (DB) ** AIR 1936 Cal 200 (202) (Interest ceases to run and mortgagee becomes accountable to the mortgagor for profits) ** AIR 1916 Oudh 279 (281) (Interest ceases to run on a valid deposit being made) ** (1907) 31 Bom 527 (533) (DB) (Mortgagee becomes accountable to the mortgagor for profits) ** (1907) 34 Cal 223 (228) (DB) (Interest ceases to run and mortgagee becomes accountable to the mortgagor for profits) ** AIR 1925 Rang 13 (14) — 2 Rang 382 (Mortgagee becomes accountable to the mortgagor for profits.)

15. (1987) 2 Ker LT 733 (DB)

16. AIR 1944 Cal 288 (289) ILR (1944) 1 Cal 321 (As long as his equity of redemption remains intact the mortgagor cannot be prevented from taking advantage of the Bengal Money Lenders Act.)

17. (1910) 12 Cal LJ 620 (622) ** **AIR 1992 SC 1135 (1138, 1139) : 1992 AIR SCW 1025 : 1992 (2) JT 130.**

[**See however** 1979 UP RCC 103 (All) (Merely by deposit the relationship of mortgagor and mortgagee does not come to an end, until final order is made by Court)]

18. (1987) 100 Mad LW 850

19. AIR 1924 Pat 41 (41, 42) (DB) ** AIR 1940 Pat 18 (19).

[**But see** AIR 1966 Mad 77 (80) (Tender of mortgage amount into Court — Dismissal of proceedings under S 83 on mortgagee's refusal to accept mortgage amount — Mortgagors allowing tender to continue in Court — Court does not become functus officio and can consider mortgagee's subsequent request to receive mortgage amount AIR 1924 Pat 41, **Dissented from.**)]

20. AIR 1962 Mad 308 (309) (Reason being that proceedings under S 83 would come to an end with refusal of mortgagee to accept the deposit)

21. 1983 TLNJ 248 (Mad)

22. (1990) 1 Mad LJ 369

continue in possession on the ground that his mortgagor has not been paid the entire purchase money by the purchaser. In such a case the latter will be liable for mesne profits from the date of the deposit.(23)

Since the mortgagor's depositing the mortgage money into Court operates as a continuous tender, the mortgagee is at liberty to accept it any time before the mortgagor rescinds the tender by withdrawing the amount from court deposit (24).

Even if refusal to take notice of deposit by the husband of the mortgagee is treated as refusal by the mortgagee it would not amount to a refusal to accept the deposit. If the mortgagee files a verified statement accepting the deposit, offers to deliver up mortgage property and deposits the mortgage deed in Court he is entitled to withdraw money (25).

21. "On depositing in the same Court the mortgage-deed and all documents in his possession or power relating to the mortgaged property."

Before the mortgagee can take out the money deposited by the mortgagor, it is necessary for him to deposit in the same Court in which the money is deposited, the mortgage deed and all other documents in his possession or power, relating to the mortgaged property (1). Before the amendment of 1929 (See Note 1) the section provided merely for the deposit of the mortgage deed, but the rules framed by the High Courts of Calcutta, Madras and Bombay with reference to the section provided also for the deposit of the other documents of title that were in the possession of the mortgagee. The validity of these rules was doubted (2) (See Note 22). The amendment now makes the position clear. (See also Notes on S. 60).

22. The third paragraph.

As seen in Note 1, the whole of the third paragraph was added by the amending Act of 1929. The reason for the amendment is as follows: According to rules framed by the High Courts of Calcutta, Madras and Bombay with reference to this section, the mortgagee, before he could take out the money deposited under the section, was required to file all documents of title that were in his possession and also a draft reconveyance or an acknowledgement just as he was required to do under S. 60. The validity of these rules was doubted by the learned authors Shephard and Brown in their commentaries on this section on the ground that the functions of the Court under the section being ministerial the Court has no power to take such steps (1). The learned authors observed: "It seems doubtful whether these rules are not *ultra vires*. It may be suggested that the section was intended for the simplest cases only, and that a provision for the return of documents other than the mortgage deed, and for a reconveyance or acknowledgement was advisedly omitted." The amendment now makes the position clear (2) (See also Notes on S. 60). The paragraph provides that

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23. AIR 1983 Mad 821 (821): (Possession of mortgagee must be deemed to be wrongful from the date of deposit.)

24. AIR 1977 Orissa 23 : 42 Cut LT 917

25. AIR 1977 Orissa 23 : 42 Cut LT 917.

Section 83 — Note 21

1. (1949) 54 Mys HCR 136 (139) ** (1938) 42 Cal WN 1177 (1179)

2. See Shephard and Brown Commentaries on the Transfer of Property Act, 7th Edn. 1910, pages 351, 352.

Section 83 — Note 22

1. Shephard and Brown Commentaries on the Transfer of Property Act, 7th Edn. 1910, pages 351, 352.

2. See the Report of the Special Committee.

(1949) 54 Mys HCR 136 (139): (Even when a verified petition by mortgagee is filed the Court shall before paying him the amount deposited direct him to deliver possession.)

where the mortgagee is in possession of the mortgaged property, the Court shall before paying to him the amount deposited by the mortgagor direct him to deliver possession thereof to the mortgagor. The order directing delivery of possession is permitted to be made in summary proceedings under S. 83 and therefore, the requirement of filing separate suit for recovery of possession is dispensed with by S. 83 (3). Even though under S. 83 of T. P. Act, on redemption of the mortgage, a mortgagee is bound to deliver possession back to the mortgagor, if lawful tenancy is created by him only symbolic possession could be handed over to the mortgagor and the tenancy would continue (4). The mortgagee is bound to surrender possession only on receipt of notice under the section and hence the mortgagor can claim mesne profits only from the date of service of the notice on the mortgagee (5).

23. Security bond, if can be taken under the section.

This section does not authorise a Court to take a *security bond* from any party to the proceedings thereunder.(1)

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84. CESSATION OF INTEREST.— When the mortgagor or such other person as aforesaid has tendered or deposited in Court under Section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or [A][in the case of a deposit, where no previous tender of such amount has been made] as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, [B][and the notice required by Section 83 has been served on the mortgagee :

Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of such withdrawal.]

Nothing in this section or in Section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money [A][and such notice has not been given before the making of the tender or deposit, as the case may be.]

[A] Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 45.

[B] Substituted for the words "as the case may be", ibid.

Synopsis

1. **Legislative changes.**
2. **Scope of the section.**
3. **"Mortgagor or such other person as aforesaid."**
4. **"Mortgagee"**
5. **"Has tendered."**
   - **(A) Tender must be unconditional.**
   - **(B) Tender must be made at the proper time and place.**
   - **(C) Money must be ready to be paid.**

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3. 1990 All LJ 815 (819).
4. AIR 1972 Guj 37 (43, 47) : (1971) 12 Guj LR 980.
5. AIR 1952 Trav-Co 236 (236) (DB).

Section 83 — Note 23

1. AIR 1924 Pat 41 (42) (DB).

(D) Tender must be in current coin.
(E) Tender must be made to the proper person.
(F) Waiver of irregularity in tender.
(G) Plea of tender.
6. "Deposited in Court."
7. "The amount remaining due on the mortgage."
8. When interest ceases in case of tender.
(A) Non-mortgage-debts.
(B) Mortgage-debts.
9. Deposit where no previous tender has been made.
10. "Has done all that has to be done..... out of Court.
(A) Where the mortgagee is an adult person.
(B) Where the mortgagee is a person incompetent to contract.
(C) Where the mortgagor does not know who is the legal representative.
11. Service of notice on mortgagee.
12. Deposit is only a kind of tender.
13. Withdrawal of deposit by the mortgagor.
14. Notice before payment or tender.
15. Notice before payment is not necessary when mortgagee demands mortgage-money.
16. Refusal of tender and costs.
17. Plea as to insufficiency of tender or deposit.
18. Section 14 of Bombay Regulation V of 1827 and section 84.
19. Tender and deposit in possessory mortgages.

1. Legislative changes.

Section 45 of the Transfer of Property (Amendment) Act 1929 (XX of 1929) has introduced the following changes in this section :

(1) The words "in the case of a deposit where no previous tender of such amount has been made" have been added. See Note 9

(2) The words "and the notice required by S. 83 has been served on the mortgagee" have been substituted for the words "as the case may be" (see Note 11)

(3) Paragraph 2 is new See Note 13.

(4) The words "and such notice has not been given before the making of the tender or deposit as the case may be" have been added to the last paragraph See Note 14

2. Scope of the Section.

After the mortgage money has become payable and before the right to redeem the mortgage is barred the mortgagor has the following alternative remedies [illegible]

(1) he may *pay* or *tender* the mortgage money to the mortgagee at a proper time and place under S. 60,

(2) he may *deposit* the amount in Court under S. 83 or

(3) he may *bring a suit* for redemption under S. 91.(1)

When the mortgagee *accepts* the payment under the first alternative or the deposit in the second alternative, the mortgage debt is fully discharged But where the mortgagee *refuses* to accept such tender or deposit this section comes into operation It penalises the mortgagee for his refusal to accept the money when offered and the penalty is the cessation of interest on the principal amount(2)—

(1) in the case of a tender, from the date of tender (See Note 8) and

(2) in the case of a deposit in Court —

(a) as soon as the mortgagor or such other person as is referred to in the section has done all that has to be done by him to enable the mortgagee to take such amount out of Court (see Note 10), *and*,

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Section 84 — Note 2

1. (1901) 4 Oudh Cas 387 (394, 395) (DB)

2. AIR 1918 Mad 1360 (1362) : 40 Mad 804 (SB). (Per Phillips J)

(b) the notice required by Section 83 has been served on the mortgagee (see Note 11)

The reason why there is a distinction made between a tender and a deposit, in respect of the date from which interest is to cease to run is that a tender to be valid must be made to the person who is entitled to it The mortgagor chooses the person and makes the tender There remains nothing more to be done in the case If the person is the right person interest ceases from the date of the tender But where a mortgagor deposits money in Court, he had something more to do than merely make a deposit He must also enable the person entitled to the deposit to take it out of Court Hence a duty is cast upon the mortgagor "to do all that has to be done to enable the mortgagee to take the amount out of Court."(3) and, as added by the amendment to see further that the notice of deposit is served on the mortgagee. Interest ceases only from the time when he fulfils both these conditions

A mere deposit by the mortgagor under S 83 does not *extinguish the mortgage* where the mortgagee does not accept it (4) The only effect of the refusal is to render him liable to the consequences referred to in this section and S. 76(i). See S 83, Note 20.

3. "Mortgagor or such other person as aforesaid"

This expression refers to S 83 which provides that a deposit may be made by the mortgagor or any other person who is entitled to institute a suit for redemption.(1) A tender or deposit must, in order to have the effect of stopping the interest, be made only by these persons or their authorised agents (2) and not by a stranger (3) In a case before the Act, it was held by the Calcutta High Court that a tender by *one or some* of the mortgagors only is not valid unless made with the consent of all of them.(4)

A mortgagee is justified in not accepting the deposit made by a purchaser, of a portion of the hypotheca when the title of the latter is in dispute.(5)

Where the person making a tender or a deposit is a person incompetent to contract, such tender or deposit must be made by a legal curator of the property of such person, and when there is no such curator, by a guardian *ad litem* appointed by the Court on his behalf (6)

When a tender has been made by the mortgagor, the benefit of it can be taken by any person, other than the mortgagor, who has instituted a suit for redemption Thus, in *A.M K M. Chettiar v A K M L Chettiar*(7) a tender of the mortgage-money was made by the mortgagor and was refused by the mortgagee A subsequent mortgagee thereafter sued to redeem the mortgage and it was held

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3. **AIR 1918 Mad 1360 (1361) : 40 Mad 804 (SB).** (Where mortgagee is dead and mortgagor not being sure as to who are the persons entitled to succession and thus enable to make a valid tender deposits the money in Court but withdraws it before the rightful heirs are ascertained, he cannot be said to have done all that he could do to enable them to receive the money.)

4. (1903) 27 Bom 23 (27) (DB)

Section 84 — Note 3

1. See Note 7 on Section 83 As regards the persons besides a mortgagor who can sue for redemption, see S. 91

2. AIR 1953 Mad 821 (821) (DB) (Purchaser of equity of redemption) ** AIR 1918 Mad 490 (490) (DB) (A deposit by melcharth holder) ** AIR 1929 Mad 230 (233) 52 Mad 322 (DB). (Tender by purchaser of equity of redemption.)

3. Halsbury Laws of England, Vol. 21, p. 149.

4. (1875) 21 Suth WR 428 (429) (DB).

5. AIR 1954 Mad 830 (831) (DB)

6. See Section 103

7. AIR 1930 Rang 255 (257)

that the subsequent mortgagee could claim the benefit of the tender by the mortgagor and that he was not liable to pay interest after the date of the tender.

In *L. Khushal Chand v. Gauri Shankar*,(8) it has been held by the Lahore High Court that where an Official Assignee in insolvency of the mortgagor sells the mortgaged property and holds the purchase-money realised from the sale, he does so as an administrator of the estate of the mortgagor and not as an agent of the mortgagee. Interest on the mortgages not paid off by him runs therefore, until the date of payment.

See also Section 59A, Notes 3 and 4, and Section 83, Note 7.

4. "Mortgagee."

By virtue of S. 59A the expressions "mortgagor" and "mortgagee" in this section will include persons deriving title from them respectively. Thus, the term "mortgagee" would include an assignee of the mortgage from the original mortgagee(1) or, where the original mortgagee dies, his heir or successor in interest, or the executor or administrator, or a person holding a succession certificate in respect of the debt.(2) See also Section 59A, Note 3.

5. "Has tendered."

A tender is an offer of performance of a promise by the promisor to the promisee. The rule regarding tender has been dealt with in S. 38 of the Contract Act(1), the material portion of which runs as follows :

"Every such offer must fulfil the following conditions ;

(1) it must be unconditional;

(2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;

(3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver".(2)

(A) Tender must be unconditional

A tender must not be accompanied by any condition (3) the principle being that a party shall

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8. AIR 1935 Lah 906 (907).

Section 84 — Note 4

1. AIR 1924 Mad 453 (454) (DB). (Sub-mortgagee.)
2. AIR 1938 All 423 (425) : ILR (1938) All 767 (FB).

Section 84 — Note 5

1. Act IX of 1872.
2. AIR 1918 Mad 88 (90) (DB).
3. AIR 1922 PC 347 (349). (If the tender is accompanied by a condition which prevented it being a perfect and complete tender, the other parties are under no obligation to accept it.) ** 1968 MPLJ 451 (452) (DB) ** AIR 1954 Mad 830 (831) (DB) ** AIR 1954 Mys 168 (169) : ILR (1954) Mys 423 ** AIR 1915 Mad 402 (404). (A tender by a person entering into a contract for purchasing the equity of redemption is not valid if it is made conditional on the delivery to him of the title deeds.) ** (1911) 34 Mad 320 (322) (DB). (There cannot be a tender or an agreement to waive tender of an unascertained sum — An offer to pay the amount found to be due on a comparison of accounts if the payee would execute an indemnity bond in accordance with law is not a valid tender.) ** AIR 1914 Mad 21 (21) (DB) ** AIR 1936 Lah 168 (175, 176) (DB). (Tender by cheque comprising of two items — One item not bound to be accepted — **Held**, conditional tender and hence invalid.) ** AIR 1931 Nag 91 (93).

not clog his offer with conditions to the prejudice of the other party **(4)** Thus, the following are not valid tenders :

(1) Tender on condition of delivery of title deeds to which the party tendering is not entitled **(5)**

(2) Tender on condition that the creditor should accept it as the whole of the balance due **(6)** The creditor should not be precluded by the acceptance from afterwards claiming that a larger amount is due.**(7)**

(3) Tender of a larger amount than is due with a demand that the creditor should *change* and give back the balance.**(8)**

(4) Tender of one entire sum for several debts of unequal amounts separately demanded by the creditor It cannot be considered a valid tender in respect of one of such debts The creditor must have the opportunity of having the amount due by a particular debtor, without taking what was offered in respect of the other debts also **(9)**

(5) Tender of a *part* of an entire demand.**(10)**

In *Pramnath Roy Chowdhry v Ram Rutton Rae***(11)** it was held by their Lordships of the Privy Council that a tender under *protest* will not defeat it where the words of protest may reasonably be regarded as idle words, but that a payment into Court of the mortgage-money accompanied by a petition disputing the mortgagee's title to foreclosure and expressing an intention to sue the mortgagee to recover back the very money tendered is not a valid tender This view does not seem to be in conformity with the English cases which hold that a protest does not render the tender conditional but that it merely imports that the party tendering does not acquiesce in the demand of the creditors and does not preclude himself from recovering the money back, if he could **(12)** In the undermentioned cases**(13)** a tender under protest was held not bad in law In another case**(14)** a

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4. AIR 1954 Mys 168 (169) ILR (1954) Mys 423 ** (1842) 12 LJ CP 2 (2 3) Fort v Noll

5. AIR 1916 Mad 1143 (1144) ** AIR 1915 Mad 402 (404)

   Also see Secion 83, Note 8

6. AIR 1954 Mys 168 (169) ILR (1954) Mys 423 ** AIR 1931 Nag 91 (93) ** (1815) 171 ER 50 (51) 4 Camp 156 Evans v Judkins ** (1825) 172 ER 23 (24) 2 C & P 50, Cheminout v Thornton ** (1841) 10 LJ QB 158 (158) : 1 QB 409, Henwood v. Oliver (But where the tenderer simply says this is what I owe it cannot be said that it is an attempt to obtain an admission from the creditor that nothing more is due and the tender is therefore good)

   [See also AIR 1918 Lah 39 (40) (DB) (Tenderer asking for partial redemption after the whole amount had become due.)]

7. (1847) 17 LJ QB 5 (6) 11 QB 130 Bowen v Owen (Per Erle J) ** (1841) 10 LJQB 158 (158) 1 QB 409, Henwood v Oliver ** (1825) 172 ER 24 (24) 2 C & P 51 Peacock v Dickerson

8. (1815) 12 ER 1064 (1064) , 16 RR 624, Robinson v. Cook ** (1811) 170 ER 1309 (1309) 13 RR 755 Batterbee v Davis

9. (1825) 130 ER 530 (534) 11 Moore PC 72 4 LJ (OS) CP 57, Strong v Harvey

10. AIR 1923 Cal 527 (530) ** AIR 1914 Cal 740 (741). (Case relating to rent.) ** (1948) 136 ER 919 (923) 16 LJ CP 237 Dixon v Clark ** (176) 3 Cal 466 (472) (DB)

11. (1865) 7 Moo Ind App 323 (359) (PC).

12. (1845) 175 ER 6 (7) : 2 C & K 13, Manning v Lunn ** (1866) 35 LJ CP 293 (294) · 13 LT 596, Scott v Uxbridge & Rickmansworth Ry Co * (1892) 61 LJ Ch 59 (60 61) (1892) 1 Ch 1 (10), Greenwood v Sutcliff

13. AIR 1936 Lah 168 (175) (DB) ** (1865) 3 Suth WR 184 (186). (Deposit of mortgage-money by mortgagor accompanied by protest against validity of mortgage)

14. (1901) 4 Oudh Cas 355 (359). (Case of deposit in Court.)

tender reserving a right in the party to dispute the amount due was held not to be a conditional tender.

In *Cole v. Black*(15) it was held that a party tendering money could not in general demand a receipt for the money. But where money was sent by cheque with a letter asking for a receipt it was held in *Jones v. Arthur*(16) that the tender was not bad on the ground that it was conditional: the party tendering put the cheque out of his power by sending it in a letter and merely requested the creditor to send him a receipt which was not a condition. But a demand for a *stamped* receipt where the party tendering had himself to bear the cost of the stamp(17) or for a receipt for the full balance due(18) was held to be a conditional tender. In *Jugat Jarini Dasi v. Nalia Gopal Chakl*(19) it was held by the High Court of Calcutta that the asking for a receipt did not vitiate the tender. Under S. 30 of the Stamp Act, 1899 a person receiving any money exceeding Rs. 20 in satisfaction or part satisfaction of a debt is bound on demand to give a duty stamped receipt. A tender therefore of more than Rs. 20 with a demand for a stamped receipt will it is conceived be a valid tender in this country.

(B) Tender must be made at the proper time and place.

A tender must be made at the proper time and place. The proper time for a tender of the mortgage-money is after the mortgage money becomes due. A tender before that time is premature **and does not stop the running of interest.(20)**

A tender must be made at the proper time of the day. What is such time is a question on fact depending upon the facts and circumstances of the particular case (21). In an old case it was held that a notice of payment at 3 O clock is not forfeited where there is an attendance for payment before 4 O clock, the principle being that upon an appointment at a given hour an attendance at any **part of the hour is sufficient (22)**

Where a mortgage executed on [illegible] 66 was redeemable only in the Chaitra month and the usufructs thereof was to be appropriated for interest the deposit of the principal sum on 4th April 67 complied with all the legal requirements since the paddy for 66 would have been harvested by **the year end and no interest was due on the date of deposit (23)**

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15. (1793) 170 ER 142 (142) : Peake 179 : 3 RR 681

16. (1840) 59 RR 833 (834) : 8 Dowl Pr Cas 442

17. (1824) 171 ER 1185 (1186) : 1 C & P 52, Long v. Meader. Tenderer was charged under 43 Geo. III c. 126 to bring the receipt and require the other party to sign it.

18. (1842) 12 LJ(C P) 2, 3, Fowler v. Neal ** (1863) 176 ER 734 (735) : 8 RR 8, Cossett v. Day.

19. (1907) 34 Cal 305 (320) (DB).

20. AIR 1918 Upp Bur 32 (34) : 2 Upp Bur Rl 141 ** (1902) 31 Cal 183 (185) (DB) (Case of simple bond.) ** AIR 1914 Oudh 140 (142). Where the parties agree that the mortgage money should be paid in the month of Jeth in a year payment on any other month is not a **good and vlaid tender.) ** (1902) 26 Bom 312 (316) (DB).**

[See also AIR 1920 All 204 (204) : 42 All 420 (DB). Tender made within time is valid.) ** (1912) 35 Mad 209 (214) (DB). (Condition of delivery of possession on default **Deposit before delivery of possession held, premature.)**

21. (1843) 134 ER 1029 (1038) 6 M & G 593 : 12 LJ Ex 477, Startup v. Macdonald. (Delivery of oil at 9 P.M. held good tender since there was time enough for completing the delivery **after measuring, etc., before 12 O'cloc.) ** (1843) 152 ER 837 (839) : 11 M & W 347 : 12 LJ Ex 318, Isherwood v. Whitmore. Party to whom tender of goods is made must have reasonable opportunity of inspecting them.)**

22. (1793) 29 ER 975 (975) : 4 Bro CC 432, Knox v. Simmons

23. AIR 1974 Orissa 196 (198, 199) : 40 Cut LT 267

As regards the place, the English rule is that, in absence of any place fixed by the contract between the parties, the debtor must seek out the creditor **(24)** This rule has been followed in India in the undermentioned cases **(25)** Section 49 of the Contract Act, 1872, however, lays down a rule for the appointment of a place of performance where it has not been fixed by the contract and it has been held that that rule is intended to apply both to the delivery of goods and to the payment of money. **(26)**

(C) Money must be ready to be paid.

A mere readiness or willingness on the part of the mortgagor to pay, whether communicated**(27)** or not**(28)** to the mortgagee, is not a valid tender It must be shown that the mortgagor was actually ready and willing to pay the money *then and there* if it could be received by the mortgagee **(29)** The money must be in sight and at hand and capable of immediate delivery **(30)** It should be actually produced **(31)** Where *A* offered *B* a sum of money mentioning the amount offered and

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24. (1853) 155 ER 1529 (1532) : 8 Ex 639 22 LJ Ex 264 Haldane v Johnson ** (1887) 57 LJ QB 134 (135) 20 QB 152 (154) 36 WR (Eng) 224 Robes v Snaefell Mining C ** **AIR 1927 PC 156 (157) : 54 Ind App 265 : 5 Rang 451** ** (1905) 7 Bom LR 993 (994) (DB)

25. (1906) 2 Nag LR 62 (63) (Debtor cannot compel the creditor to go to any place the debtor chooses to receive payment) ** AIR 1929 Rang 271 (272) (Notice that mortgagee should come to mortgagor s place and take money is not valid tender — Mortgagor must go to the mortgagee s place) ** (1906) 30 Bom 167 (171) ** AIR 1929 Mad 230 (232) 52 Mad 322 (DB) * (1907) 9 Bom LR 903 (909) ** AIR 1917 All 128 (129) ** AIR 1930 Nag 207 (208) : 26 Nag LR 300

26. AIR 1927 PC 156 (158) : 54 Ind App 265 : 5 Rang 451. (Section 49 however does not get rid of inferences that should be justly drawn from the terms of the contract itself or from the necessities of the case.) ** (1905) 7 Bom LR 993 (994) (DB)

27. AIR 1966 Guj 40 (46) ILR (1965) Guj 277 (Statement in notice to mortgagee that mortgagor had deposited principal amount with his advocate and his readiness to pay on accounts being supplied, such further amount as would be found due) ** AIR 1954 Nag 193 (205) (DB) (Mortgagor sending notice to mortgagee offering to redeem Mortgagee declining offer and characterising notice as absurd — No actual tender or deposit made — interest does not cease from date of notice) ** AIR 1918 Mad 219 (220) (DB) ** AIR 1929 Pat 397 (39) (DB) (A telegram from mortgagor to the mortgagee asking him to refrain from filing suit and promising to pay by a fixed date or a subsequent telegram expressing willingness to pay and informing that amount was ready) ** AIR 1929 Rang 271 (272) (A notice sent by the mortgagor asking the mortgagee to come to his place and take the money) ** AIR 1923 Lah 632 (634) 4 Lah 406 (DB) (Mere notice to redeem) ** (1899) 1 Bom LR 841 (842) (DB) (Mere notice to the creditor of the payment of the principal to a third party is not sufficient) ** 1881 Bom PJ 57 (DB) (A mere notice in a newspaper by a mortgagor to a mortgagee to receive the mortgage debt) * (1898) 22 Bom 440 (446) (DB) (Offer by registered letter) ** AIR 1915 Mad 210 (216) 3 Mad 959 (Offer by letter of readiness to pay.)

28. AIR 1918 Nag 217 (218)

29. AIR 1929 Pat 397 (398) (DB) ** AIR 1937 All 122 (123) (DB) (Validity depends on ability and willingness of tenderer to pay in money at the time when the tender is made) ** **AIR 1918 Nag 217 (218)**

30. (1803) 170 ER 733 (734) 5 Esp 48 8 RR 828 Glasscott v Day

31. AIR 1914 All 53 (53) 36 All 139 (DB) (Offer by letter is not good tender) ** (1899) 1 Bom LR 841 (842) (DB) ** AIR 1920 All 204 (204) 42 All 420 (DB) (An offer by notice of the amount due under a mortgage without production of the money) ** (1903) 5 Bom LR 387 (389) (The money thought not actually produced was ready there and then for the purpose but the negotiations fell through because the mortgagee demanded three months extra interest **Held,** actual production was waived) * AIR 1923 Mad 284 (287) 46

held the money twisted up in bank notes in his hand, it was held that it was a sufficient tender but that it would not have been so if the amount had not been mentioned (32)

But the actual production of the money may be dispensed with by express declaration or equivalent act of the creditor (33) Actual production is not also necessary where the creditor has refused to receive it on the ground that more is due(34) or that it is too late (35) As was observed by Sir James Wigram, V. C., in *Hunter v. Daniel*(36) :

> "The practice of the Court is not to require the party to make a formal tender where as in this case from the facts stated in the bill, or from the evidence it appears that the tender would have been a mere form and the party to whom it was made would have refused to accept the money

See also the undermentioned cases(37) to the same effect

(D) Tender must be in current coin.

A tender must be in the current coin of the realm (38) But where the debt is contracted in a

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Mad 148 (DB) (Evidence showing mortgagor's approach to mortgagee with a person who had money with him — Mortgagor asking mortgagee to take it — Latter refusing — **Held**, this was waiver of actual tender.) ** (1808) 103 ER 714 (714) 10 East 101 10 RR 229 Thomas v. Evans.

32. (1824) 171 ER 1199 (1199) : 1 C & P 288, *Alexander v. Brown*.

33. AIR 1947 All 68 (70) ILR (1947) All 25 (DB) (Where on the offer of the debtor to pay the amount due the creditor mortgagee refuses to accept it raising a plea that the redemption is premature it must be taken that the mortgagee has waived the condition of the actual production of the money) ** (1808) 103 ER 714 714 10 East 101 10 RR 229 *Thomas v. Evans*.

34. (1791) 170 ER 101 (101), *Black v. Smith*.

[**See also** (1825) 31 RR 654 (654) : 2 C & P 77, *Harding v. Davis*]

35. (1852) 42 ER 1138 (1140) 2 De GM & G 936, *Ex parte John Danks*

36. (1845) 67 ER 712 (717) : 4 Hare 420 : 14 LJ Ch 194 : 67 RR 114

37. AIR 1952 Raj 72 (78) ** AIR 194 Pat 18 (2 2) 25 Pat 45 DB (Action for recovery – Plea of tender — Plea need not be followed by deposit in Court — Judgment debtor tendering money towards payment of instalment due under decree – Tender made on due time – Decree executable forthwith on default of payment of one instalment — Tender refused by decree-holder – Tender held was valid and operated to invalidate immediate execution of decree) ** **AIR 1923 PC 26 (28) : 50 Ind App 41 : 46 Mad 108.** (Mortgagor asking by letter the amount due Mortgagee replying that no amount need be paid as he had become purchaser but giving the amount **Held**, reply did not amount to refusal of tender) ** AIR 1930 Rang 255 (256) (Mortgagor asking mortgagee to accept mortgage money – Mortgagee refusing — There was valid tender though money was not actually offered and interest would stop from such tender) ** AIR 1917 Low Bur 122 (122) 9 Low Bur Rul 18 (The offer of payment is enough where it is shown that the creditor would not have accepted the money, even if produced) ** **(1865) 3 Moo PC 245 (266, 267) : 16 ER 92 : 146 RR 62.** *Owners of the Norway v. Ashburner* (Mere demand of larger amount does not mean dispensation of tender) ** (1901) 24 All 85 (88) (DB) (Tender of amount due at house of creditor by post office peon holding a money order is a good tender) ** **AIR 1941 Mad 484 (485) : ILR (1941) Mad 767 (FB).** (Where there has been an unequivocal refusal to accept a tender in redemption of a mortgage the law does not require a tender to be made)

[**See also** (1843) 63 ER 268 (270) 60 RR 294, *Cliff v. Wordsworth*]

38. AIR 1955 All 350 (351, 352) (Insured cover is not legal tender of debt) ** (1907) 34 Cal 305 (319) (DB) (A legal tender as defined by the Indian Coinage Act, the Indian Paper Currency Act, and the Indian Coinage and Paper Currency Act does not include a tender by cheque) ** (1831) 149 ER 7 (8) 1 LJ (NS) Ex 5 37 RR 623, *Polglass v. Oliver*

particular currency other than the current one, the tender may be made in the same currency(39) or in its equivalent in the current currency (40) The legal tender includes coins and currency notes but it does not include a cheque A tender by a cheque(41) or in country bank notes(42) or by a bank bill(43) is not, therefore, legal

(E) Tender must be made to the proper person.

A tender must be made to the mortgagee himself or to his accredited agent (44) But an agent having authority to accept tender of an amount has no implied authority to accept tender of a cheque in lieu of cash (45) A tender to a person who disclaims authority to accept it is made at the tenderer's risk.(46)

(F) Waiver of irregularity in tender.

A creditor can waive his objection to an irregularity of the tender in which case, the tender will be good A specific objection to a tender will amount to a waiver of other objections (47) As has been seen already, the actual *production* of the money may be dispensed with by the creditor in which case he cannot afterwards object to the tender on the ground of non-production of the amount An objection to the *form* of the tender may similarly be waived by the creditor Thus where he rejects the tender not on the ground of its nature or form, but on some other ground such as, that a larger sum is due, the objection as to form would be deemed to be waived (48) Where on the tender of a *cheque* or in country bank notes the creditor, without objecting to the nature of the tender, refuses it on the ground that more is due, the tender is good (49) Where *A* demanded the balance due and costs, 13s and 4d and the debtor, *B*, sent a Bank bill for the balance but not for the costs,

39. (1892) 16 Bom 599 (602 603) (DB) (Loan in the Poona currency)

Also see S 60, Note 7.

40. (1909) 2 Ind Cas 469 (474) (DB) (Bom) (Mortgage-debt advanced in Shikkai coins)

41. (1899) 68 LJ Ch 425 (427) (1899) 2 Ch 73 (78) 80 LT 488 47 WR (Eng) 517 *Johnston v Boyes* ** (1901) 24 All 85 (88) (DB)

42. (1831) 149 ER 7 (8) 1 LJ (NS) Ex 5 37 RR 623 *Polglass v Oliver*

43. (1863) 158 ER 1092 (1093) 7 LT 636 (637) 32 LJ Ex 97 11 WR (Eng) 239 *Caine v Coulson*

44. Ghose on 'Law of Mortgage' 5th Edn , page 249 ** (1808) 170 ER 1027 (1027) 1 Camp 477 10 RR 731, *Goodland v Blewith* (A tender to an agent authorised to receive payment is as good as a tender to the creditor in person.)

45. (1897) 66 LJ Ch 127 (128) (1897) 1 Ch 171 (173) 75 LT 627 45 WR (Eng) 246 *Blumterg v. Life Interests etc , Corporation.* (Authorized solicitor.)

46. (1908) 32 Bom 521 (531) (DB).

47. **AIR 1941 Mad 484 (485) : ILR (1941) Mad 767 (FB).** (Refusal of a tender not because the amount tendered is short but because the mortgagee considered that he was entitled to wait until the date fixed for payment in the mortgage deed amounts to a waiver of any objection to the amount being short.)

48. AIR 1949 Mad 535 (538) ILR (1949) Mad 657 (DB) ** (1907) 34 Cal 305 (319) (DB) ** AIR 1929 Mad 230 (232) 52 Mad 322 (DB) (Creditor refusing to accept money point blank and not merely objecting to form of tender — Tender was legal although by cheque) ** **(1831) 149 ER 7 (8) : 1 LJ (NS) Ex 5 : 37 RR 623,** *Polglass v Oliver* ** **(1840) 59 RR 833 (834) : 8 Dowl PC 442,** *Jones v Arthur* (Tender by cheque sent with a letter requesting receipt — Cheque returned with demand for large amount — **Held,** no objection to the form and hence a good tender) ** AIR 1931 Bom 118 (120) : 55 Bom 525 (DB) ** AIR 1936 Lah 168 (175) (DB)

49. (1840) 59 RR 833 (834) 8 Dowl PC 442, *Jones v Arthur* ** (1831) 37 RR 623 (625) , 149 ER 7, *Palglass v. Oliver* (Country bank notes.)

and *A* wrote in answer that he would not receive the bank bill unless the costs also were paid, but did not return the bill, it was held that the objection as to the tender not being in money was waived (50) A tender of a larger amount than is due with a demand for a change will be a good tender if the creditor does not object to it on *that* account but only demands a larger sum (51)

(G) Plea of tender.

A plea of tender is, in practice, very seldom successful (52)

It is no objection to a tender that the creditor had previously put the matter into his attorney's hands.(53)

6. "Deposited in Court."

The deposit in this section is one which is made in Court under S 83 and hence to be valid must comply with all the provisions laid down in that section (1) Thus where a mortgagor presented a petition for deposit without paying actual money and after some days deposited the amount including interest only up to the date of the application, it was held that it was not a valid deposit under S 83 and hence could not stop the running of interest (2)

7. "The amount remaining due on the mortgage."

As distinguished from the expression "mortgage-money" in S 60 the expression "the amount remaining due on the mortgage" used in this section is very wide and covers any just allowances or costs which can be tacked on to the mortgage-money under the ordinary law of mortgage (1) A tender or deposit in Court must include the *whole* of the balance that is due on the mortgage (2) The reason is that the lender is entitled to claim the whole of the amount due to him at once and to decline to accept payment in instalments in the absence of a stipulation to the contrary (3) A tender of *larger* amount than what is actually due will be valid, on the principle that the greater includes the smaller;(4) but a tender or deposit of an amount which falls short of the balance due is invalid and will not stop the running of interest (5) The extent of insufficiency whether it is Re 1 or Rs

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50. (1863) 158 ER 1092 (1093) : 32 LJ Ex 97. *Caine v. Coulson*

51. (1824) 3 LJ (OS) KB 41 (41), *Cadman v. Lubbock* ** (1791) 170 ER 101 (101) 3 RR 661 *Black v. Smith* ** (1839) 151 ER 130 (131) : 8 LJ Ex 263, *Bevans v. Rees*

52. (1828) 172 ER 448 (449), *Leatherdale v. Sweepsone.*

53. (1814) 12 ER 707 (708) : 5 Taunt 307 : 15 RR 506. *Moffat v. Parsons*

Section 84 — Note 6

1. AIR 1937 All 706 (708).
2. AIR 1916 Mad 383 (384) (DB).

Section 84 — Note 7

1. AIR 1924 Bom 264 (266)
2. AIR 1966 Guj 40 (46) ILR (1965) Guj 277** AIR 1937 All 328 (333) (DB) ** (1886) 8 All 502 (508) (DB) ** (1848) 5 CV 365 (377) 136 ER 919 5 D and L 155 16 LJCP 237 Dixon v. Clarke ** AIR 1923 Oudh 241 (242) : 26 Oudh Cas 59
3. (1902) 24 All 461 (463) (DB) ** (1887) 1 CPLR 154 (156) ** AIR 1916 Oudh 279 (281)

   Also see Section 60, Note 7.
4. AIR 1949 Mad 535 (538) ILR (1949) Mad 657 (DB) (It is open in such a case to the creditor to accept to much of it as is due to him and reject the rest) ** AIR 1919 Cal 234 (235) (DB) ** AIR 1936 Lab 168 (175) (DB) ** AIR 1918 Mad 88 (90) (DB)

   Also see Section 83, Note 17
5. **AIR 1929 PC 243 (246) : 56 Ind App 339.** (Suit for interest Deposit of mortgage money in Court — Amount insufficient — **Held,** interest did not cease) ** AIR 1937 All 328 (333) (DB) ** AIR 1918 Lah 39 (40) (DB) (An offer of a part payment after demand for payment of the full amount due) ** AIR 1914 All 53 (53) 36 All 139 (DB)

100 or Rs 1,000, does not make any difference.(6) The maxim *de minimis non curat lex* (the law cares not for small or trivial things) does not apply to tenders.(7) But where it is not possible to ascertain the exact amount due, the position may be different. In the undermentioned case(8) where the mortgage bond contained a penal clause and the mortgagee was consequently entitled only to a reasonable compensation, it was held that such a compensation could not be determined with great accuracy and hence a tender falling short by Rs. 2-3-0 of the amount was held valid for the purpose of stopping interest.

In *Bhabani Charan v. Kadambini Dassee*(9) A executed a usufructuary mortgage in favour of *B* on condition that *B* should take the income of the land in lieu of interest and should deliver possession on repayment of the principal. A certain amount was also fixed as the annual interest. In case A failed to deliver possession to *B*, *B* was, however, given possession of only half the land mortgaged and later on, the whole was sold to *C*, who obtained possession also from *B* after the latter had been in possession for two years. *C* tendered the principal to *B* who refused to accept it and, thereupon, *C* deposited the same in Court. The question was whether the deposit *only of the principal* was sufficient to prevent the interest running. It was held that it was sufficient inasmuch as the mortgagee was bound to account for the profits of the period of two years and as until he did so, it was not possible for *C* to know whether there was any interest due on the amount. The profits of the land were also found to be nearly sufficient to cover the interest at the stipulated rate in default of delivery of possession.

A tender or a deposit of a part of the amount due, even though under *bona fide* belief that it is the real amount due, or under an honest mistake in calculation, is not sufficient to stop interest running, even on the amount so tendered or deposited.(10) As remarked by Lindsay, J.C., in *Gouri Shankar v. Abu Jafar Khan*(11) "there is no *via media* in the matter, either a full tender is made in which case interest stops altogether, or an inadequate tender is made which the mortgagee is at liberty to ignore and which does not affect his right to recover interest at the contract rate up till the date of the suit."

See also Note 17 on Section 83.

[See also AIR 1916 Mad 1040 (1040) (Instalment bond — Whole sum payable on default of three instalments — Tender of principal sum of only three instalments without interest — Not valid tender.)]

6. AIR 1921 All 280 (281) (DB) (Amount short by Rs. 2-9-6 — **Held** not proper deposit.) ** AIR 1917 Mad 922 (924) (DB). (Amount short by 94/2 pies — **Held**, not proper deposit.)

7. **AIR 1941 Mad 484 (485) : ILR (1941) Mad 767 (FB).** (AIR 1918 Mad 88 and AIR 1939 Mad 503. **Dissented from; AIR 1917 Mad 922. Followed.**)

8. **AIR 1932 Nad 169 (170) : 28 Nag LR 149 (DB).**

9. **AIR 1929 Cal 304 (306) (DB).**

10. AIR 1917 Mad 922 (924) (DB) (Deposit short by 94/2 pies owing to mistake in calculation.) ** (1903) 6 Oudh 135 (140, 141) (There is no provision that although the exact amount is not tendered the interest shall cease *pro tanto*.) ** (1886) 8 All 502 (508) (DB) (Inadequate deposit scarcely entitles the debtor to the benefit of S. 84, even *pro tanto*.)

[See also AIR 1932 Nag 169 (170) : 28 Nag LR 149 (DB) (Provision to pay compound interest at double the original rate in case of default — Tender of money is not bad simply because it is less by Rs. 2-3-0 than amount considered to be adequate compensation to the creditor, calculation being made by allowing compound interest at original rate or simple interest at enhanced rate.)]

Also see Section 83, Note 17.

[**See however** (1892) 16 Bom 141 (149) (The rule that the tender of only a part of debt must be treated as if it had never been made, applies only where the party making the tender admits more to be due than is tendered.) ** (1910) 5 Ind Cas 165 (169) (DB) (Cal) (Do.)]

11. AIR 1916 Oudh 279 (281).

8. When interest ceases in case of tender.

The general principle is that when a "valid tender" has been made, interest on the debt ceases to run (1) Under the English law, interest will cease to run on a debt only so long as the money is "kept dead" or unemployed by the tenderer and ready at all times to be paid to the creditor as soon as demanded by him (2) If the creditor files a suit for the recovery of the debt, the amount tendered must be deposited in Court. In other words, a plea of tender must be followed by a deposit in Court.(3)

In this country there has been a difference of opinion expressed on both these points, firstly in relation to debts other than mortgage debts, and secondly in relation to mortgage-debts

(A) Non-mortgage-debts.

According to one class of cases, the amount tendered must be kept unemployed(4) and further that such amount should be deposited in Court as soon as a suit is filed for the recovery of the debt (5) According to a second class of cases there must, no doubt, be continued readiness to pay the amount whenever demanded, but the deposit in Court is not necessary(6).

(B) Mortgage-debts.

According to one class of cases it is necessary even in the case of mortgage-debts that the tender should be kept good and that the mortgagor should not profit by the refusal of the tender by the mortgagee (7) In the undermentioned case(8) it was held by the Rangoon High Court following

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Section 84 — Note 8

1. AIR 1962 Pat 203 (203, 204) (Institution of suit for redemption of usufructuary mortgage — Not tantamount to tender of mortgage money — Deposit in Court after preliminary decree for redemption — Mesne profits can be awarded only from date of deposit and not from date of institution of suit.) ** AIR 1947 Mad 730, 732) (If there is no tender of the mortgage amount interest can rightly be charged.) ** AIR 1927 Nag 138 (138) ** AIR 1929 Pat 397 (399) (DB) ** (1911) 34 Mad 320 (321) (DB) ** (1903) 5 Bom LR 387 (389) ** (1880) 5 Cal LR 105 (107).

   [**See also** AIR 1918 Mad 1314 (1315) (DB) (Tender under S 83 T P Act and an offer to pay under Ss 37 and 38 Contract Act are valid when made to the party direct 33 Mad 100, **Followed.**)]

2. (1675) 22 ER 913 (913) 2 Cas in Ch 206 Lutton v Rodd (Money tendered and refused — **Held,** interest ceased from date of tender.) ** (1726) 24 ER 774 (774) 2 P Wms 377 Gesjies v Hall ** (1911) 180 LJ Ch 532 (536) (1911) 2 Ch 301 310, 311) 55 Sol Jo 520, **Edmondson v. Copland**

3. Vide O 22 R 3 of the Rules under English Judicature Act cited in AIR 1928 Cal 874 and AIR 1926 Cal 310 ** (1848) 136 ER 919 (924) 5 CB 365 Dixon v Clarke

4. (1907) 34 Cal 305 (321) (DB) ** **(1908) 35 Cal 34 (50, 51) (FB).** (Per Mukherjee J.) ** AIR 1926 Cal 310 (311) (DB) ** (1903) 3 Ind Cas 346 (348) (Cal) (Tender must be "maintained.")

5. See the AIR Commentaries on the Code of Civil Procedure 10th (1985) Edn O 24 R 3 Note 2 and the following case :

   (1907-08) 4 Low Bur Rul 108 (109) (Creditor is not entitled to interest during the interval between the date of the tender and the date of the institution of the suit but is entitled to interest from the date of the institution of the suit till the realization **Dissenting from.** 16 Bom 141.)

6. AIR 1926 Cal 310 (311) (DB) (Suit on hand note — Deposit in Court after refusal of tender not necessary — 16 Bom 141. **Dissented.**) ** (1907) 34 Cal 305 (323) (DB) ** AIR 1918 Mad 1314 (1315) (DB)

7. (1907) 34 Cal 223 (229) (DB) ** AIR 1918 Mad 219 (221 222) (DB) ** AIR 1929 Mad 230 (233) : 52 Mad 322 (DB).

8. AIR 1934 Rang 316 (317) : 13 Rang 22

the decision of the Bombay High Court in *Haji Abdul Rahman v. Haji Noor Mohammed*(9) that a plea of tender must be accompanied by a deposit in Court in order to stop the running of interest. The decision of the Bombay High Court was, however, before this Act was made applicable to the Bombay Presidency, and was based upon the English law. The same view was held by Calcutta High Court in the undermentioned case.(10) On the other hand, in *Velayuda Naicker v. Haider Hussain Khan*(11) in which the mortgagor utilised for his own purposes the money tendered, after its refusal by the mortgagee, and it was contended on the strength of English authorities that the money must be kept ready for payment in order to stop the running of interest, the High Court of Madras observed :

> "We are bound by the terms of S. 84 of the Transfer of Property Act, and, as already pointed out under that section, "interest shall cease from the date of tender." The word *tender* does not in itself imply that he must have been always ready to pay the money."

In *Arunachalam Pillai v. Govindaswami*(12) the same High Court observed : "It is clear from S. 84 that in mortgages, a tender alone has the effect of stopping interest from the date of the tender", suggesting thereby that such tender need not be accompanied by deposit in Court.

From the language of the first paragraph of the section itself it does not appear that continued readiness to pay or deposit in Court following the tender is essential in order to stop interest running. A mere tender of the amount appears to be sufficient to stop interest from the date of such tender. This, however, seems to be inconsistent with the principles underlying the doctrine of tender in English law. The rule that the creditor is not entitled to interest where a valid tender of the amount by the debtor has been refused by him rests upon the equitable consideration that the debtor who has lost the use of his money by reason of the conduct of the creditor, cannot at the same time be called upon to pay interest to the creditor. It follows from this that if the debtor *does* have the use of his money, the equitable consideration does not apply and the mortgagee ought to be entitled to interest. The principle stated above has been expressly recognised by the Legislature with reference to deposit in Court (which is only another form of tender) in the first proviso to the section. It is difficult to see why the first paragraph has not also been amended in conformity with the above principles, and with the decisions on the subject.

In *Pandurang v. Dadabhoy*(13) the executors of a deceased mortgagee demanded by notice the payment of the mortgage-debt within three months. The mortgagors were ready with the money but could not pay the same to the executors as they had not obtained probate. Before the expiry of the period in the notice, the mortgagors intimated by notice that money was kept ready for payment. It was held that it was a valid tender and that interest ceased to run from the date of expiry of period stated in the notice of demand.

In the undermentioned case(14) the mortgagor sent a notice to the mortgagee offering to redeem the mortgaged properties but the mortgagee declined the offer characterising the notice as absurd. The mortgagor did not actually tender or deposit the amount. It was held that interest did not cease to run from the date of giving notice.

Even if it was due to the default of the mortgagee that the mortgagor was unaware as to what exactly was the amount due under the mortgage the consequence of a breach of this duty on the part of the mortgagee would not be the loss of interest.(15)

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9. (1891) 16 Bom 141 (149, 150).
10. (1903) 8 Cal WN 153 (155).
11. (1910) 33 Mad 100 (101) (DB)
12. AIR 1932 Mad 109 (111) : 55 Mad 458 (DB).
13. (1902) 26 Bom 643 (648)
14. AIR 1954 Nag 193 (200) (DB).
15. AIR 1966 Guj 40 (45, 46) : (1965) 6 Guj LR 177

See also the undermentioned case.(16)

9. Deposit where no previous tender has been made.

Where a valid tender is refused by the mortgagee, interest ceases to run from the date of tender. Very often after a proper tender is refused the party tendering deposits the amount in Court. It is not, however, *this* deposit that is dealt with by this section. The deposit in Court in such cases merely shows the continued readiness to pay on the part of the mortgagor which is a necessary element in a valid tender.

The deposit dealt with in this section is one where there was *no previous tender* of the amount. The distinction between this deposit and the one referred to above is made clear by the introduction of the words "in case of a deposit where no previous tender of such amount has been made".

10. "Has done all that has to be done.....out of Court."

As has been seen in Note 2, the mere fact that the amount has been deposited is not sufficient by itself, to stop interest running. The mortgagor has to do something more. He has to do *all that is necessary to enable the mortgagee to take the money out of Court*. The nature of the duty on the part of the mortgagor varies according as the case falls within one or the other of the following categories:

(a) where the mortgagee is an adult person;

(b) where he is a person incompetent to contract;

(c) where the mortgagee is dead and is succeeded by rival claimants, out of whom the mortgagor is unable to find the rightful legal representative.

(A) Where the mortgagee is an adult person.

This case presents no difficulty. The mortgagor has simply to deposit the amount to the account of the mortgagee, give his correct address and pay *batta* for the issue of notice to him. When he has done this he has done all that is necessary to enable the mortgagee to take money out of Court.(1)

(B) Where the mortgagee is a person incompetent to contract.

In this case it is necessary that a guardian *ad litem* should be appointed for him to act on his behalf and to take the money out of Court (2). Section 103 lays down the procedure to be followed in such a case. It provides that an application for the appointment of a guardian *ad litem* for the purpose of taking out the deposit should be made and that the provisions of O. 32 of the Civil Procedure Code apply to such an application (3). It is obviously the duty of the mortgagor to comply with these requirements. Further, inasmuch as the mere fact of making an application for the appointment of a guardian will not enable a person to withdraw the money from Court, until he is actually appointed guardian, it is incumbent upon the mortgagor *to see* that a proper guardian has

16. AIR 1964 All 370 (371) (Usufructuary mortgage — Mortgagor continuing in possession as tenant under a simultaneous rent note executed by him — Mortgagor depositing mortgage money in Court and applying for redemption stating therein that he had been compelled to deposit the money in Court as mortgagee refused to accept it — Mortgagee neither opposing application nor contradicting allegation — Mortgage must be deemed to have been redeemed even on the date when the deposit was made — Mortgagor's liability to pay rent does not continue after that date.)

Section 84 — Note 10

1. AIR 1922 All 147 (148) (151) (44 All 102 (DB)) ** AIR 1923 All 24 (25) (DB) (Even if notice is served after the due date.) ** AIR 1917 Mad 922 (924) (DB).

   Also see Note 11 and Section 83, Note 18.

2. AIR 1923 All 183 (184) (45 All 273 (DB)) (Letters Patent Appeal from AIR 1922 All 147 (44 All 102).)

3. See Notes on Section 103.

been appointed for the minor It is only after the appointment of the guardian that the mortgagor can be said to have done all that is required of him to enable the mortgagee to take the money out of Court under this section.(4)

The deposit becomes effective only from the date of such appointment (5) In *Seo Saran v Ram Lagan*(6) the mortgagor made an application under Section 83 with the necessary deposit and notice was issued to the minor mortgagee "under the guardianship of" his father There was no separate application for the appointment of a guardian and in fact no guardian was appointed. The notice was not served and the application was dismissed. In the subsequent suit for redemption it was held that the procedure was irregular and could not bind the minor mortgagee Where there are major and minor mortgagees, interest will not cease to run simply because there was service of notice upon the major mortgagees when no guardian *ad litem* was appointed for the minor mortgagees and there was therefore no valid service of notice upon the minor mortgagees (7) See also S 83 Note 16 and S. 103 Note 2.

(C) Where the mortgagor does not know who is the legal representative.

Where the original mortgagee is dead and the mortgagor is unable to find out who the real legal representative of the mortgagee is, owing to disputes between the rival claimants to the mortgagee's estate he may deposit the money into Court with the request that the Court should pay it to the person who is entitled to recover it If he does that he has done all that is required to him to enable that person to recover the money (8) In such a case it is the business of the person entitled to take steps to satisfy the Court that he is the person to whom the money should be paid (9) The fact that there is a dispute among the claimants to the estate of the deceased mortgagee does not affect the validity of the deposit, nor can the mortgagor be made to suffer for no fault of his (10) As observed by the Allahabad High Court in *Ram Gopal v Lachman Das*,(11)

> "It would be most unfair to deprive the mortgagor of his right to redeem the mortgaged property merely because there was a dispute between a number of people about the right to succeed to the interests of the mortgagee Those people might take a considerable time in having their disputes settled and it might be years before the mortgagor was able to know to whom the money should be paid For all that time he would be deprived of the power which is expressly given to him by statute to redeem the property in a summary way by depositing the amount due in Court Although he

4. (1903) 27 Bom 23 (29) (DB) ** AIR 1923 All 183 (184) 45 All 273 (DB) (Letters patent appeal from AIR 1922 All 147) ** AIR 1925 Mad 1017 (1018, 1019) (Minor and major mortgagees joined — Mortgagor not appointing guardian *ad litem* for minor — Tender not valid) ** AIR 1926 All 665 (666) 48 All 611 (DB) (One of the mortgagees minor — No proper guardian *ad litem* appointed at time of making deposit — Deposit is not valid) ** AIR 1930 All 609 (610) (DB) (Claim by mortgagor for mesne profits after deposit)

   [See also AIR 1928 All 311 (312) 50 All 655 (DB) (Where the Court wrongly refused to enquire into the question of minority.)]

5. AIR 1938 Mad 405 (408) (DB) (Case decided under law before amendment **Overruled** on another point in AIR 1946 Mad 542.)

6. AIR 1922 All 355 (355) : 44 All 64 (DB).

7. AIR 1959 Pat 457 (460)

8. **AIR 1938 All 423 (425) : ILR (1938) All 767 (FB)** ** AIR 1924 Mad 559 (560) (DB) ** AIR 1924 Mad 453 (454) (DB) (Deposit as payable both to the legal representative and the sub-mortgagee is proper) ** AIR 1923 Mad 354 (354) (DB) (Deposit in favour of mortgagee's heirs — Dispute between claimants — Amount allowed to remain in Court — **Held,** he did all he was required to do and interest ceased from the date of deposit)

9. **AIR 1938 All 423 (425) : ILR (1938) All 767 (FB).**

10. AIR 1924 Mad 559 (560) (DB)

11. **AIR 1938 All 423 (425) : ILR (1938) All 767 (FB).**

might be prepared to pay the money he would still be compelled to pay interest upon it."(12)

Where a mortgagor deposits money into Court to the account of *certain named* persons the Court cannot pay the amount to one or some of them only, even though the others are found not entitled to it. By so naming the persons, the mortgagor really prevents the rightful claimants from recovering the money due to them.(13) and cannot, therefore, be said to have done all that was necessary to enable the mortgagee to take the amount out of Court Thus where a mortgagor had deposited money in Court to the account of *A* and *B*, two sons of the deceased mortgagee and it was found out that by the custom of primogeniture in the mortgagee's family only *A* was entitled to the amount, it was held that the mortgagor himself had made it impossible for *A* to recover the money by associating with him *B*, a person not entitled to the money and hence the deposit was not valid so as to stop the running of interest (14) The deposit in such cases should be to the account of the *deceased mortgagee's estate* with the request that it should be paid to anyone who can establish his title to it. The deposit then is a valid one even if some of the persons named in the petition are found to have no title to the money as the mortgagor has done all he has to do to enable the rightful claimants to take the money out of Court(15) See also S 83, Note 15

11. Service of notice on mortgagee.

Prior to the amendment of the present section in 1929 it was not necessary that mortgagee should be served with notice of the deposit in order that interest may cease to run (1) It was sufficient, where the mortgagee was an adult person, if the mortgagor made a deposit of a sufficient amount and gave the correct address of the mortgagee and paid *batta* for the issue of a notice to him (2) Where the mortgagee was a minor it was sufficient for the mortgagor making the deposit to have a guardian *ad litem* appointed for the mortgagee and interest ceased to run on such appointment being made (3) The mortgagor, in such cases, was allowed by the High Court of Allahabad to make an additional deposit of the further interest accruing up to the date of such appointment (4) The effect of the present amendment is that interest *does not* cease to run as soon as the mortgagor has done all he had to do to enable the mortgagee to take such amount out of Court It ceases to run only when, in addition, the mortgagee is *served* with the notice of deposit It is on the *date of service* of such notice that the interest ceases to run under the amended section (5)

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12. AIR 1916 Oudh 292 (294) 19 Oudh Cas 145 (Mortgage by A in favour of B and C Transfer of mortgagee rights by B alone to D – A deposited mortgage money in Court making B C and D parties B and C did not appear though served Application dismissed A sued for redemption **Held**, deposit was valid and interest stopped from date of deposit) ** AIR 1924 Mad 453 (454 455) (DB) (A sub-mortgagee is an assign and a deposit of money as payable both to the legal representative and the sub mortgagee is a proper deposit.)

13. **AIR 1938 All 423 (426) : ILR (1938) All 767 (FB)** ** 1904 All WN 20 (21) (DB (Deposit to the account of mortgagee and his pleader – **Held**, invalid)

14. AIR 1928 All 311 (313) : 50 All 655 (DB).

15. **AIR 1938 All 423 (426) : ILR (1938) All 767 (FB).**

Section 84 — Note 11

1. (1910) 8 Ind Cas 4 (6) (DB) (Cal).

2. AIR 1923 All 24 (25) (DB) ** AIR 1917 Mad 922 (924) (DB) ** (1912) 35 Mad 44 (45) (DB) ** AIR 1922 All 147 (148) : 44 All 102 (DB).

   Also see Note 10 and S. 83, Note 18.

3. AIR 1923 All 183 (184) : 45 All 273 (DB)

4. AIR 1923 All 183 (184) : 45 All 273 (DB)

5. AIR 1952 Trav-Co 236 (236) (DB) (Under S 83 deposit of mortgage amount in Court by the mortgagor will operate as a valid tender of mortgage money only when notice of deposit is given to the mortgagee.)

Notice must be served on the mortgagee when he is an adult person, and on his guardian *ad litem* when he is a minor or a person incompetent to contract.(6) Where the mortgagee does not reside in the district in which the mortgaged property or some part of it is situate notice on his agent holding a general power of attorney from the mortgagee will be deemed sufficient service under S. 102. (See also Notes on S. 102 for the service of notice where no person or agent on whom notice can be served is to be found or is known.)

Where the original mortgagee is dead, notice must be served on his legal representatives. If there is any dispute among the claimants of the estate of the deceased, the deposit may be made to the credit of the estate of the deceased and notice should be issued to all the known rival claimants. It is essential under this section that all the persons who are entitled to recover the money must be served with notice, although it may happen that those who are not so entitled may be served with the notice. Interest in such cases ceases from the date of service of notice on those who are entitled to the money.(7)

In *Kushal Singh v. Ram Kishan Singh*(8) a mortgagor deposited in Court an amount sufficient to cover the principal and interest up to the date of deposit. The mortgagee was served with notice after some time but refused to withdraw the amount. The mortgagor thereupon brought a suit for redemption and the mortgagee contended that as under the amended section interest did not cease to run until the service of notice on him, the deposit should have included interest up to that date and hence was insufficient. It was held by the High Court of Allahabad that it was not contemplated by this section that the deposit would become an invalid deposit under S. 83, if interest up to the date of the service of the notice was not included in the deposit. It was further observed as follows:

> "If the deposit is a valid deposit on the date on which it was made namely, that if interest has been calculated up till the date of deposit, then all that the defendant can say when notice is served on him is that some more interest should be allowed to him and that that amount should also be paid to him. The Court on such a plea will find out the amount of the interest and will direct the applicant mortgagor to pay that amount. If the applicant-mortgagor refuses to pay that amount, the mortgagee opposite party might be entitled to refuse to accept the amount, but he (the mortgagee) cannot refuse to accept the deposit on the ground that the initial deposit was short.

12. Deposit is only a kind of tender.

A deposit in Court under S. 83 is, as has been seen in Notes 2 and 8 on S. 83, only a special form of tender. (1) It is a tender *through* Court and consists of two things, an actual deposit in Court and, notice to the person entitled to withdraw it from the Court. (2) Hence, where there are both a deposit in Court and notice to the mortgagee and the mortgagee refuses to accept the same, the natural consequences of refusal of a valid tender follow and interest ceases to run on the principal if the deposit is kept in Court. (3) Where a mortgagor deposits money in Court but withdraws the application before the notice of the deposit has been served on the person entitled to withdraw it, it is not a proper tender as there is no notice and hence interest will not cease to run even if the money is kept in Court.(4)

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6. AIR 1959 Pat 457 (460). (Major and minor mortgagees — No guardian *ad litem* appointed — Notice of deposit to minor mortgagees — Tender not valid — Interest does not cease to run.)

7. **AIR 1938 All 423 (426) : ILR (1938) All 767 (FB).**

8. AIR 1937 All 706 (708).

Section 84 — Note 12

1. AIR 1938 Mad 405 (406) (DB). (**Overruled** on another point in AIR 1946 Mad 542.)

2. AIR 1916 Mad 503 (504) (DB). (Per Tyabji, J.) ** AIR 1918 Mad 490 (490) (DB). (Deposit may be something more than a tender, but it is tender nevertheless.)

3. AIR 1918 Mad 490 (490) (DB). ** **AIR 1918 Mad 1360 (1362) ; 40 Mad 804 (SB).** (Per Phillips, J. — Even if the deposit is subsequently withdrawn — Case before amendment.)

4. AIR 1916 Mad 503 (504) (DB). (Per Tyabji, J.)

13. Withdrawal of deposit by the mortgagor.

Prior to the amendment of the section in 1929 there was a conflict of opinion as to the effect of the withdrawal by the mortgagor of the amount deposited. One view was that when once the mortgagor deposited the amount due and the mortgagee, on receipt of the notice of deposit, refused to accept it, the mortgagor had done all that he had to do, that consequently interest ceased to run from the date of the deposit and that the subsequent withdrawal of it by the mortgagor could not render him liable for interest from the date of withdrawal (1). The view rested on the principle that a deposit was only a special kind of tender and that a refusal by the mortgagee of the tender was sufficient to stop the running of interest. The mortgagor's willingness and continued readiness to pay was *presumed* and the onus of proving the contrary was cast on the mortgagee (2). According to the contrary view this section pre-supposed the continuance of the deposit in Court in order to stop the running of interest and the subsequent withdrawal of the amount by the mortgagor, even after the refusal of the mortgagee, had the effect of rendering the mortgagor liable for interest from the date of such withdrawal (3). By the introduction of a new paragraph in the section, the Legislature has given sanction to the latter view(4) and has thus set the conflict at rest. The amendment is not retrospective in its effect.(5)

Where the mortgagor who had deposited the amount under S. 83 filed a suit for redemption and withdrew the deposit and redeposited it in pursuance with the preliminary decree, it must be held that it was a case of continuance of deposit till obtaining of possession and was proof of readiness and willingness to pay and the mortgagor will be entitled to mesne profits from the date of the original deposit.(6)

14. Notice before payment or tender.

Under the English law it is a settled rule of practice that after a default has been made by the mortgagor to pay the mortgage money in accordance with the stipulation for redemption, he must give the mortgagee either six calendar months' notice of his intention to pay off the mortgage money or six months' interest in lieu of the notice (1). (Here the rule) rests entirely on custom.

Section 84 — Note 13

1. AIR 1922 All 181 (182) : 44 All 198 (DB).
2. **AIR 1926 Mad 601 (604, 605) : 49 Mad 609 (FB) ** AIR 1940 All 65 (66, 67) : ILR (1940) All 79 (DB). (Case before the amendment. AIR 1926 Mad 601 (FB) : Followed.)**

   [See also AIR 1938 Mad 405 (413) (DB) (Assignee of mortgagor deposits amount under S. 83 — Amount not accepted by mortgagee and subsequently withdrawn by assignee of mortgagor — Assignee not able to produce amount even at time of suit for redemption — Held, he was entitled to mesne profits only during period the amount was in Court deposit but not subsequently — Overruled on another point in AIR 1926 Mad 542.)]
3. (1912) 35 Mad 44 (45) (DB) ** AIR 1915 Mad 256 (256) (DB) (Per Wallace J. Ayling J. contra.) ** **AIR 1918 Mad 1360 (1361, 1362) : 40 Mad 804 (SB).** (Per Venkata Rama Offg. C.J. and Seshagiri Ayyar, J.) ** AIR 1927 Oudh 103 (104) (35 Mad 44 : Foll.)
4. AIR 1966 Mad 77 (81) : ILR (1966) 1 Mad 84. (Cessation of interest — Mortgage with possession — Dismissal of S. 83 proceedings on mortgagee's refusal to accept mortgage amount — Redemption suit — Mortgagor withdrawing deposit and redepositing it in pursuance with preliminary decree — **Held,** in circumstances of case continuance of deposit till obtaining possession was proof of readiness and willingness to pay and mortgagor was entitled to mesne profits from date of original deposit.)
5. AIR 1940 All 65 (66) : ILR (1940) All 79 (DB).
6. AIR 1966 Mad 77 : 78 Mad LW 205.

Section 84 — Note 14

1. (1891) 60 LJ Ch 694 (694) : (1891) 3 Ch 550. Smith v. Smith ** (1889-90) 38 WR (Eng) Dig. 138 (138). Johnson v. Evans ** (1737) 22 ER 506 (507) : 2 EQ Cas Abr 603. Sharpnel v. Blacke.

observes Shadwell, V C, in *Browne v Lockharn*.(2) "and the custom is founded on this namely, that it is but fair that the party who has lent his money upon the security should have a reasonable opportunity before the transaction is put an end to, of finding some other security on which he may lay out his money when it has been repaid to him." If after giving the notice of his intention to pay off the mortgage, the mortgagor does not do so within the time specified in the notice, the mortgagee is again entitled to a six months' notice or the interest for the period in lieu thereof (3) The rule of notice before payment is not, however, applicable to mortgages by deposit of title deeds as they are regarded as debts of a temporary nature.(4)

This Act does not require a mortgagor, as a matter of a *law*, to give the mortgagee notice of his intention to pay the mortgage money before he makes a tender or deposit in Court, but it recognises, as valid, a contract by the parties stipulating for such a notice (5) Where there is such a contract, this section and S 60 recognise the liability of the mortgagor to pay interest in lieu of notice in case he fails to give such notice before a tender or deposit in Court (6) This has been made clear by the addition of the words "and such notice has not been given before the making of the tender or deposit as the case may be" in the last paragraph of this section In fact the provisions of this section do not apply to the case until the agreed notice has been given by the mortgagor (7)

Where in a usufructuary mortgage deed there is a provision that the mortgage money should be deposited whenever the mortgagor desires to deposit it only on the last day of *Baisakh* every year and there exists no contract in the deed for a notice, by the mortgagor to the mortgagee, before the making of the deposit as is contemplated by the last para of S 84, nor is there a provision in the deed as to when the notice of the deposit as contemplated by the second para of S 83, should be given and the notice of the deposit on the last day of *Baisakh* being impossible, that being the only date when the deposit has to be made in terms of the contract, a notice of deposit under S 83 served within *Jeth* of the year before the commencement of the agricultural season on the 1st of *Asarh* of the year is sufficient.(8)

15. Notice before payment is not necessary when mortgagee demands mortgage money.

The English rule of six months' notice by the mortgagor of his intention to pay off the mortgage is not applicable, even in England, where the mortgagee himself demands the payment of his mortgage debt or takes steps to compel the payment thereof.(1) In such a case the mortgagee is

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Also see Section 60, Note 40

2. (1840) 59 ER 678 (679) : 10 Sim 420

3. (1867) 36 LJ Ch 671 (672) : 17 LT 100 Bartlett v. Franklin.

   [**See also** (1911) 80 LJ Ch 532 (535) (1911) 2 Ch 301 (309), Edmondson v Copland (Notice by mortgagee to mortgagor to pay off mortgage — Failure to pay on date named — Subsequent tender improperly refused — **Held**, that good tender having been made, the mortgagor was not bound to give fresh notice or pay interest for six months.)]

4. (1892) 61 LJ Ch 231 (232) (1892) 1 Ch 385 (388, 389), Fitzgerald's Trustee v Mellersh

5. See Section 60, Note 40.

6. AIR 1951 Punj 404 (406) ILR (1950) Punj 271 (Section 84 clearly shows that absence of stipulated notice of intention to redeem is no bar to tender or payment and if it is no bar to the right to redeem it is difficult to see how it can be a bar to a suit to redeem) ** AIR 1924 Bom 264 (269) ** AIR 1923 All 24 (25) (DB). (**Held**, there was no contract in this case)

7. See the Report of the Special Committee

   [**See also** (1912) 15 Ind Cas 592 (593, 594) (All)]

8. AIR 1956 Pat 201 (203) 35 Pat 177 (In such a case if the mortgagor brings a suit for redemption he would be entitled to mesne profits from the mortgagee from the date of deposit.)

Section 84 — Note 15

1. (1911) 80 LJ Ch 532 (536) (1911) 2 Ch 301 (307), Edmondson v Copland ** (1891) 60

bound to accept the principal and the interest tendered by the mortgagor, even if there is some delay in complying with his notice, a mere failure to pay within the time prescribed in the notice does not render the mortgagor liable to pay an additional six months' interest (2) This view was followed in a Bombay case, *Nadershaw Sheriarji v Shirinbai Bapuji*(3) where the parties had agreed to give three months' notice before payment of the mortgage money The mortgagee gave the mortgagor a notice demanding his money within three months but due to some pending suits no action was taken upon this notice by mutual consent of the parties A tender was made two years after the expiry of the period fixed in the notice and it was held, that in the circumstances of the case, the delay was excusable and that, it did not render the mortgagor liable to pay three months' additional interest in lieu of notice.

16. Refusal of tender and costs.

A mortgagee is entitled to his general cost in a suit for redemption or foreclosure, unless he forfeits the right by some improper defence or other misconduct (1) The contract between the mortgagor and the mortgagee is understood to make the mortgage a security not only for the principal interest and such other ordinary charges and expenses as are usually provided for in the instrument but also for the costs properly incidental to a suit for redemption or foreclosure Thus, the mortgagee's right to costs rests substantially on contract between the parties and can only be lost or curtailed by such inequitable conduct on the part of the mortgagee as may amount to a violation or neglect of his duty under the contract (2) An improper refusal of a valid tender which renders a suit for redemption necessary deprives a mortgagee of his costs he may even be ordered to pay the costs of the mortgagor (3) So also a suit for foreclosure by a mortgagee who has refused a proper

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LJ Ch 694 (696) (1891) 3 Ch 550, Smith v Smith (Mortgagee taking no steps to compel payment of his security.)

2. (1911) 80 LJ Ch 532 (536) (1911) 2 Ch 301 (309) Edmondson v Copland

3. AIR 1924 Bom 264 (270).

Section 84 — Note 16

1. AIR 1942 Mad 307 (310) ILR (1942) Mad 550 (DB) ** AIR 1916 Oudh 279 (281) (Mortgagee awarded costs.) ** (1912) 35 Mad 44 (46) (DB) (1872) 28 Ch App 295 Foll ** (1872) 42 LJ Ch 417 (419) 8 Ch App 295, Cotterell v Stratton ** (1889) 58 LJ PC 82 (84) 14 App Cas 273 Bank of New South Wales v O'Connor (Mortgagee may even have to pay costs of such an action in a case where he has acted vexatiously or unreasonable.) ** (1889) 58 LJ Ch 556 (556) 42 Ch D 610 60 LT 892, Kinnaird v Trollope.

2. (1872) 42 LJ Ch 417 (419) 8 Ch App 295 Cotterell v Stratton ** AIR 1942 Mad 592 (593) : ILR (1943) Mad 205 (DB) (The fact that a prior mortgagee refused to accept a deposit made by a subsequent mortgagee under S 83 T P Act when it is found that the deposit under S 83 was not full and correct and that the mortgagors were not made parties to the application under S 83 cannot amount to vexatious or unreasonable conduct on the part of the prior mortgagee so as to disentitle him to costs in a later suit for redemption by the subsequent mortgagee.)

3. AIR 1952 Trav-Co 92 (96) 1950 Trav-Co LR 398 (DB) (In a redemption suit the mortgagor is normally not entitled to his costs but the defendant mortgagee refusing to accept a proper tender by mortgagor is also not entitled to costs of the suit Where both the parties are at fault the order will be that both parties will bear their own costs.) ** (1889) 58 LJ PC 82 (87) 14 App Cas 273, Bank of New South Waives v O Connor ** (1899) 1 Bom LR 381 (383) (DB) ** (1843) 63 ER 268 (271) 7 Jour 1108 Cliff v Wadsworth (Mortgagee made to pay the costs.) ** (1840) 49 ER 34 (35) 3 Beav 86 Hodges v Croydon Canal Co (But as there was no tender the mortgagor was ordered to pay the costs.) ** (1911) 80 LJ Ch 532 (536) (1911) 2 Ch 301 (309), Edmondson v Copland (Mortgagee being wrong made to pay general costs of action.)

[**See also** (1909) 3 Ind Cas 346 (348) (DB) (Cal). (Suit for rent.)]

render will disentitle him to his costs.(4)

The mere fact that a mortgagee claims more than what he is entitled to will not, however, deprive him of his costs.(5)

See also Notes on Civil Procedure Code, O 34, R. 10 in the Appendix.

17. Plea as to insufficiency of tender or deposit.

If a mortgagee denies the fact of a tender, he cannot subsequently raise a plea that the amount tendered was not sufficient or that it was not legally valid (1) So also where a mortgagee admits that the amount deposited was the amount due on the date of deposit but was refused by him on some other ground, he cannot, in a subsequent suit on the mortgage, allege that the amount deposited was insufficient.(2)

The question of sufficiency or insufficiency is a question of fact, which cannot be determined without going into evidence and, hence, cannot be raised for the first time in second appeal Similarly, the question whether money was kept ready or not after tender is also a question of fact which cannot be raised for the first time in second appeal.(3)

The finding that there was a valid tender of money by the mortgagor is a finding of fact and cannot be attacked in second appeal.(4)

18. Section 14 of Bombay Regulation V of 1827 and Section 84.

As has been seen in Note 7 a tender or deposit must, under this section, be of the entire amount due on the mortgage, in order that interest may cease to run But S 14 of Bombay Regulation V of 1827 which is still in force in the Bombay Presidency lays down that "If a debtor can prove that he has tendered the whole or *any portion* of the amount due, all further interest shall cease on the amount tendered." As the said section is not expressly repealed by this Act, it is not affected by this section by virtue of S 2, Cl (a). It has, therefore been held that in the Bombay Presidency a tender by a mortgagor even of a partial amount due will stop the running of interest under S 14 of the abovementioned Regulation (1) The tender must, however, be valid. A conditional tender asking the mortgagee to accept the partial tender in full discharge of the mortgage debt is invalid and hence inoperative to stop interest even under S 14 of the said Regulation (2)

19. Tender and deposit in possessory mortgages.

Where the mortgage is one with possession, and a valid tender or deposit is made of the mortgage amount, interest will of course cease to run on the mortgage amount, from the date of the tender or in the case of a deposit from the date of service of notice on the mortgagee The conse-

4. AIR 1929 Pat 397 (397) (DB)

[See also (1889) 58 LJ Ch 556 (561) 42 Ch D 610 Kinnaird v Trollope]

5. (1912) 35 Mad 44 (46) (DB) ** AIR 1916 Oudh 279 (281) ** (1872) 42 LJ Ch 417 (421) 8 Ch App 295, Corterell v Stratton ** (1889) 58 LJ Ch 556 (560) 42 Ch D 610, Kinnaird v. Trollope

Section 84 — Note 17

1. AIR 1949 Mad 535 (535) ILR (1949) Mad 657 (DB) ** AIR 1914 Cal 823 (824, 825) (DB).
2. AIR 1922 Nag 174 (175). (Sufficiency of deposit not challenged on the date of deposit — **Held,** mortgagee should be taken to have admitted the sufficiency of the deposit)
3. AIR 1922 Pat 167 (169) : 1 Pat 350 (DB)
4. AIR 1925 Lah 353 (354)

Section 84 — Note 18

1. AIR 1924 Bom 264 (270) (DB)
2. AIR 1924 Bom 264 (273) (DB).

quence of this is that the mortgagee will be liable to the mortgagor from such date for mesne profits (1) On deposit of the principal amount interest ceases from the date of tender If the mortgagor obtains possession of the property from a tenant the mortgagee's suit for injunction and possession cannot be decreed (2) Of course, the deposit must be kept good If the mortgagor withdraws the money from Court, he will, from that date be disentitled to mesne profits (3)

Where the principal amount had been deposited by mortgagor in full after serving notice under S 83 the interest on principal money ceased from date of deposit by mortgagor and notwithstanding the subsistence of mortgage the mortgagee lost the right to get into possession of mortgaged house as usufructuary mortgagee, when mortgagor himself obtained possession of house from the tenant, father of mortgagee.(4)

[A]Suits for Foreclosure, Sale or Redemption

85. PARTIES TO SUITS FOR FORECLOSURE, SALE AND REDEMPTION.— [Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S 156 and Schedule V.]

[A] For the repealed provisions as re enacted, see the Code of Civil Procedure 1908 (Act V of 1908 Schedule I. Order XXXIV.

Foreclosure and Sale

86 to 90.— [Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S. 156 and Schedule V.]

Redemption

[A]**[91. PERSONS WHO MAY SUE FOR REDEMPTION.—** Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely :—

(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

(b) any surety for the payment of the mortgage debt or any part thereof, or

(c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property]

Section 84 — Note 19

1. AIR 1962 Pat 203 (203). (Institution of suit for redemption of usufructuary mortgage — Not tantamount to tender of mortgage money Deposit in Court after preliminary decree for redemption — Mesne profits can be awarded only from date of deposit and not from date of institution of suit) ** AIR 1953 Mad 821 (821) (DB) ** AIR 1952 Tras Co 236 (236) (DB). (Mortgagor who has obtained a decree for redemption can claim mesne profits only from the date of service of the notice of deposit on the mortgagee till the date of actual delivery of possession to the mortgagor) ** AIR 1923 Mad 354 (354) (DB) ** AIR 1938 Mad 405 (413) (DB) (Deposit made but subsequently withdrawn by mortgagor — Mortgagor not able to produce amount even at time of redemption He is entitled to mesne profits only for period when deposit was in Court) ** AIR 1930 All 609 (610) (DB) ** AIR 1928 All 156 (157) ** AIR 1929 Rang 271 (271) ** AIR 1924 Nag 285 (286)
2. 1981 UPLT (NOC) 99 : (1981) 7 All LR 63
3. AIR 1938 Mad 405 (413) (DB)
4. 1981 UPLT (NOC) 99 : (1981) 7 All LR 63

[A] Substituted for the original section by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S.46.

Synopsis

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22A. **Co-mortgagors.**

23. **Member of Malabar tarwad.**
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28. **Person holding decree for sale of mortgaged property.**
29. **Trustee.**
30. **Benamidar.**
31. **Guardian of property of minor mortgagor and curator of lunatic mortgagor.**
32. **Trespasser.**
33. **Person having no interest redeeming mortgage — Effect of.** See Notes on Section 92
34. **Person with imperfect title to equity of redemption.**
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36. **Mortgage by occupancy tenant — Right of person recognised by landlord as tenant to redeem.**
37. **Clause (b) — Surety.**
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39. **"May redeem."**
40. **Partial redemption.**
41. **Order of redemption.**
42. **Onus of proof.**
43. **Whether section applies to redemption of charges.**
44. **Law in the Punjab.**
45. **Right of redemption of persons not made parties to suits relating to mortgages.**
46. **Limitation for suits for redemption of mortgagees.** See the AIR Commentaries on the Limitation Act 7th (1997), Edn., Art 61(a).

1. Legislative changes.

The present section has been substituted by S 46 of the Transfer of Property (Amendment) Act 20 of 1929 for the original section which ran as follows :

"Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property :

(a) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property;

(b) any person having any interest in or charge upon the right to redeem the property,

(c) any surety for the payment of the mortgage debt or any part thereof,

(d) the guardian of the property of a minor mortgagor on behalf of such minor;

(e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot

(f) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property;

(g) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property."

The Special Committee in proposing the change observed as follows:

"Section 91 specifies persons who, in addition to a mortgagor, are entitled to redeem. Clauses (a) and (b) can be suitably combined in one clause. Clauses (d) and (e) are superfluous and, in our opinion, should be omitted. An attachment does not create any interest such as a charge or a lien in the property attached (ILR 29 Cal 428, 32 Mad 429) and there is no reason why an attaching creditor should have the right of redemption. We, therefore, propose to omit clause (f)."

2. Scope of the section.

Section 60 deals with the mortgagor's right to redeem the mortgaged property and this section enumerates the persons who, in addition to the mortgagor, are entitled to redeem or institute a suit for redemption of the mortgaged property (1). The right of redemption conferred by the section on other persons is, however, the same right which the mortgagor possesses under S. 60 and not a different kind of right (2). The persons who are given the right of redemption under the section may be broadly grouped under two heads, i.e., persons having an interest in or charge upon the mortgaged property or in or upon the right to redeem the same (Clauses (a) to (c)) and persons who have no interest or charge upon the mortgaged property or in or upon the right to redeem it but who are given a personal right to redeem on some special grounds (Clauses (d) and (e)) (3).

A co-mortgagor can redeem the entire mortgage without impleading other mortgagors as co-mortgagors are not necessary parties in a suit for redemption (4).

Where a person who has no interest in the equity of redemption or the property mortgaged pays off the mortgage and goes into possession, a suit for possession against him by the owner of property without paying the mortgage money is maintainable. This is so on the basis that the person going into possession is a mere volunteer and not subrogated to the rights of mortgagee (5).

Though the rights redeemed under S. 91 are not made applicable to the State of Punjab and Haryana, but the right to redeem and principles of subrogation being principles of good conscience and equity they can be made applicable to cases arising in these States (6). A usufructuary mortgage can be redeemed only by operating another document and not by putting up a story that it was orally redeemed unless redemption by a subsequent deed and receipt for consideration of mortgage amount is executed.(7)

3. "Besides the mortgagor."

This section deals with the right of redemption of persons other than the *mortgagor*, though it recognises the mortgagor's right of redemption, as is shown by the words "besides the mortgagor" (1). The mortgagor himself has a right of redemption given to him by S. 60. Section 59-A

Section 91 — Note 2

1. See the report of the Special Committee ** AIR 1917 All 110 (110) : 39 All 536 (DB) ** (1891) 13 All 432 (454) (FB).
2. AIR 1917 All 110 (110) : 39 All 536 (DB)
3. AIR 1936 Nag 209 (213) : ILR (1936) Nag 1 (7) (DB) ** AIR 1939 Pat 7 (9) : 18 Pat 155 (DB)
4. 1989 HRR 34 (Punj. Har) ** AIR 1990 (NOC) 73 : (1989) 2 Ker LJ 521
5. AIR 1984 Pat 362 (364, 365) : 1984 Pat LJR 894
6. (1983) 85 Pun LR 558.
7. 1990 SCD 68 (All)

Section 91 — Note 3

1. (1911) 34 Mad 115 (117) (DB) ** AIR 1921 Mad 51 (52) (DB).

provides that "unless otherwise expressly provided," the word "mortgagor" shall be deemed to include persons deriving title from him. It has been held by the High Court of Bombay that this section is one of such express provisions inasmuch as, in providing that "besides the mortgagor the following persons are entitled to redeem" and in including among those persons such persons as derive title from the mortgagor, it clearly distinguishes between the mortgagor and persons deriving title from him. Consequently, a purchaser from the mortgagor, for instance, is entitled to redeem, not by virtue of S. 60, but by a virtue of this section.(2)

The mortgagor must, in order to be entitled to redeem, have an *existing right* in the equity of redemption.

Even the smallest interest in the property is sufficient to entitle a person to redeem the mortgage. Interest in mortgaged property is not the same as interest in the mortgage security. Order 34, R. 1, C.P.C. is procedural and does not create a substantive right to redeem the mortgage which is given under S. 91.(3)

If he absolutely and entirely parts with it, his right to redeem comes to an end.(4) But if, even after he has absolutely parted with his equity of redemption, he is sued by the mortgagee upon his *covenant to pay the mortgage debt* he acquires a new right to redeem and is entitled to a reconveyance to himself, *subject* of course to *any equity of redemption that may have vested in any other person*.(5) In *Dhana Koeri v. Ram Kewal*(6) it has been held that this principle will apply not only when the mortgagee sues the mortgagor on the covenant but also on the mortgage debt. In that case, I mortgaged property to *B* by way of simple mortgage and then to *C* by way of usufructuary mortgage. *B* sued on his mortgage impleading only. A obtained a decree for sale and, in execution,

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[See also (1955) 1 Mad LJ 223 (223) (Under S. 91 it is open to any co-sharer to redeem a mortgage executed by himself and other co-sharers.)]

2. AIR 1942 Bom 98 (99) : ILR (1942) Bom 69 (DB) (Auction purchaser under money decree paying off a mortgage is entitled to subrogation against subsequent mortgagee.)

   [See however 1964 Ad LJ 244 (246) (If a person is not a mortgagor within the limited meaning of the expression under S. 58 or within the extended meaning given to it by S. 59-A, he cannot be regarded as a mortgagor although he may be interested in the mortgaged property and may be entitled to redeem the mortgage.)]

   Also see S. 59-A, Note 4.

3. AIR 1971 Raj 175 (176) : 1971 Raj LW 277.

4. AIR 1951 Cal 202 (204, 205) : ILR (1951) 2 Cal 309 (DB) (But a mortgagor who has entirely parted with his interest in the mortgaged property cannot actively enforce his right to redeem when sued upon the personal covenant.) ** AIR 1921 Mad 51 (53, 54) (DB) ** AIR 1920 Oudh 269 (270) : 23 Oudh Cas 113 (A mortgagor creating subsequent mortgages on the same property cannot redeem the first mortgage without redeeming all the subsequent ones as before such redemption of the subsequent mortgages his right of redemption which he has parted with by the subsequent mortgages does not become vested in him.) ** (1904) 27 Mad 428 (429) (DB).(Sale in execution of a decree.) ** AIR 1916 Pat 375 (380) (DB) (Do.)

   [See also AIR 1925 Rang 377 (381) : 3 Rang 367 (DB).]

   [See however AIR 1959 Bom 172 (174) : ILR (1958) Bom 756 (Even if a mortgagor has parted with the right of redemption and the equity of redemption has become vested in a third person he is always entitled to a right to redeem the mortgaged property.)]

5. AIR 1951 Cal 202 (204) : ILR (1951) 2 Cal 309 (DB) ** (1888) 39 Ch D 636 (645) : 57 LJ Ch 905 : 37 WR (Eng) 234 : 59 LT 433, Kinnaird v. Trollope ** AIR 1930 Pat 570 (572, 573) : 10 Pat 197 (DB).

   [See also AIR 1921 Mad 51 (53) (DB).]

6. AIR 1930 Pat 570 (572, 573) : 10 Pat 197 (DB).]

   [See also AIR 1950 Assam 59 (65) (DB) (AIR 1930 Pat 570, Foll.)]

purchased the property himself. Being unable to obtain possession he again sued both *C* and *A*. A decree was passed that *C* should redeem *B* and that, if he failed to do so, *B* should redeem *C* redeemed *B*. It was held that the consequence of it was that *B* mortgage was satisfied, that therefore *ipso facto* the decree and sale in favour of *B* were vacated, and that the equity of redemption came again into the hands of *A*. *B* could have got in the whole estate by redeeming *C* but if he did not take that course, then, he must be taken to have fallen back on his mortgage and thus revived the equity in *A*. *A* could, therefore, redeem *C* by payment of the amount due under *C*'s mortgage plus the amount paid by *C* to *B*. Where, however, the decree in *B*'s suit against *C* remained unsatisfied, it was held in the undermentioned case(7) that mere suit by *B* against *C* or passing of a decree therein had not the effect of reviving the right of redemption in *A*. In another case where the equity of redemption had passed to *B* in execution of a decree in his suit against *A* only, it was held by the Kerala High Court(8) that there could be no question of revival of right of redemption in *A* when later *C* redeemed or paid off *B*.

A subsequent mortgagee having been instrumental in bringing about the auction sale by the prior mortgagee cannot lose his character as a mortgagee and his purchase of the equity of redemption was only in trust for the mortgagor and there was no need to set aside the sale, the suit for redemption being maintainable.(9)

4. Clause (a) — General.

This clause refers to four classes of persons who are entitled to redeem

(a) persons having an interest in the *property mortgaged*,

(b) persons having a *charge* upon the *property mortgaged*,

(c) persons having an *interest in the right to redeem* the property mortgaged, and

(d) persons having a *charge* upon the *right to redeem* the property mortgaged (1)

The "property mortgaged" is not the same thing as "the right to redeem the same." The former has reference to a stage *before the mortgage was executed* and comprises the *entire interest* of the mortgagor which was offered as security under the mortgage. The latter has reference to a stage *after the mortgage is executed* and comprises the mortgagor's interest which *remains* after deducting the mortgagee interest (2). Again, the words "property mortgaged" and "right to redeem the

7. AIR 1954 Trav-Co 384 (387) (DB) (Suit by prior mortgagee — Puisne mortgagee not impleaded — Decree passed and property sold in execution — Auction purchaser failing to get possession — Auction-purchaser suing puisne mortgagee for auction amount — Suit decreed. **Held** that the passing of a decree to redeem the auction purchaser had not the effect of divesting the latter's title to the equity of redemption and revesting it in those in whom it vested prior to the auction sale, so as to enable them to sue for redemption — AIR 1930 Pat 570 Explained and Disting.)

8. AIR 1959 Ker 56 (58) : ILR (1958) Ker 1133 (DB) (AIR 1930 Pat 570 and AIR 1950 Assam 59. Criticised.)

9. 1981 TLNJ 14 (16)

Section 91 — Note 4

1. (1978) 80 Pun LR 195 : 1978 Rev LR 137 ** AIR 1959 Mys 39 (41) : ILR (1958) Mys 239 (Wehre one of the co-owners mortgages not only her share of the property but the entire property, without the concurrence of the other co-owners, the other co-owners have right to redeem the same.)

[See AIR 1953 Bom 315 (316) : ILR (1953) Bom 727 (Clause (a) of S 91 was amended in 1929 and apparently the amendment was made with a view to follow the English rule under which the mortgagor and all persons having any interest in the property subject to the mortgage are allowed to redeem.)]

2. AIR 1959 Mys 39 (41) : ILR (1958) Mys 239 ** AIR 1955 All 610 (611) ** AIR 1947 Nag 210 (222) : ILR (1947) Nag 740 (DB)

same" cannot obviously comprise interests which the mortgagor did own and which could not be transferred by the mortgagor by way of mortgage Thus suppose, *A*, the owner of proprty *x*, executes a mortgage first in favour of *B* and then in favour of *C* *B* cannot be said to have any interest in the "property mortgaged" to *C*, inasmuch as what was mortgaged to *C*, was the equity of redemption remaining in *A* after the mortgage to *B* The same view may be expressed by saying that the interest of any person which is *not bound* by the contract of mortgage is not an interest in the "property mortgaged" or in the right to redeem the same and the owner of such interest is not entitled to redeem the mortgage under this clause **(3)** A co-debtor who is not a mortgagor, having no property belonging to him, but who is personally liable for the mortgage debt under the terms of the mortgage is a person entitled to redeem the mortgage within the meaning of the section **(4)**

Any of the co-mortgagors can redeem the entire mortgage without impleading the other co mortgagors as parties to the suit.**(5)**

But it is not necessary that in order that a person may have an interest in the "property mortgaged" he should have *derived his title* from, or should have claimed through the mortgagor, though it is necessary that such interest is *bound* by the mortgage **(6)**

Notwithstanding the insolvency of the mortgagor he is entitled to redeem under S 91 **(7)**

A person claiming paramount title has no interest in the mortgage security or the right of redemption and, therefore is not a person entitled to redeem **(8)** (See Civil P C , O 34, R 1, Note 5).

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3 AIR 1947 Nag 210 (215 222 ILR (1947) Nag 740 (DB) (No person whose interests are not affected by a mortgage can redeem the mortgage Lease subsequent to mortgage binding on the mortgagee — Lessee cannot redeem.) ** (1908) 4 Nag LR 9 (11) (Mortgage by some coparceners Other coparcener held could not redeem) ** AIR 1915 Lah 199 (200) (DB) (A B and C brothers — Estate though still joint each dealt with specific portions as his own and effected separate mortgages — Suit by A for redemption of mortgage by B — **Held** that technically A had interest in every inch of joint estate but in fact its joint character must be regarded as in a State of suspension at any rate till the redemption of the mortgages hence A could not redeem) ** (1901) 5 Cal WN 83 (85) (DB) (Holder of raiyati interest or purchaser of equity of redemption cannot redeem) ** AIR 1917 Nag 133 (134 135) 14 Nag LR 117 (Lease made subsequent to the mortgage — Lessee who is prejudiced by sale or foreclosure can redeem) ** (1907) 29 All 679 (682) (Perpetual lease of sir land for premium and annual rent — Lessee was not to be ejected even for non payment of rent — Lessee was held to be entitled to redeem) ** **(1891) 13 All 432 (454) (F B)** ** AIR 1930 Nag 173 (175 176) 26 Nag LR 208 (One coparcener not being manager, mortgaging — Other coparceners cannot redeem.)

[See also **(1886) 12 Cal 414 (422) , 12 Ind App 171 (PC)**. (Person made party to mortgage suit but who claims a paramount title and gets the suit dismissed against him cannot afterwards redeem.)]

[**See however** AIR 1926 Nag 496 (498) 23 Nag LR 128 (Mortgage Subsequent lease by mortgagor — It was observed that the lessee "becomes a transferee of a portion of equity of redemption and as such is a person having an interest in the property or at least in the right to redeem the property.")]

4. 1954 All LJ 336 (339) (DB)

5. 1976 Rev LR 79 (81) (Punj)

6. (1908) 4 Nag LR 9 (11) (Thus the nearest reversioner can redeem mortgage by Hindu widow) ** AIR 1934 Bom 32 (33) 58 Bom 75

[**See however** AIR 1915 Lah 199 (200) (DB) ("The interest contemplated by this section must be an interest derived directly or indirectly from the mortgagor since the time of the making of the mortgage ")

7. ILR (1976) 3 Mad 257 (318)

8. AIR 1948 Nag 369 (371) : ILR (1948) Nag 584 (DB).

This clause gives a right of redemption not only to a person having an *interest* in the property mortgaged or in the right to redeem the same, but also to a person having a *charge* upon such property or right to redeem **(9)** As has been seen in Note 4 on S 58 a charge does not create any interest in the property though under certain circumstances the property may be made liable for **the payment of the money charged.**

Illustrations

(1) A and his son *B* constitute a Mitakshara undivided Hindu family A mortgages the family property to *C* for purposes binding on the family *B* is a person having an interest in the property mortgaged and so can redeem *C* *B* it may be noted does not claim through *A* **(10)**

(2) *A* a Hindu widow mortgages her husband's property to *B* for purposes binding on the estate After the death of *A* *C* the next reversioner is a person having an interest in the property mortgaged and so can redeem *B* It may be noted here also that the reversioner *C* does not claim through the **widow but only through the last male owner (11)**

(3) *A* is the owner of property *X* and *B* has a *charge* on that property for certain amounts due A mortgages the property to *C* who takes it *bona fide* without notice of the charge The mortgage is binding on *B* *B* can, therefore, as a person having a charge upon the property mortgaged redeem *C*

(4) *A* mortgages property first to *X* and then to *Y* *Y* has an *interest* on the right to redeem remaining in *A* after the prior mortgage to *X* He is therefore entitled to redeem *X* **(12)**

(5) *A* mortgages property *X* to *B* and then sells his equity of redemption to *C* for a consideration of Rs 4,000, which however is not paid Under S 55 sub s (4) (b) *A* has a *charge* on the equity of redemption transferred to *C* *C* has a *charge* on the right to redeem and so can under this **clause, redeem *B* (13)**

(6) Brother and son of deceased mortgagor being his co-sharers are entitled to redeem **(14)**

(7) Where the mortgagee of a property obtained a decree for sale against the mortgagors without impleading the purchaser of a portion of that property from the mortgagor the purchaser was not represented in execution of his decree Held that the sale in execution although it was valid and effective as against the mortgagors who were parties to the action did not affect the right of redemption of the **purchaser from the mortgagor as he was not impleaded as a party (15)**

(8) Where a mortgagor sold the mortgaged property to the mortgagee and the mortgagee subsequently

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9. (1978) 80 Pun LR 195 1978 Rev LR 137 (140) ** (1896) 19 Mad 151 (153) (DB) (Lessee can redeem.) ** (1836) 164 Ind Cas 1009 (1010) (Cal) (By a consent decree it was provided that certain property would remain charged for the lessee's rent subject to a lien as encumbrance — It was held that the decree was compulsorily registrable under S 17(2) (vi) of the Registration Act 1908 and as it was not so registered the decree holder could not claim any charge on the property so as to be able to redeem a mortgage on the property ** (1898) 11 CPLR 95 (96 101 102 Superior proprietor having a decree against an inferior proprietor for revenue payable under a sub settlement, has charge on the properties comprised in sub settlement) ** AIR 1920 Lah 486 (488) (DB A mortgaged certain property to B and then sold the equity of redemption to C C sued B for the redemption of the mortgage making A a co-defendant — A alleged that his consent to the sale was caused by undue influence and fraud there was no consideration for the sale and the sale was void — It was held that the defence of fraud and undue influence would not avail as part of consideration was proved to have been paid by C to A and this sum constituted a charge **upon the land entitling C to maintain the redemption suit.)**

10. See Note 21

11. See (1908) 4 Nag LR 9 (11)

12. See Note 5.

13. AIR 1925 Mad 778 (778) (Part of the consideration was reserved in this case)

14. AIR 1982 All 503

15. AIR 1968 Bom 106 (108) : 69 Bom LR 504 (DB)

executed a document stating that the sale deed was fictitious, that he had not paid any amount towards purchase price that the only amount due to him was the mortgage debt the sale of property could not be said to have taken place That being so the mortgage subsisted and so too the right of the son of the mortgagor to redeem so long as that right was not foreclosed **(16)**

The "interest" contemplated by the clause is obviously not confined to the right of *ownership* but may be any interest in the property however small it may be **(17)** It may accrue by succession, conveyance or contract **(18)** It must, however, be a *present* interest and not a mere contingent or future interest.**(19)** i e , it must be an interest actually in existence at the time when the right of redemption is claimed.**(20)** A reversionary interest under the Hindu law cannot be said to be a *present interest* as it is merely a *spes successionis* **(21)** But although it is necessary that the person should have a *present interest* in the property or in the right to redeem it, *a present right to the possession and enjoyment* of the property is not essential **(22)**

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16. AIR 1972 SC 806 (810, 811) : (1972) 2 SCJ 242 (2).

17. AIR 1959 Mys 39 (41) ILR (1958) Mys 239 ** AIR 1955 All 610 (611) (Cultivating lessee who has been granted a lease when a usufructuary mortgage has already come into existence has an interest in the property mortgaged as also in the right to redeem) ** AIR 1924 All 147 (147) (In the case of an occupancy holding if one parcel is mortgaged and another parcel is free from the mortgage and a person is joint in cultivation with the mortgagor in the latter, that is enough to give him a right to redeem the former) ** (1888) 39 Ch D 456 (462) 57 LJ Ch 1085 59 LT 742 37 WR (Eng) 276 Tarn v Turner (Lease after mortgage for a term Lessee can redeem) ** (1896) 19 Mad 151 (153) (DB) (Verumpattom tenant in Malabar of an ottidar may redeem) ** AIR 1929 Bom 139 (140, 141) 53 Bom 353 (Purchaser of shares of some co mortgagors is entitled to redeem) ** AIR 1927 Cal 479 (480) ** AIR 1926 Nag 496 (498) 23 Nag LR 128 (Lease after mortgage Lessee may redeem) ** (1869) 5 Ch App 227 (229) 39 LJ Ch 342 22 LT 190 19 W R (Eng) 196 Pearce v Morris ** (1881) 6 Cal 663 (664) (Mortgage — Attachment — Attaching creditor cannot redeem)

[**See also** AIR 1957 Mys 65 (68) ILR (1957) Mys 1 (DB) (Interest in making payment does not mean such an interest as will stand the test of a judicial trial and all that is necessary is that the person making the payment should honestly and really believe payment to be necessary in his own interest.)]

18. AIR 1932 All 643 (647) (DB).

19. AIR 1956 Mad 304 (306) ** (1908) 30 All 497 (498, 499) (DB) (Reversionary heirs of Hindu mortgagor cannot redeem during the lifetime of his widow who is in possession) ** AIR 1930 Oudh 294 (296) 5 Luck 691 (DB) (Do) ** AIR 1919 Oudh 217 (220) (DB) (Reversioner cannot redeem 8 Oudh Cas 349, **Dissented from.**) ** AIR 1914 Upp Bur 45 (49) 2 Upp Bur Rul 46 (Under Buddhist law a daughter has no such an interest in the property sought to be redeemed during the lifetime of her mother as is contemplated by the section.)

20. AIR 1935 Oudh 139 (141) 10 Luck 531 (DB) (Puisne mortgagee whose right to foreclose is time-barred cannot redeem) ** (1902) 15 CPLR 175 (177) (Landlord's right of pre-emption under S 41 of Tenancy Act against absolute occupancy holding is contingent

21. See Note 16

22. AIR 1956 Mad 304 (306) ** AIR 1929 Nag 27 (28 29) (A legatee who is to get the devised property after the death of the testator and his wife, and who survives the testator, has after the testator's death, a vested interest in the property and consequently his son is entitled to redeem a mortgage executed by the testator.

[**See** (1909) 12 Oudh Cas 197 (200) (DB) (Custom that where person holding grove abandons village the rights in grove revert to zamindar — Hence on such abandonment zamindar can redeem mortgage of the grove 1 Oudh Cas 42 **Overruled.**) ** (1909) 12 Oudh Cas 201 (204) (DB), (Do — But not while the mortgagor is alive and resides in the village.)]

The "interest" or "charge" must be a *validly vested* "interest" or "charge." An invalid interest or charge will not entitle a person to claim the right of redemption under the clause **(23)**

A transfer of the common property by one of the co-owners is assertion of exclusive right in himself, followed merely by possession by the transferee for over twelve years without knowledge or ouster of the other co-owners cannot operate to bar altogether the rights of such others **(24)**

If all persons entitled to redeem property or some of them institute suit for redemption and one of them dies during the pendency of the suit, the suit does not abate even if the LRs of the deceased are not brought on record.**(25)**

5. Puisne mortgagee.

After the creation of the prior mortgage it is only the right to redeem the property which is left in the mortgagor and when he creates a subsequent mortgage on the same property it is only the right to redeem which is mortgaged to the subsequent mortgagee **(1)** A puisne mortgagee is thus a person who has an interest in the "right to redeem" the mortgaged property under the prior mortgage**(2)** and is consequently entitled under this clause to redeem or to institute a suit for redemption of the prior mortgage.**(3)**

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23. (1938) 42 Cal WN 1106 (1109)

[**But see** AIR 1945 Pat 289 (291) : 24 Pat 263 (DB) (Mortgage of holding — Sale of holding in execution of rent decree — Decree and sale held void as decree was passed by Civil Court — Auction purchaser though mere trespasser was held entitled to redeem as person interested in the mortgaged property — Note — The reasoning of the decision on this point is not clear. Perhaps it was assumed that the possession of the auction purchaser gave him a right to redeem.)

24. AIR 1975 Ker 39 (43) : 1975 Ker LT 269 (AIR 1963 Ker 249, **Overruled.**)

25. (1976) 78 Pun LR 917 (919) : 1976 Pun LJ 642

Section 91 — Note 5

1. AIR 1924 Nag 191 (194) ** AIR 1924 Nag 198 (199).

2. (1905) 22 Cal 33 (39) (DB) ** (1904) 28 Bom (Supp) 163 (DB) ** (1884) 8 Bom 468 (473) (DB) ** AIR 1924 Nag 191 (194) ** (1897) 20 Mad 35 (37, 38) (DB) — Second mortgage is as to the second mortgagee nothing but an assignment of the mortgagor's interest — As an assignee of the mortgagor the second mortgagee may insist upon all the rights of a mortgagor against the first mortgagee.)

[**See also** (1882) 20 Ch D 724 (732) : 51 LJ Ch 621 : 47 LT 208 : 30 WR (Eng) 716 Teesdale v. Smith (The mortgagor by mortgaging the property to the second mortgagee makes him his assign.)

3. AIR 1933 Mad 583 (583) : 56 Mad 846 (FB) ** 1866 Agra 7 (12) (FB) ** 1950 MPLJ 866 (867) ** 1955 I Mad LJ 223 (223) (Mortgage by separated member of tarwad — Mortgagee has right to redeem a previous mortgage binding on tarwad) ** AIR 1953 Bom 405 (407) : ILR (1954) Bom 10 (DB) (Prior mortgagee obtaining decree without making puisne mortgagee party — Execution — Mortgaged property put to sale — Rights of puisne mortgagee are not affected so long as they are not barred — His right to redeem prior mortgagee subsists — His claim cannot be rejected on the ground that the amount of redemption will lead to consequential relief of possession [illegible] ** AIR 1952 Trav-Co 386 (387) (DB) (Superior mortgage for certain period with direction to redeem pre-existing mortgage — Suit to redeem pre-existing mortgage beyond the period — **Held,** period specified would not shorten period within which a puisne mortgagee could file suit for redemption of the prior mortgage and that he could bring suit within period during which mortgagor himself could file suit for redemption) ** AIR 1950 Assam 59 (65) : ILR (1949) 1 Assam 59 (DB) (Suit for sale by prior mortgagee — Puisne mortgagee cannot be impleaded — Prior mortgagee purchasing property in execution — Puisne mortgagee has right to redeem mortgage — On redemption equity reverts to mortgagor — (Obiter)) ** AIR 1948 Mad 412 (415, 416) (Puisne mortgagee's right to redeem — not taken away

A subsequent mortgagee does not lose the benefit of his mortgage merely for delay in paying off the prior encumbrances when the prior mortgagee proceeds against the mortgagor. The subsequent mortgagee can be called upon to discharge the prior mortgage **(4)**

by sale in execution of prior mortgage decree to which he was not a party.) ** AIR 1939 Cal 15 (18). ILR (1938) 2 Cal 643. (A second mortgagee seeking to redeem the first mortgagee is bound to pay not the amount of the first mortgagee's decree but the amount due under the first mortgage.) ** (1895) 22 Cal 33 (39) (DB). ** (1901) 4 Oudh Cas 100 (103) (DB). (Puisne mortgagee is not, however, representative in interest of mortgagor and is not bound by decree made between prior mortgagee and mortgagor.) ** (1873) 5 NWHPCR 145 (148) (DB). ** (1888) 10 All 611 (612) (DB). ** (1895) 18 All 83 (86) (DB). (Prior mortgage usufructuary — Subsequent mortgage simple — Rights of subsequent mortgagee — No sale till first mortgage is capable of redemption.) ** (1900) 23 All 25 (29, 31) (DB). ** (1905) 26 All 72 (77) (DB). (Assignee of the puisne mortgagee.) ** **(1905) 27 All 325 (332), 32 Ind App 123 (PC).** ** (1900) 22 All 453 (460) (DB). ** (1906) 3 All LJ 240 (241, 242). (Subsequent mortgagee party to a suit on prior mortgage as one of mortgagees under prior mortgage — His right to redeem is extinguished on decree.) ** 1883 All WN 193 (193) (DB). ** 1894 All WN 136 (137) (DB). ** (1904) All WN 285 (286) (DB). ** 1906 All WN 190 (190). (Purchase by prior mortgagee of mortgagor's right — Subsequent mortgagee's right to redeem not extinguished.) ** (1909) 1 Ind Cas 505 (506) (All). ** (1911) 10 Ind Cas 925 (926) (All). ** (1911) 9 Ind Cas 158 (159) (DB) (All). ** AIR 1915 Ad 299 (300). ** AIR 1930 All 869 (871) (DB). (Subsequent mortgagee paying off prior mortgage but redeeming more than what is mortgaged to him — He has a right of subrogation.) ** AIR 1934 All 946 (948). (Subsequent mortgage can redeem an auction purchaser in execution of prior mortgage decree to which he was not party.) ** AIR 1914 Bom 259 (259) (DB). ** AIR 1928 Cal 116 (117). 55 Cal 602 (DB). ** 11 Ind Cas 512 (513) (Lah). ** (1882) 4 Mad 213 (215) (DB). ** (1892) 15 Mad 54 (56) (DB). ** (1894) 17 Mad 17 (20) (DB). ** (1894) 17 Mad 62 (64) (DB). ** (1903) 13 Mad LJ 1 (1, 2). **** (1911) 9 Ind Cas 513 (516) (FB) (Mad).** ** AIR 1921 Mad 612 (614) (DB). ** (1889) 2 CPLR 173 (174). ** AIR 1923 Nag 24 (25). ** AIR 1915 Oudh 211 (213) (DB). ** AIR 1934 Oudh 246 (250). 9 Luck 652 (DB). ** AIR 1935 Oudh 139 (141). 10 Luck 531 (DB). ** (1901) 4 Oudh Cas 199 (202) (DB). ** AIR 1915 Sind 9 (9). 9 Sind LR 86 (DB). ** (1901) 1 Cal LJ 65 (69) (DB). (A puisne mortgagee's right to redeem a prior mortgage arises when he asserts it by a suit.) ** (1908) 30 All 30 (31). (A decree for sale on a mortgage was passed giving right of redemption to a puisne mortgagee. — The puisne mortgagee did not redeem and the decree became absolute. — **Held,** that no subsequent suit for redemption would lie by a person alleging that he was the real puisne mortgagee, and that the person whose name appeared in the decree as puisne mortgagee was merely a benamidar.) ** AIR 1934 Mad 563 (563, 564) (DB). (The question how for a second mortgage by a karnavan is binding on the tarwad cannot be raised by the first mortgagee in a suit for redemption by the second mortgagee unless the second mortgage is wholly invalid and not merely voidable. — Until it is avoided by the tarwad in a proper suit the second mortgagee is entitled to redeem.) **** AIR 1942 Oudh 260 (267) : 17 Luck 755 (FB).**

[See also 1960 Ker LT 1255 (1257, 1258) (DB). (Time essence of contract — Puisne mortgagee failed to exercise his right to redeem the earlier mortgage within reasonable time after the right became available to him. — Failure would result in rendering contract relating to period void under the option of the mortgagor under S. 55 Contract Act.) ** AIR 1933 Lah 503 (504). 4 Lah 596 (DB). (Article 148 and not Art. 132, Limitation Act, applies.) ** AIR 1926 Lah 602 (608). 7 Lah 399 (DB). (Subsequent mortgage for five years and with a condition that mortgagee may redeem prior mortgage any time within the five years. — **Held,** the mortgagee was entitled to redeem even afterwards before redemption of his mortgage.)]

4. 1906 Pun WR 196 (197).

There is a difference of opinion on the question whether a puisne mortgagee who has allowed his remedy on the mortgage against the mortgagor to be barred by limitation can be said to have a *subsisting interest* in the right to redeem so as to entitle him to sue for redemption of the prior mortgage. On the one hand, it has been held that the right of the puisne mortgagee to redeem the prior mortgage is not an absolute right but has been conceded to him for the protection of the rights possessed by him under his own mortgage and that, therefore, if the puisne mortgagee has lost all the remedies available to him in respect of his own mortgage, he cannot be said to have a subsisting interest sufficient to entitle him to claim redemption(5) under this clause.

If a puisne mortgagee is not in possession his right to recover the mortgage money becomes barred under Art. 132 and he has no subsisting right to redeem the prior mortgage though suit for **redemption may not be barred under Art. 146.(6)**

Where the puisne mortgagee was not made a party in suit wherein a prior mortgagee purchased the equity of redemption, the decree and consequent purchase by the prior mortgagee do not affect puisne mortgagee's right to sue for sale subject to prior mortgage before putting property for **sale to satisfy his own claim.(7)**

The effect of this view is that though under Art. 148 of the Limitation Act of 1908 a period of 60 years is prescribed for a suit for redemption, this period is reduced to 12 years in the case of a puisne mortgagee as, in suits governed by Art. 132 of that Act, he has only a period of 12 years for instituting a suit on his mortgage. On the other hand, a contrary view is taken in the undermentioned cases(8) that even when the puisne mortgagee's right to enforce payment of his mortgage is barred under Art. 132, his *right as mortgagee* is not extinguished under S. 28 Limitation Act, 1908 and he can, therefore, redeem under Art. 148 within the period of 60 years. It is submitted that the latter view is correct. (Under Art. 61(a) of the Limitation Act of 1963 which corresponds to Art. 148 of the Act of 1908, a period of 30 years instead of 60 years is now provided for redemption but under Art. 62 of the Act corresponding to Art. 132 of the Act of 1908, the period remains the same **i.e., 12 years.)**

Where there are successive mortgages a puisne mortgagee can redeem any of the prior incumbrances and is not required to redeem only the mortgage immediately prior to him **(9)**.

The puisne mortgage must be a *valid* mortgage, a void mortgage cannot give the person in

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5. 1958 Andh LT 654 (656) ** AIR 1951 Assam 65 (2) ILR (1950) 2 Assam 275 (DB) (Per Ram Labhaya J., Thadani J. dissenting.) ** AIR 1935 Oudh 139 (141) 10 Luck 531 (DB) ** AIR 1925 Mad 76 (77).

   [**See also** AIR 1953 Bom 405 (407) ILR (1954) Bom 40 (DB) (If the puisne mortgagee's right to enforce his rights is barred the position may be different.) **** AIR 1929 Cal 609 (610) : 57 Cal 704 (FB).** (Puisne mortgagee is allowed to redeem if his suit is not barred by limitation — Article 144 and not Art. 132 Limitation Act applies.) ** AIR 1934 Lah 799 (800) (Subsequent mortgagee is only representative in interest of mortgagor to the extent that he can redeem prior mortgage — He is not absolute owner — If prior mortgage is valid he cannot challenge the terms thereof is pen. though he is entitled to equitable considerations.) ** AIR 1924 Oudh 56 (59) (DB) (Puisne mortgagee's right to redeem is not absolute but arises when he comes to Court to obtain remedy on his mortgage.)

6. AIR 1970 Ker 81 : 1969 Ker LT 338.

7. AIR 1981 Cal 404 (412) (DB).

8. AIR 1933 Bom 25 (25, 26) (DB) ** AIR 1937 Nag 205 (207) ILR (1937) Nag 367 (The two rights of foreclosure of one's own mortgage and redemption of the prior mortgage are distinct — Extinction of one does not necessarily lead to the extinction of the other.) ** AIR 1919 Nag 93 (94).

9. (1913) 21 Ind Cas 560 (561) (DB) (Mad) ** AIR 1924 Oudh 56 (59) (DB) **** (1891) 13 All 432 (488) (FB). (Mahmood, J., contra.)**

whose favour it is executed a right to redeem a prior mortgage.(10)

Unlike a purchaser of the equity of redemption, in whose case there is a *prima facie* implied contract to indemnify the vendor against liability on the mortgage, a puisne mortgagee is in no way personally liable to discharge the prior mortgage.(11)

As to the right of puisne mortgagee who was not made a party to the suit on prior mortgage and of the purchaser in execution sale under that decree to redeem each other see Note 8

6. Sub-mortgagee of puisne mortgagee.

A sub-mortgagee of the rights of a puisne mortgagee is entitled to redeem or to institute a suit for redemption of the prior mortgage as being a person having an interest in the 'right to redeem' the mortgaged property (1)

A sub-mortgagee may be redeemed by his mortgagor that is the original mortgagee but he cannot redeem the original mortgage He may have his usual remedies against his mortgagor i.e. the original mortgagee as also against original mortgagor But sub-mortgagee is not a derivative title holder of the original mortgagor to enable him to redeem the original mortgage (2)

Mortgagor is entitled to redeem a sub-mortgage as there is a privity between the two What is required under this section to enable a person to redeem the mortgage is not privity of estate but any interest in the mortgaged property or the right to redeem the same Release of a sub-mortgage in favour of the original mortgagor does not extinguish the sub-mortgagee to operate as an assignment of the sub-mortgage in favour of the mortgagor.(3)

7. Prior mortgagee.

As has been seen already in Note 4 a person not bound by the mortgage sought to be redeemed cannot be said to have an "interest" in the "property mortgaged" within the meaning of this section A prior mortgagee is not bound by the second mortgage (1) He has no interest such as is contemplated by the section in "the property mortgaged" under the second mortgage for what is mortgaged under the second mortgage is the equity of redemption remaining in the mortgagor after the first mortgage It follows that a prior mortgagee cannot redeem the second mortgage under this section This is in accordance with the well known principle of law "redeem up and foreclose down" which means that, of any number of mortgagees the later can always redeem the earlier but cannot be compelled to do so and *the earlier cannot redeem the later except by consent* (2) The explanation to

10. (1938) 42 Cal WN 1106 (1109)

11. AIR 1936 PC 65 (68).

Section 91 — Note 6

1. (1923) 21 Ind Cas 560 (561) (DB) (Mad) ** (1905) 27 All 472 (478) (DB)

   See also (1905) 2 All LJ 609 (611 612) (DB) (Sub mortgagee's suit for a declaration that a decree held by a prior mortgagee had been satisfied and hence become incapable of execution held not maintainable — A suit for redemption ought to have been brought)

   [But see 1900 Pun LR No. 23, p. 62 (65) (DB).]

2. (1966) 2 Mad LJ 308 : (1966) 79 Mad LW 400

3. AIR 1969 Ker 73 (74)

Section 91 — Note 7

1. AIR 1920 Pat 630 (631) (DB) (Prior mortgagee is not affected by decree on subsequent mortgage)

   [See also AIR 1924 Nag 198 (198) (Prior mortgagee is not a necessary party to suit on subsequent mortgage — But if joined must set up his prior lien)]

2. AIR 1954 Trav-Co 384 (387) (DB) ** AIR 1926 Nag 21 (23) 23 Nag LR 86 ** AIR 1921

O 34 R 1 Civil P C , also makes this clear That rule provides that all persons having an interest either in the mortgage security or in the right of redemption are necessary parties to any suit relating to the mortgage, but that a prior mortgagee is not a necessary party to a suit for sale or foreclosure by a puisne mortgagee or to a suit for redemption by the mortgagor of the puisne mortgage There is, however *no prohibition* against joining him as a party to such suits and the aforementioned cases(3) have held that where it is joined as a party to the suit by the puisne mortgagee he is entitled to pay off the puisne mortgage

The principle "redeemp up and foreclose down" will not apply where the prior mortgage is not binding on the subsequent mortgagee The position in such a case is that the subsequent mortgagee operates on the entire interest of the mortgagor as if it had not been burdened with a prior encumbrance and hence the position of the subsequent mortgagee though later in time is superior to that of the prior mortgagee in view of his higher rights.(4)

A prior mortgagee who purchases the mortgagor's equity of redemption whether privately (5) or in execution of a decree(6) stands in the shoes of the mortgagor and can *in that capacity* redeem the subsequent mortgage So also where the prior mortgagee forecloses behind the back of a subsequent mortgagee and acquires the mortgagor's equity of redemption he will be entitled to redeem the subsequent mortgage (7)

8. Purchaser of equity of redemption.

A purchaser of the equity of redemption is entitled to redeem or to institute a suit for redemption of the mortgaged property (1) That he will be entitled to redeem if he has purchased or

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Mad 612 (614) (DB) ** AIR 1917 Mad 751 (752) 40 Mad 778 (DB) ** (1908) 4 Nag LR 9 (11)

3. (1910) 37 Cal 282 (283, 284) (DB) ** AIR 1929 Nag 135 (136) 25 Nag LR 171

4. AIR 1937 Nag 189 (191) ILR (1937) Nag 208 (Mortgage by a tenant without previous consent of landlord, as required by law — Subsequent mortgage by tenant in favour of landlord — Landlord not bound by prior mortgage)

5. (1907) 10 Oudh Cas 356 (358) (DB) ** AIR 1915 All 299 (300) ** AIR 1924 Pat 452 (453) 3 Pat 114 (DB) ** (1910) 37 Cal 282 (283) (DB)

6. AIR 1952 Pat 321 (321) 27 Pat 526 (DB) ** (1910) 14 Cal W N 675 (676) (DB) ** (1908) 2 Ind Cas 495 (496) (All) ** (1907) 10 Oudh Cas 356 (358) (DB) ** AIR 1917 All 237 (238) (DB) ** AIR 1915 All 299 (300) ** 1887 All W N 125 (125) (DB) ** (1904) 1 All L J 360 (362, 363) (DB) (Sale in execution in contravention of S 99 but acquiesced in — Parties are estopped) ** (1897) 20 Mad 120 (123) (DB) ** AIR 1921 Mad 648 (649) (DB) ** AIR 1924 Patg 484 (486) 3 Pat 436 (DB) ** (1893) 16 Mad 121 (125, 126) (DB) ** (1910) 6 Ind Cas 670 (671) (DB) (Cal) ** AIR 1926 Nag 135 (136) Also See Note 41

7. (1904) 28 Bom 153 (163, 170) (DB)

Section 91 — Note 8

1. AIR 1967 Assam 32 (33) ILR (1964) 16 Assam 508 (Usufructuary mortgagee taking fresh settlement of mortgaged property from the landlord with himself — The right of redemption of the assignee of the mortgagor is not lost) ** AIR 1960 Bom [illegible] ILR (1958) Bom 1429 (Section 60 only gives a right of redemption to the transferee from the mortgagor But it does not state that the transferee from the mortgagor will be personally liable for the mortgage debt) ** AIR 1952 Mys 17 (18) ILR (1951) Mys 389 (DB) (Mortgagee allowing mortgage to be redeemed by a person not entitled to redeem — Purchaser of equity of redemption can obtain a decree for redemption against mortgagee and such person) ** AIR 1950 Pat 85 (85, 86) (1906) 8 All 638 (640) (DB) ** (1912) 35 Mad 42 (43) (DB) ** (1882) 6 Bom 538 (540) (FB) ** (1900) 4 Cal W N 266 (268) (DB) ** (1865) 3 Suth W R 128 (128) (DB) ** AIR 1920 Mad 386 (390) (DB) ** AIR 1917 Nag 137 (138) 14 Nag LR 84 ** 1887 Bom PJ 200 (DB) ** AIR 1932 Cal 23 (24) 49 Cal 626 (DB) ** AIR 1927 Pat 25 (26) (DB) ** AIR 1926

portion of the equity of redemption(2) or has purchased the same in execution of a decree (3)

Rang 183 (184) 4 Rang 96 (DB) ** AIR 1931 Mad 542 (547, 548) (DB) (Private sale.) ** AIR 1936 Mad 70 (74, 78) 59 Mad 312 (DB) ** (1901) 4 Oudh Cas 100 (103) (DB) ** (1908) 4 Nag LR 9 (11) ** AIR 1921 Mad 648 (649) (DB) ** AIR 1936 Nag 207 (208) ILR (1936) Nag 183 (If the sale of the mortgaged property is unreal the person in whose favour the sale is made obtains no interest in either the property or the right to redeem.)

** (1892) 16 Bom 705 (707) (DB) ** (1866) 6 Suth WR 230 (231) (DB) ** (1868) 3 Agra 30 (31) (DB) (Default by a purchaser in payment of the purchase money or any portion of it does not necessarily invalidate the sale and in a suit brought to redeem the property purchased the mortgagee cannot avail himself of the objection that the full amount of purchase-money has not been paid.)

[See also AIR 1940 Lah 201 (201) (Assumed.) ** AIR 1914 Lah 289 (290) 1914 Pun Re No. 162 (DB) (In a suit by a mortgagee to redeem a sub mortgagee the sub mortgagee could not claim by way of defence, a right to redeem the mortgage on the ground of the transfer of the equity of redemption.) ** (1910) 6 Ind Cas 837 (838) (DB) (All) (Transferee from a mortgagee has a right to redeem the sub-mortgage created by the mortgagee.) ** (1865) 3 Suth WR 230 (231) (DB) (Assignee of mortgagor's equity of redemption held to be mortgagor's legal representative within the meaning of S. 8 of Bengal Regulation XVII of 1806)

** (1900) 4 Cal WN 452 (453) (DB) (Mortgagee bringing suit on his mortgage without making purchaser (X) of equity of redemption party — Sale in execution — Auction purchaser ejecting X — Suit by X for possession decreed — Mortgagee held should have sued for foreclosure or sale subject to right of redemption of X or should have made X party to suit.) ** AIR 1950 Trav-Co 16 (17) (DB) (Suit for redemption by purchaser of equity of redemption in tarward property — Person who is stranger to tarwad and who is in the position of a sub mortgagee cannot question validity of purchase.)]

2. **AIR 1967 SC 1440 (1445) : (1967) 2 SCR 18** ** AIR 1968 Bom 106 (108, 111) (DB) (Sale in execution of decree in mortgage suit — Purchaser of portion of mortgaged property not impleaded — Purchase by mortgagee — Purchaser's right to redeem his portion not affected.) ** AIR 1950 Trav Co 33 (35) (DB) (Entitled to redeem the whole mortgage but not his share only.) ** AIR 1933 Pat 33 (35) (DB) ** AIR 1929 Bom 139 (140, 141) 53 Bom 353 ** (1898) 21 Mad 64 (66) (DB) ** AIR 1918 Cal 975 (976) (DB) ** (1879) 2 Mad 223 (224, 225) (DB) ** (1904) 27 All 178 (182) (DB) ** (1898) 21 Mad 18 (26) (DB) ** AIR 1933 Rang 392 (393) (DB) ** AIR 1927 Cal 559 (561) (DB) ** (1901) 23 All 429 (430, 431) (DB) ** AIR 1927 Cal 259 (260) (DB) ** (1913) 20 Ind Cas 184 (185) (DB) (All) ** AIR 1923 Mad 533 (534) 47 Mad 7 (DB) ** AIR 1917 Oudh 415 (415, 416) ** AIR 1928 Lah 105 (105) (DB).

3. **AIR 1967 SC 1440 (1445) : (1967) 2 SCR 18** ** AIR 1962 Punj 402 (407) : ILR (1962) 2 Punj 227 (DB) (Auction-purchaser in execution of the decree based on the first mortgage.) ** AIR 1957 Ker 45 (47) ILR (1957) Ker 53 (DB) ** AIR 1954 Trav Co 251 (252) (DB) ** AIR 1952 Pat 324 (321) 27 Pat 513 (DB) (Auction purchaser in execution of decree obtained on the foot of a prior mortgage without impleading the subsequent mortgagee.) ** 1950 Trav-Co LR 150 (152, 153) (DB) (He is entitled to bring a suit for redemption of the mortgage even without obtaining formal delivery of possession under his sale certificate through the execution Court.) ** AIR 1937 Oudh 493 (497) 13 Luck 484 (DB) ** (1879) 2 Mad 223 (224, 225) (DB) ** (1912) 15 Oudh Cas 211 (217, 218) (Purchaser taking subject to a mortgage cannot question its validity but purchaser taking merely with notice of the mortgage can question its validity.) ** AIR 1937 Nag 205 (208) ILR (1937) Nag 367 ** AIR 1929 Nag 246 (250) 25 Nag LR 19 (A mortgagee who forecloses a mortgagor, omitting to implead the owner of the equity of redemption as a party to the suit and at a time when he had left in the mortgagor no interest to foreclose cannot plead that the settlement entry based on a foreclosure which brought him no part of the equity of redemption that had already vested in another person and gave him nothing beyond his own right as prior mortgagee secured to him the status of an absolute occupancy tenant

A purchaser of the equity of redemption in execution of a money decree is not a "mortgagor" under S. 91(a).(4)

It has been held that a purchaser at a sale in execution of a rent decree is entitled to redeem a prior mortgage even if the decree and sale are declared void (5)

As between a puisne mortgagee and a purchaser of the equity of redemption sold in execution of a decree on the prior mortgage, the latter is entitled to redeem the former (6)

See also S. 67, Notes 19 and 20

In competition between a prior and a subsequent purchaser of the equity of redemption under a mortgage decrees the title of the former prevails over the latter (7)

In case of successive mortgages if the prior mortgagee purchases the mortgaged property he is entitled as assignee of equity of redemption to redeem the subsequent mortgagees. In a conflict between the right of the prior mortgagee as assignee of the equity of redemption to redeem the puisne mortgage and the right of the puisne mortgagee to redeem the prior mortgagee, the former has prior right (8)

A purchaser in a prior mortgagee's suit at a Court auction has better right to redeem the puisne mortgagee since the right of redemption of the mortgagor vests in him by purchase; how can the purchaser in puisne mortgagee's suit have a better title than the puisne mortgagee (9)

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under the provisions of S. 80 C. P. T. and Revenue Act and also under S. 104 of the C. P. Tenancy Act and deprive the owner of the right of redemption which the Transfer of Property Act secures to him.) ** AIR 1922 Cal 32 (34) (DB) (If the purchaser at the rent sale under Bengal Tenancy Act has not availed himself of the provisions of annulling the mortgage within the prescribed period of one year under S. 167 of the Act he holds the property subject to the mortgage and is entitled to redeem.) ** (1868) 10 Suth WR 6 (169) (DB) ** AIR 1923 All 232 (232) (DB) ** (1888) 10 All 520 (523, 524) (DB) ** AIR 1920 Mad 389 (390) (DB) ** (1884) 7 Mad 423 (424) (DB) ** (1891) 16 Bom 486 (491) (DB) ** (1904) 26 All 464 (466) (DB) ** (1901) 3 Bom LR 92 (94) (DB) ** (1898) 26 Bom 139 (142) (DB) (If a party whose title may to some extent be impeached sues for redemption and is able to prove a perfect title at the hearing of his case he should be given a decree for redemption. Here the certificate for sale was issued after the institution of the suit though it was applied for before. It was produced at the time of hearing.) ** AIR 1921 Mad 648 (649) (DB) ** AIR 1918 Cal 806 (806) (DB) ** AIR 1933 Cal [illegible] 60 Cal 948 (DB) ** (1870) 14 Suth WR 233 (235) (DB)

[See also (1875) 24 Suth WR 210 (210) (DB) (When a creditor under a bond by which property is mortgaged, takes a money decree and proceeds to attach and sell the mortgaged property he transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor.) ** (1896) 18 All 320 (321) (DB) (A purchased certain mortgaged property in execution of money decree and obtained possession. Mortgagees sued on their mortgages without making A party and sold the property to B. A sued B for declaration that the sale did not affect him. **Held,** the suit was maintainable and need not be brought as a suit for redemption.)]

4. AIR 1976 Mad 44 : (1975) 2 Mad LJ 475
5. AIR 1945 Pat 289 (291) : 24 Pat 263
6. AIR 1957 Ker 45 (47) : ILR (1957) Ker 53 (DB).

   [See however AIR 1967 Mad 418 : ILR (1967) 1 Mad 378 (Suit by prior mortgagee and suit by puisne mortgagee. Puisne mortgagee not impleaded in former suit. Prior mortgagee not impleaded in latter suit. Sale in former suit cannot prevail over sale in latter suit — Auction purchaser in latter has the right to redeem the property.)]

7. 1965 Ker LT 1107 : 1965 Ker LT 984
8. AIR 1981 SC 160 : 1980 UJ (SC) 890.
9. AIR 1976 Kant 209 : (1976) 1 Kant LJ 114.

Purchaser of equity of redemption of agriculture land is entitled to redeem an intermediary who brings a suit for rent and purchases the land in execution though the purchaser of the equity of redemption was not impleaded.(10)

An auction purchaser at a sale on suit filed by prior mortgagee to which puisne mortgagee is not impleaded is entitled to redeem the puisne mortgage as he occupied a dual capacity i.e. the capacity of the first mortgagee as well as the owner of the equity of redemption (11)

A purchaser of equity of redemption gets the same rights, as the liability of the purchaser is not a new liability but one arising under the pre-existing mortgage debt though the liability is confined to the property in his possession. His rights are thus co-extensive with those of the mortgagor in whose shoes he steps.(12)

A purchaser of the equity of redemption from the original mortgagor cannot redeem a sub-mortgage executed by original mortgagee.(13)

Mortgagor's security was sold by the Municipal authority in enforcement of first charge for taxes subject to the second mortgage and purchased by A which was confirmed. Prior to his decree the second mortgagee obtained a preliminary decree and then a final decree and purchased the property but his sale was confirmed after the auction purchaser in the Municipal suit was put in possession. It was held that the auction purchaser in the Municipal suit was entitled to redeem in preference to the auction purchaser either in the first mortgagee's or the second mortgagee's suit (14)

9. Person contracting to purchase mortgaged property.

As will be seen from the provisions of S. 54, a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. Therefore, a person who has merely entered into a contract to purchase the mortgaged property cannot redeem or institute a suit for redemption of such property on the basis of the contract (1)

10. Transferee pendente lite.

A transferee from the mortgagor during the pendency of a suit for sale, foreclosure or redemption of the mortgage is, as has been seen in Note 40 on S. 52, bound by the decree or order

10. AIR 1981 Pat 153 : 1981 Pat LJR 235 ** (1974) 1 Mad LJ 350 : 87 Mad LW 454 (2)

11. AIR 1970 Mad 244 (246, 247) : (1969) 2 Mad LJ 477.

12. (1967) 2 Andh WR 260 : (1967) 2 Andh LT 273

13. 1970 Ker LT 384 : 1970 Ker LJ 373. (AIR 1969 Ker 73, **Overruled.**)

14. AIR 1980 Andh Pra 305 : (1980) 2 APLJ (HC) 152.

Section 91 — Note 9

1. AIR 1926 Mad 597 (598) ** (1902) 15 C PLR 175 (177) (The remarks are obiter — The decision was that a landlord having a right of pre-emption under S. 46 of the Tenancy Act cannot redeem a mortgage of his holding by an absolute occupancy tenant.) ** AIR 1936 Nag 209 (2, 3) : 11 R (1936) Nag 127 (DB) (Attaching creditor's right to redeem (which was in dispute in this case) is, it was observed, even weaker than that of a person in whose favour a contract to sell has been made — Both cannot redeem.)

[See also AIR 1928 Oudh 298 (299) (DB) (N was claiming certain rights in a certain estate — He having no money with which to prosecute his claim executed an agreement in favour of D whereby D undertook to finance his litigation and to recoup himself by retaining half of anything that the Courts awarded — On the strength of this agreement D instituted a suit for redemption of a two annas share in a village in which N had the right to redeem four annas — **Held** that D had no right to redeem, as the agreement was neither a sale nor a transfer.)]

Also see Section 83, Note 7

made in the suit.(1) and will be entitled to redeem the mortgage (2) But he can redeem only before a final decree debarring the mortgagor from redeeming the mortgaged property under O. 34, R. 5 or R. 8 of the Code of Civil Procedure is passed (3) or before the confirmation of sale made in pursuance of a final decree under O. 34, R. 5 or R. 8 of the Code of Civil Procedure.(4) but not afterwards.(5)

11. Donee.

A person to whom a gift has been made of the equity of redemption can redeem or institute suit for redemption of the mortgaged property (1) **

12. Lessee of mortgaged property.

In England a lessee from the mortgagor is a person having an interest in the equity of redemption and is entitled to redeem the mortgage (1) Under this section also a lessee is entitled to redeem

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Section 91 — Note 10

1. **See also** the AIR Commentaries on the Code of Civil Procedure 10th (1985) Edn., O. 22 R. 10 Note 2 and the following cases :

   AIR 1915 Nag 28 (28) : 12 Nag LR 50 ** AIR 1926 Nag 21 (23) : 23 Nag LR 80 ** (1907) 29 All 76 (80, 81).

2. AIR 1933 Nag 171 (173) : 30 Nag LR 265 (DB)

   [**See also** (1909) 2 Ch 437 (439) : 78 LJ Ch 782 : 101 LT 382, In re Parbola Ltd : Blackburn v. Parbola Ltd (Foreclosure order nisi passed — Subsequently a creditor in another action obtaining appointment of receiver by [illegible] and applying for being added as party to foreclosure [illegible] He was [illegible] was entitled to redeem but period fixed for redemption was [illegible] ** AIR [illegible] All 88 (88, 89) : 37 All 226 (Purchaser from the mortgagor after a preliminary decree in a redemption suit by the mortgagor but before the final decree [illegible] property which entitled him to be made a plaintiff in the suit under O. 22 R. [illegible] C.)]

3. AIR 1915 Nag 28 (28) : 12 Nag LR 50 ** AIR 1926 Nag 21 (22, 23) : 23 Nag LR 80

   [**See** (1907) 29 All 76 (81) (Suit for foreclosure — [illegible] redemption — Transfer by mortgagor after the period [illegible] foreclosure — Suit by purchaser for redemption [illegible] (358) (DB) (Mortgage after preliminary decree which provides for [illegible] default within certain period — No redemption during [illegible] period — [illegible] bound by foreclosure.)]

   [**See also** (1909) 2 Ch D 437 (439) : 101 LT 382 : 78 LJ Ch 782, In re Parbola Ltd : Blackburn v. Parbola Ltd (Prayer by the purchaser to extend the period [illegible] granted.)]

4. (1899) 26 Cal 966 (970, 971, 972) (DB) ** (1901) 23 All 331 (334) (DB)

   [**See also** AIR 1946 Mad 51 (52) (Charge decree — Mortgage of property [illegible] decree — Mortgagee can redeem before sale in execution is confirmed.)]

5. AIR 1937 Nag 400 (401, 402) : 11 R. 1937 Nag 452 (Principle of the doctrine of lis pendens applies to auction sales.)

   [**See also** AIR 1951 Pat 254 (258) : 30 Pat 613 (DB) (Attaching creditor purchasing mortgaged property in execution of his decree during pendency of mortgage suit — Sale in execution of mortgage decree — His right to redeem is extinguished.)]

Section 91 — Note 11

1. AIR 1921 Bom 413 (413) : 45 Bom 105 (DB) (Donee from Hindu widow — Mortgagor cannot resist his claim for redemption — Only reversioner can.)

Section 91 — Note 12

1. (1888) 39 Ch D 456 (468) : 57 LJ Ch 1085 : 59 LT 742 : 37 WR (Eng) 276, Tarn v. Turner

the mortgage, as a person having an interest in the right to redeem **(2)** A lessee from the mortgagor, whose lease is binding on the mortgagor though it may not be binding on the mortgagee, is still a person having an interest in the mortgaged property and, therefore, entitled to redeem the mortgage **(3)** He does not lose that right merely because he attorns in favour of mortgagee **(4)** It has been held by Hidayatullah, J agreeing with Bose, J in a case referred on a difference of opinion between Bose and Hemeon, JJ that a lessee from a mortgagor, whose lease is binding on the mortgagee, not being a person, whose interests are in any way jeopardised by the mortgage is not entitled to redeem **(5)** But this view does not appear to be correct As observed by Hemeon, J in that very case there is nothing in S 91(a) to indicate that the right to redeem can only be exercised where the interest is likely to be or can be affected by the mortgage, and no fetters have been imposed in the clause as it stands on the right of redemption by a person "who has any interest in the property mortgaged" In *Pava Matathil Appu v Kavamel Amina* **(6)** their Lordships of the Madras High Court said :

"In our opinion the word 'interest' is not necessarily confined to right of ownership, but is sufficiently large to include any minor interest such as that of a tenant. . . " Thus, a perpetual lessee,**(7)** a lessee for a term of years,**(8)** an ex-proprietary tenant,**(9)** a *verumpattom* tenant in

2 **AIR 1967 SC 1390 (1395)** ** AIR 1969 Mad Pra 35 (41) 1969 MPLJ 17 ** AIR 1955 All 610 (611) (A cultivatory lessee who has been granted a lease when a usufructuary mortgage has already come into existence) ** AIR 1951 Assam 101 (104) ILR (1949) 1 Assam 198 (DB) ** (1912) 17 Ind Cas 1 (3) (DB) (Cal) ** AIR 1926 Nag 496 (498) 23 Nag LR 128 ** (1901) 4 Oudh Cas 100 (103) (DB) (Obiter) ** (1896) 19 Mad 151 (153) (DB) (Verumpattom tenant in Malabar claiming under a lease from an ottidar can redeem) ** AIR 1923 All 140 (141) (DB) ** AIR 1940 Bom 15 (16, 17) ILR (1939) Bom 713 **(Transferees of Khoti land from permanent tenant.)**

3. AIR 1945 Cal 135 (136) (DB) (Assumed) ** AIR 1945 Pat 106 (107) 23 Pat 648 (DB)

4. **(1983) 85 Pun LR 558**

5. **AIR 1947 Nag 210 (215, 222) : ILR (1947) Nag 740 (DB).**

6. (1896) 19 Mad 151 (153) (DB) Tarn v Turner (1888, 39 Ch D 456, Followed — So long as the plaintiff has an interest validity entitling him to possession he is in a position to redeem.).

7. AIR 1925 Oudh 270 (271) ** AIR 1923 Nag 273 (273, 274) 19 Nag LR 18 ** (1907) 29 All 679 (682) ** AIR 1929 All 616 (617) (Where a usufructuary mortgagor first makes a perpetual lease of the property mortgaged and subsequently sells whatever rights he has in the property to the mortgagee himself the mortgagee purchases merely the remaining rights of the mortgagor in the equity of redemption subject to perpetual lessee's right to redeem)

[**See also** AIR 1933 Bom 97 (99) 57 Bom 194 (DB) (Obiter — The real decision was that a landlord can redeem a mortgage by a permanent tenant dying without heir) ** (1909) 12 Oudh Cas 271 (274) (Compromise creating permanent heritable non-transferable interest and not a mere cultivating tenancy — Redemption allowed) ** AIR 1917 Nag 133 (134 135) 14 Nag LR 117 (Perpetual lease by a Malik Makbuza in C P — The lessee becomes a perpetual sub tenant under C P Tenancy Act XVII of 1889 — He can redeem.)]

8. AIR 1926 Nag 496 (498) 23 Nag LR 128 (If the mortgagor grants a lease of the mortgaged property to another the latter comes a transferee of a portion of the equity of redemption and as such is a person having an interest in the property or at least in the right to redeem the property within the meaning of S 91, clauses (a) and (b)) ** AIR 1937 Oudh 146 (148) 12 Luck 161 ** AIR 1933 Nag 44 (46) 29 Nag L R 77 (A lessee who takes the property for a lease of 15 years on pre-payment of a lump sum has an interest in the property)

9. AIR 1918 All 392 (392) (DB) ** (1933) 14 LR All (Rev) 645 (647)

Malabar claiming under a lease from the *ottidar* (10) a holder of a *zarpeshi* lease (11) a *patnidar* (12) and a darpatnidar (13) have all been held to have an "interest" within the meaning of S 91 clause (a). In the undermentioned case (14) a distinction has been made between the permanent tenants of land before the mortgage and those after the mortgage. It was held that in the former case what is mortgaged by the landlord is reversionary right vesting in him and the permanent tenant has no interest in it as would entitle him to redeem. His interest is paramount in the sense that it is not affected by redemption or foreclosure or sale. But in the case of a permanent tenant after the mortgage, it was held that since his rights came into existence during the subsistence of the mortgage he is entitled to redeem.

In the undermentioned case (15) it has been held that a year to year lessee is not a person entitled to redeem under section 91 Clause (a). So also in the case noted below (16) arising before the Transfer of Property Act it was held that a person holding a *mortgage makurari patta* from a mortgagor was not entitled to redeem. It is submitted that this view does not appear to be correct. There is no reason why such persons should not be entitled to redeem.

Where *A* mortgages property to *B* usufructuarily and *B* leases back the property to *A* who sub leases the same to *C*. *C* really derives title from the mortgagee since he is a transferee of an interest from *A* who is a transferee from *B* in so far as the leasehold interest is concerned. And as the mortgagee himself cannot redeem his own mortgage (as is shown by the words "other than the mortgagee of the interest sought to be redeemed") *C* who derives title from him cannot also redeem the mortgage. In the case noted below (17) in which the facts were as above stated it was held that *C* was not entitled to redeem the mortgage as he had no interest in the equity of redemption. This is no doubt true but the better reason why he should not be allowed to redeem is as stated above, that he derives his title from the mortgagee. The position of a tenant who pays statutory dues to the Municipality should be regarded as a fortiori case. What he possesses is not a mere right to redeem. It is something more. (18)

A lessee executed usufructuary mortgage in respect of an agricultural land. Since no rent was paid to landlord, the property was put to sale. The mortgagee paid the decretal amount. He contended the mortgage was liable to be redeemed at the option of the mortgagee. On purchase of the property in Court sale by the mortgagee no merger took place between the two rights but the mortgage was not extinguished (19)

Where a lease of mortgaged property is void the lessee has no right to redeem (20)

13. Landlord, if can redeem mortgage by tenant.

A leases property to *B* for a *term of years*. *B* mortgages his [illegible] interest to *C*. A's right

10. (1896) 19 Mad 151 (153) (DB)

11. (1880) 6 Cal 317 (319) (DB) ** AIR 1937 Oudh 146 (148) : 12 Luck 161 ** AIR 1920 Nag 176 (176) : 16 Nag LR 180) ** (1882) 8 Cal 79 (87) (DB)

12. (1882) 8 Cal 79 (87) (DB) ** (1892) 21 Cal 116 (120) (DB)

13. AIR 1922 Cal 23 (24) : 49 Cal 626 (DB)

14. AIR 1953 Bom 315 (316) : ILR (1953) Bom 727

15. AIR 1925 Oudh 270 (271)

16. (1883) 9 Cal 643 (644) (DB) (Following 17 Suth WR 271) ** (1871) 17 Suth WR 271 (272) (DB)

17. AIR 1935 Mad 813 (814)

18. AIR 1978 (NOC) 192 : (1978) 1 Mad LJ 276

19. AIR 1997 SC 456 (457, 458) : 1996 AIR SCW 3842 : 1996 (5) SCC 526

20. AIR 1945 Pat 106 (108) : 23 Pat 648 (DB)

in the property called a "reversion"(1) though a vested right, is not an interest in the "property mortgaged" or "the right to redeem the same" inasmuch as what is mortgaged is the *leasehold interest*. Consequently, *A* cannot claim to redeem the mortgage. He is in fact not bound by the mortgage at all.

A landlord has no right to redeem the mortgage of occupancy tenancy created by such tenant (2).

There is a class of tenancy in this country in which the landlord is not entitled to the reversion except on failure of all the heirs of the tenant. In such cases the landlord's interest is really not a subsisting interest at all but merely a *spes successionis* like that of a reversioner to a Hindu widow. In such cases also the landlord cannot be said to have any "interest" such as will entitle him to claim redemption of a mortgage by the tenant of his holding.(3)

In respect of a mortgage created by his tenant if the landlord has carved out his interest and there is no full transfer it would satisfy the test applied in such cases namely whether there is absolute transfer so that nothing remains with the landlord or that some residual interest remains with him which could attract the words "any person who has any interest in the mortgaged property" in the section.(4)

Where the holding *reverts* to the landlord, either because the tenant dies without leaving any heirs(5) or by the tenant abandoning the village(6) or in some other way,(7) it has been held that he would be entitled to redeem the mortgage. These decisions do not raise the question whether the landlord will be *bound* at all by the mortgage created by the lessee. The general principle is contained in the maxim *cessante statu primitiva, cessat derivativus* (the derived estate ceases on the determination of the original estate). This principle also applies to *leases*. Where a *reversion* takes place, the lease will *determine* on the principle of *merger* contained in S. 111 of the Act. On such determination, therefore, on the maximum above quoted, the subordinate interests created by the lessee must also be held to come to an end. (See S. 105, Note 6 and S. 111, Note 1.) There are only

Section 91 — Note 13

1. AIR 1916 Bom 223 (223); 40 Bom 313 (DB); Halsbury Laws of England Vol. 18 Page 335.
2. (1966) 68 Pun LR (D) 340.
3. (1909) 12 Oudh Cas 201 (204) (DB) ** (1902) 15 CPLR 175 (178) (Right of pre-emption vested in the landlord under S. 41 of the C. P. Tenancy Act is a contingent right and does not entitle him to redeem mortgage of an absolute occupancy holding — Contrary observations in 3 CPLR 154 held as being purely obiter.)
4. AIR 1976 Bom 398.
5. AIR 1951 All 655 (660) (Bhe) Berari Tenure. ** (1911) 33 All 111 (116) (FB). (30 All 488, **Overruled** — A fixed rate tenancy is but a limited interest which cannot be the subject of escheat to the Crown. — Such a tenancy is carved out of the landholder's interest in the land to which it relates, and a fixed rate tenant has no absolute interest in it. — If the tenancy comes to an end it necessarily goes back to the estate, which it was carved out of, and lapses to the landholder.) ** (1909) 12 Oudh Cas 201 (204) (DB) (When a tenant mortgages his grove and dies without heirs the equity of redemption must vest in the zamindar though the mortgagee is in possession. — 1 Oudh Cas 42 **Overruled.**) ** AIR 1933 Bom 97 (99); 57 Bom 194 (DB) (Even in the case of permanent tenancy the property reverts to the landlord and rent free occupancy holding — There can be an escheat to Crown only of an absolute hereditary mokararry tenure.) ** AIR 1932 All 437 (438) (DB) ** AIR 1927 Lah 75 (77) (Case of mokararidar.)
6. (1909) 12 Oudh Cas 197 (200) (DB) (**Overruling** 1 Oudh Cas 42.)
7. AIR 1932 All 53 (55) (DB) (Ejectment of ex proprietary tenant.) ** AIR 1923 All 263 (263) (DB) (Relinquishment of holding by tenant.) ** (1911) 10 Ind Cas 306 (308) (Dd) (Cal) (Do.)

two exceptions to this general principle and they are contained in S 115 They do not cover the case of the *reversion* of a lease on the death of a lessee intestate without leaving any legal heirs Hence, in such cases, the mortgage of the lease hold interest will itself be extinguished and it cannot be seen how a question of the right to redeem will arise at all

14. Superior proprietor under C.P. Land Revenue Act.

Section 122 of the C P Land Revenue Act 2 of 1917 (S 65 of the C P Land Revenue Act, 18 of 1881) provided that the sum payable under a sub-settlement shall be a first charge upon the land comprised in the sub-settlement It was held that the word "charge" as used in that section had the same meaning as the word "charge" used in Cl (a) of this section Where, therefore a superior proprietor held a decree against the inferior proprietor on account of the sum payable under the sub-settlement, he was held entitled to redeem a mortgage on the land comprised in the sub-settlement.(1)

15. Tenant for life and remainderman.

A mortgages property to *D* and transfers his equity of redemption to *B* for life or for a particular period and then to *C* Under the English law *B* can sue for redemption (1) *C* also can redeem, but only with the *consent* of *B* (2) On the death of the *tenant for life* his interest comes to an end and if he has transferred his interest to a third person such third person cannot redeem the mortgage after the death of the tenant for life (3) In the undermentioned case (4) *A*, a holder of a life estate, a mortgaged the entire proprietary interest in the land to *B* The life estate holder died and thereafter *C* the remainderman, *accepted the mortgage as binding on him* and claimed redemption It was held that he could do so.

16. Reversioner under Hindu Law.

The interest of a reversioner under the Hindu law is an interest expectant on the death of the limited owner such as a Hindu widow During the lifetime of the limited owner the reversioner has no more than a *spes successionis* and has no present interest in the property held by the limited owner(1)

Section 91 — Note 14

1. (1898) 11 CPLR 95 (101 102) (Case under S 65 of the C P Land Revenue Act XVIII of 1881)

Section 91 — Note 15

1. (1896) 2 Ch 808 (809 810) 66 LJ Ch 24 45 WR (Eng) 157 75 LT 409 Prout v Cock ** (1864) 11 LT (NS) 591 (591 592) 10 Jur (NS) 1257 2 Dr & Sm 293 13 WR (Eng) 223 , 142 RR 123, Riley v Croydon ** (1860) 70 ER 726 , 727, 1 John & H 215 128 RR 331 Wicks v Scrivens.
2. (1896) 2 Ch D 808 (809 810) 66 LJ Ch 24 45 WR (Eng) 157 75 LT 409 Prout v Cock (The same principle applies to any limited estate) ** (1869) 5 Ch 227 (230) 39 LJ Ch 342 : 22 LT 190 : 19 WR (Eng) 196, Pearce v. Morris

   [See also (1836) 44 RR 126 (127) 6 LJ (NS) Ch 87 48 ER 439 Raffety v King]
3. (1864) 11 LT (NS) 591 (591, 592) 10 Jur (NS) 1257 2 Dr & Sm 293 13 WR (Eng) 223 : 143 RR 123, Riley v. Croydon.
4. AIR 1931 Oudh 358 (362) : 6 Luck 715 (DB)

Section 91 — Note 16

1. AIR 1917 PC 95 (97) : 45 Cal 590 : 45 Ind App 35 ** (1968) 70 Pun LR 1046 (1052) 1968 Cur LJ 268 (AIR 1956 Mad 304, Rel on) ** AIR 1956 Mad 304 (306) (AIR 1921 Mad 272 44 Mad 951, Dissented from) ** AIR 1952 Pepsu 74 (74) ILR (1952) Patiala, 101 ** AIR 1919 Oudh 217 (220) (DB) ** AIR 1930 Oudh 294 296) 5 Luck 691 (DB) ** (1908) 30 All 497 (498, 499) (DB) Mulla, Principles of Hindu Law 9th End , 1940 Section 175, Pages 161, 162

so as to entitle him to redeem a mortgage during the life of the limited owner (2) But in the undermentioned cases(3) the view has been expressed that *ordinarily* a reversioner is not entitled to redeem during the lifetime of the limited owner, but that he can do so where it is necessary to preserve the property from loss on the same principle on which he is allowed to institute a suit to restrain waste by the limited owner It has also been held in the cases noted below(4) that irrespective of the question of the necessity of preserving the property from loss a reversioner has sufficient interest in the property held by the limited owner so as to entitle him to redeem the mortgage during the lifetime of such owner It is submitted that the last two views are not correct The mere fact that the reversioner is interested in the preservation of the property and is allowed to maintain a suit for that purpose does not mean that he has any present *interest in the property* so as to entitle him to redeem the mortgagee under Cl (a) of the section After the death of the widow, the reversioner would be entitled if the mortgage was one binding on the estate to redeem the same as being a person having an interest in the "property mortgaged." (See Note 4).

17. Surrender of mortgaged property by Hindu widow to next reversioner.

A Hindu widow can renounce the estate in favour of the nearest reversioner and by a voluntary act efface herself from the succession as effectively as if she had then died The effacement opens the estate of her deceased husband to his next heirs at that date (1) It is thus evident that on such renouncement the next reversioner in whose favour the renouncement is made becomes entitled to redeem the mortgage existing on the estate In the undermentioned case(2) a Hindu widow

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Also see Section 6, Note 4

2. (1968) 70 Pun LR 1046 (1052) (AIR 1956 Mad 304, Rel on) ** AIR 1952 Pepsu 74 (74) (ILR (1952) Patiala 101) ** AIR 1919 Oudh 217 (220) (DB) ** (1908) 30 All 497 (498, 499) (DB) ** AIR 1930 Oudh 294 (296, 297) (DB).

[See also (1931) 129 Ind Cas 730 (731) (DB) (All). (Mortgage by limited owner for legal necessity — Declaratory suit by reversioner that mortgage was not binding — Decree declaring reversioner's right to succeed but upholding mortgage by limited owner — Foreclosure suit by mortgagee against the limited owner — **Held** declaratory decree did not give reversioner present right to property mortgaged limited owner represented entire estate in foreclosure suit and the right to redeem was lost on such foreclosure)]

3. AIR 1921 Mad 272 (276) 44 Mad 951 (DB). (Per Ramesam, J.) ** (1913) 36 Mad 426 (435, 436)

[See also AIR 1950 Orissa 150 (154) (DB) (Obiter) — Per Ray C J. — It is always desirable that when a reversioner wants to make out a case of an interest in the equity of redemption so as to be entitled to redeem he must plead and prove that it was necessary for the preservation and protection of the property)]

4. (1894) Oudh Select Case No 271 p 597 600) ** (1905) 8 Oudh Cas 349 (351) (DB) ** AIR 1925 Oudh 30 (33) ** AIR 1915 Oudh 177 (180) (DB) ** AIR 1929 Nag 27 (29). (Possession present right to possession and enjoyment is not essential for claiming a right of redemption.)

[See also AIR 1950 Orissa 150 (153) (DB) (Obiter) — Per Ray C J — The words "any interest in the property mortgaged or the right to redeem the same" would convey the widest possible connotation so as to include the particular kind of "interest" that a reversioner under Hindu law has in the last male owner's property during the subsistence of limited owner's tenure) ** AIR 1925 Mad 95 (105) (DB) (Per Seshagiri J (Obiter))]

Section 91 — Note 17

1. **AIR 1919 PC 75 (78) : 46 Ind App 259 ** AIR 1918 PC 196 (198, 199) : 46 Ind App 72.**

[See also AIR 1958 Pat 624 (625) (DB) (The effacement of the widow must be total effacement and there should be a bona fide and total renunciation of the widow's right to hold the property and the surrender should not be a mere device to divide the estate with the reversioners)]

2. AIR 1919 Lah 109 (110)

mortgaged the estate of her husband and then by a compromise surrendered the possession of the estate to the next reversioner who agreed to hold the estate for her and pay her a fixed sum in cash and grain for her maintenance. It was held that the next reversioner acquired such an interest in the estate as qualified him to redeem.

18. Transfer from limited owner under Hindu law.

An alienation made by a Hindu widow or other limited owner in excess of her powers is not absolutely void but voidable at the option of the reversioner [illegible] redeem and until set aside. The persons entitled to dispute the validity of such [illegible] are the reversionary heirs or persons who are entitled to succeed to the estate [illegible] A stranger to the reversion is certainly not entitled to dispute the validity of such [illegible] (1). When a transferee of a Hindu widow or other limited owner mortgages the estate to A and then transfers the equity of redemption to *B*, the mortgagee, A has no *locus standi* to resist the claim of *B* for redemption on the ground that the transfer to *B* is beyond the powers of the [illegible] (2).

19. Government acquiring mortgagor's interest by escheat.

When by the law applicable to the last owner the [illegible] of heirs [illegible] escheats to the Government as the *ultimus haeres*. If there are [illegible] subsisting on the property the Government will take the property subject to such incumbrances (1), and will be owner of the mortgagor's interest, be entitled to redeem the mortgage (2).

Where the Collector passed orders [illegible] allotment and [illegible] of land which had revested to the State by [illegible] amount allottee would be entitled to claim [illegible] delivery of possession over the property for the [illegible] and discharge holders, allottees would be entitled to seek [illegible] (3).

As to the cases where the mortgaged property is a [illegible] intestate and without any legal heirs, see S. 105 Notes 6 and 42.

Where the equity of redemption of the mortgagor is [illegible] the treason or other offence committed by the mortgagor the Government [illegible] entitled to redeem the mortgage.(4)

20. Heirs of mortgagor.

As seen in Note 4, interest under [illegible] mortgagor. Thus, a person who succeeds to the original mortgagor [illegible] heir, can redeem the mortgaged property (1).

Section 91 — Note 18

1. AIR 1921 Bom 413 (413) : 45 Bom 105 (DB) ** AIR 1932 Oudh 342 (343) : 6 Luck 710. Mulla, Principles of Hindu Law, 9th Edn., 1940, Section 185A, page 192.
2. AIR 1921 Bom 413 (413) : 45 Bom 105 (DB) ** AIR 1932 Oudh 342 (343) : 6 Luck 710.

   [See also 1913 Pun Re No. 87 (DB). (Case under Customary Law in the Punjab.)]

Section 91 — Note 19

1. (1861) 8 Moo Ind App 500 (525, 526, 527) (PC) [illegible] 1866 11 Moo Ind App 619 (635, 636) (PC) ** (1875) 1 Cal 391 (401) : 3 Ind App 92 (PC).
2. (1866) 11 Moo Ind App 619 (636) (PC) ** (1864) 10 LT (NS) 519 (520) : 33 Beav 551 : 34 LJ Ch 96 : 12 WR (Eng) 927, Cateley v. Sampson.
3. AIR 1989 SC 1426 (1429, 1430).
4. (1696) 91 ER 80 (80) : 1 Salk 85, Sir Salathiel Lovel's case.

Section 91 — Note 20

1. (1900) 24 Bom 556 (561) : 27 Ind App 86 (PC) [illegible] AIR 1931 Pat 67 (69, 70) : 5 Pat LJ 644 (DB). (Where two of the successors of the mortgagor enter

Where G filed a suit for redemption as heir of mortgagor but failed the successor in interest G cannot subsequently file a suit for redemption alleging to be the owner as it will be barred under Sec. 11, C.P.C.(2)

21. Son under Mitakshara law.

Under the Mitakshara law the son takes by birth an interest in the ancestral property of the family. Where the father mortgages such property for a binding purpose the son will be a person having an interest in "the property mortgaged" (see Note 4). As such the son has a right to redeem the mortgage.(1) As to the question whether the son's right to redeem is affected where he is not made a party under O. 34, R. 1 of the Code of Civil Procedure, see C.P.C., O. 34, R. 1 Note 12 in the Appendix.

The son under Mitakshara law does not acquire by his birth any interest in the self-acquired property of his father. He cannot, therefore, in the lifetime of the father claim a right to redeem a mortgage of such property created by the father. After his death, however, he will be entitled to redeem as his heir.(2)

22. Mortgage by manager of joint Hindu family.

Where the manager of a joint Hindu family mortgages the family property for a binding purpose, and subsequently the family gets divided in status, each of the members has a right to redeem the mortgage as a person having an interest in the mortgaged property.(1)

Where a joint family property is subject to mortgage there is no transfer of ownership and coparceners are entitled to allot the mortgaged property in an oral partition to any one of them. The coparcener to whom the property is allotted in partition becomes entitled to redeem the mortgage and his right is also available to transferee from him. It is not necessary that such a right which flows from ownership can be made only by registered instrument.(2)

22A. Co-mortgagors.

One of the co-mortgagors can get the entire property redeemed even of his co-mortgagors.(1)

Although it is prescribed by O. 34, R. 1, CPC that all persons having an interest either in the mortgage security or in the right of redemption, shall be joined as parties in suit relating to the mortgage but as per Ss. 91, 92 even one of the fractional owners of the equity of redemption may sue to redeem the whole mortgage and the suit is not liable to be dismissed for non-joinder of other co-mortgagors. Therefore even if the legal representatives of co-mortgagors have not been brought

into a compromise with the mortgagee whereby they effect a new mortgage in lieu of the old mortgage, the compromise is not binding on the other successors and they can redeem the old mortgage.) ** (1881) 5 Bom 14 (20) (DB) ** AIR 1925 All 707 (710); 47 All 803 (DB) ** (1885) 9 Bom 429 (432) (DB) ** AIR 1925 All 15 (15, 16) ** (1881) 5 Bom 8 (13) (DB)

2. 1979 Mah LJ 682

Section 91 — Note 21

1. AIR 1942 Nag 39 (41); ILR (1942) Nag 543 (DB). (A son conceived and born after the mortgage transaction can redeem the mortgage, although he cannot challenge it.) ** (1909) 5 Nag LR 117 (117) ** AIR 1933 Nag 44 (46); 29 Nag LR 77 ** (1888) 8 Bom 481 (488) (DB) ** AIR 1916 Pat 375 (380) (DB) ** (1906) 2 Nag LR 90 (90)
2. AIR 1916 Pat 375 (380) (DB). (20 All 267 (PC). Foll.)

Section 91 — Note 22

1. (1913) 18 Ind Cas 891 (892) (DB) (Mad)
2. AIR 1980 Pat 254

Section 91 — Note 22-A

1. 1996 (4) ICC 634 (640) (Punj & Har)

on record the court is not precluded from passing a decree in favour of surviving mortgagor for redemption of the mortgaged land.(2)

Where the suit for redemption of mortgage of only share of the mortgagor in joint family property is filed by the mortgagor himself other sharers are not necessary parties (3)

After the death of original owner of the property his eldest son executed a mortgage deed creating usufructuary mortgage and delivered possession of property to the mortgagee He was entitled to file suit for redemption of mortgage without impleading other heirs of the original owner since he was the mortgagor.(4)

Whereabouts of one of the mortgagors was not known Suit for redemption was filed by wife and other heirs of the absconding mortgagor and a period of 7 years elapsed during the pendency of the suit In the circumstances the suit was maintainable All the mortgagors are not necessary parties to the suit for redemption of mortgage and by virtue of O 1 R 9 C P C the mortgagors cannot be non-suited merely on ground that one of the mortgagors was not impleaded as a party to the suit (5)

23. Member of Malabar tarwad.

The *anandravans* or junior members of a Malabar *tarwad* are persons having an "interest" in the *tarwad* property within the meaning of this section But the right of the junior members to redeem a mortgage created by the *Karnavan* of the *tarwad* must be taken subject to the *marumakkatavam* law applicable to the parties Under that law a Malabar family "speaks through the *karnavan*" and except in antegonism to him, can speak in no other way It has therefore been held that only under very special circumstances (the onus of proving which is on the junior members) can the junior members be allowed to maintain a suit for redemption of a *Kanom* granted by their *Karnavan* (1) As to an illustration of such special circumstances see the undermentioned case.(2)

After a division in status the members of a tarwad become tenants in common and it is open to some of them to redeem a previous mortgage which is binding on the tarwad Therefore the

2. 1996 AIHC 1836 (1838) (Him Pra)
3. AIR 1999 Guj 101 (103) : 1999 (2) Land LR 220
4. AIR 1999 Guj 101 (103) : 1999 (2) Land LR 220
5. AIR 1997 Andh Pra 53 (69) : 1996 (1) Andh WR 655

Section 91 — Note 23

1. AIR 1964 Ker 81 (85) : 11 R (1964) 1 Ker 193 ** AIR 1920 Mad 401 (401) : 43 Mad 393 (DB) (Karnavan alleged to be guilty of gross misconduct and collusion with the mortgagee

   (See however AIR 1958 Ker 307 (309) : 11 R (1957) Ker 859 (DB) (The junior members of a tarwad who have redeemed tarwad mortgages from strangers can still not be taken to be representative of the tarwad in the matter The redeeming junior member cannot be equated to the position of an assignee of the mortgage but is rather to be taken as the holder of a special interest in tarwad property with right to contribute to possession until his accounts are settled and paid off) ** (1958) Ker LJ 72 (75) (DB) (It is open to any member of a tarwad to redeem mortgages of tarwad properties))

2. AIR 1974 Ker 218 (220) (A junior member of tarwad property cannot file a suit for redemption of mortgage of tarwad property If however a junior member obtained possession of tarwad property by redeeming earlier mortgage and subsequently mortgaged the same whatever be the nature of his right in the property it is his interest that he has mortgaged and not that of the tarwad and hence a suit for redemption by other members is not maintainable) ** 1956 Ker L T 827 (829, 830) * AIR 1933 Mad 706 (706, 707) (DB) (Collusion between karnavan and kanomdar or prejudice to the tarwad interest by the continuance of the kanom)

mortgagees of the shares of such separated members are also interested in the previous mortgage within the meaning of this section (3)

24. Tenants-in-common.

A tenant-in-common does not possess any interest in the share held by another tenant-in-common in the common property. The interest of each tenant-in-common is distinct and defined and is held by him not in unison with the others but independently of them. One tenant-in-common has therefore no right to redeem a mortgage created by another tenant-in-common of his share in the common property.(1) (See also Note 44 on section 60).

25. Attaching judgment-creditor.

Under the English law, an execution creditor who took out attachment of the equity of redemption was in the position of a tenant by *elegit* having an *interest* in the property sufficient to entitle him to redeem (1) In this country it has long been established that the attaching creditor does not obtain, by reason of the attachment, any interest in or charge or lien upon the attached property (2) In cases before the Act it was accordingly held that such a creditor was not entitled to redeem a mortgage which had been executed before his attachment (3) The Act, however, in Cl (f) of the old section gave him a right to redeem (4) The Legislature has, in 1929, repealed Cl (f) and

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3. (1955) 1 Mad LJ 223 (223)

Section 91 — Note 24

1. AIR 1930 Nag 173 (176) : 26 Nag LR 208

Section 91 — Note 25

1. (1881) 6 Cal 663 (664) ** AIR (1921) Mad 30 (34) : 44 Mad 232 (DB) ** (1874) LR 3 Ch App 229 (236) : 22 WR (Eng) 356 : 43 LJ Ch 372 : 30 LT 279, Hatton v. Haywood. ** (1874) LR 17 Eq 435 (437) : 22 WR (Eng) 294, Beckett v. Buckley. ** (1870) 23 LT 584 (584) : 19 WR (Eng) 148, Champneys v. Burland

[See also (1744) 26 ER 917 (917) : 3 Atk 200, Shirley v. Watts (Judgment-creditor has no right to redeem unless he has taken out execution.)]

2. (1881) 6 Cal 663 (664) (There is no analogy between the position of an attaching creditor in India and that of an execution creditor in England.) ** (1898) 25 Cal 179 (185) (PC) ** (1902) 29 Cal 428 (431) (FB) ** (1909) 32 Mad 429 (442) (DB) ** AIR 1930 Mad 801 (807) : 53 Mad 881 (FB). (Confirming AIR 1925 Mad 266 on Letters Patent Appeal and overruling AIR 1914 Mad 439.) ** AIR 1915 All 201 (203) (DB) ** AIR 1921 Mad 30 (33, 34) : 44 Mad 232 (DB) ** AIR 1931 Cal 763 (770) : 58 Cal 598 (DB) ** ILR (1937) 1 Cal 65 (68) ** (1922) 64 Ind Cas 525 (527) (Low Bur) ** AIR 1938 All 651 (652) ** AIR 1939 Pat 7 (8, 11) : 18 Pat 155 (DB) ** (1912) 17 Ind Cas 432 (432, 433) (DB) (Cal) ** AIR 1936 Nag 209 (213) : ILR (1936) Nag 127 (DB) ** AIR 1920 Mad 126 (127, 128) : 43 Mad 696 (DB) ** AIR 1933 All 934 (938) (DB)

See also the AIR Commentaries on the Code of Civil Procedure, 10th (1985) Edn, S. 64 Note 5.]

[But see (1903) 25 All 446 (452, 453) (DB)]

3. (1881) 6 Cal 663 (665) ** (1881) 3 All 413 (414, 415) (DB)

4. AIR 1930 Mad 801 (807) : 53 Mad 881 (FB). (Confirming AIR 1925 Mad 266 on Letters Patent appeal and overruling AIR 1914 Mad 439.) ** (1891) 13 All 432 (457) (FB) ** (1901) 23 All 467 (469) (DB) ** AIR 1939 Pat 7 (11) : 18 Pat 155 (DB) ** AIR 1945 Oudh 87 (88, 89) : 20 Luck 53 (DB) ** AIR 1938 Mad 293 (294) (DB) ** (1920) 13 Bur LT 221 (223) ** AIR 1936 Nag 209 (213) : ILR (1936) Nag 127 (DB) ** (1912) 17 Ind Cas 432 (432) (DB) (Cal) ** (1903) 26 All 72 (75) (DB) ** (1903) 25 All 446 (452) (DB) ** AIR 1915 All 201 (203) (DB) ** AIR 1926 Nag 67 (68) (DB) ** AIR 1936 All 512 (513) : AIR 1921 Mad 30 (34) : 44 Mad 232 (DB). (The legislature did not regard him as entitled to redeem by virtue of an interest in the property but on other grounds. His right to redeem

the attaching creditor is now no longer a person who may redeem or institute a suit for redemption of the mortgaged property.(5)

26. Government attaching property under section 88, Criminal Procedure Code.

Under S 88, Criminal Procedure Code the Court has power to order an attachment of the property belonging to a person who is absconding. Sub-section (7) of that section provides that if the proclaimed person does not appear within the time specified, the property under attachment *shall be at the disposal of the State Government*. Thus the interest possessed by the State Government under S 88 Criminal Procedure Code is not that of a mere attaching decree holder. The effect of the section is to create an interest in the property and to enable the Government to remain in possession of it. The State Government therefore comes within the category of persons who may redeem or institute a suit for redemption of the mortgaged property under S 91 of the Transfer of Property Act.(1)

See also the AIR Commentaries on the Code of Criminal Procedure 8th (1982) Edn section 88, Note 7.

27. Judgment-creditor obtaining order for appointment of receiver under section 51, clause (d), Civil Procedure Code.

A judgment creditor who has obtained an order for the appointment of a Receiver of the judgment debtor's property under S 51 (d) of the Civil Procedure Code in execution of his decree cannot be said to have an interest in the property within the meaning of this section and cannot, therefore, redeem a mortgage previously executed by the judgment debtor on the property.(1)

28. Person holding decree for sale of mortgaged property.

In the undermentioned case (1) one *A*, a prior mortgagee, brought a suit for sale of his mortgage and impleaded *B*, a subsequent mortgagee as a party defendant. The suit was decreed against the mortgagor but dismissed against *B*. In a subsequent suit by *B* on his mortgage it was held that *A* was entitled to be impleaded as a party as he had a right to redeem *B*'s mortgage under this section by virtue of the decree for sale which he had against the mortgagor. It is submitted that this view is not correct. As has been seen already a *prior mortgagee* cannot claim to redeem a subsequent mortgage. The mere fact that he has obtained a decree for sale on his mortgage does not alter his position so as to give him an interest in the right to redeem. This view is also supported by reference to Cl (c) of the section which provides for a special case of a creditor obtaining a decree for sale of the mortgaged property

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comes to an end with the court sale) ** AIR 1928 Nag 97 (98) : 23 Nag LR 164 ** ILR (1937) 1 Cal 65 (68) ** AIR 1937 Nag 400 (401) : ILR (1937) Nag 452 ** (1922) 64 Ind Cas 525 (526, 527) (Low Bur) ** AIR 1933 Nag 333 (334) ** AIR 1923 Nag 311 (312) ** AIR 1917 All 110 (110) : 39 All 536 (DB) ** AIR 1932 All 356 (357) (DB)

[**See also** AIR 1951 Pat 254 (258) : 30 Pat 613 (DB) (When an attaching creditor on execution of his decree, purchases the property which is subject to a mortgage, his right to redeem the mortgage under the old S 91(f) is extinguished. After the purchase, he can only seek to redeem the mortgage as being the owner of the equity of redemption.)]

5. See the report of the Special Committee AIR 1936 All 512 (513)

Section 91 — Note 26

1. AIR 1930 Mad 1017 (1020) (DB) (The Government is a necessary party to mortgage suit under O 34, R 1, C P C.)

Section 91 — Note 27

1. ILR (1937) 1 Cal 65 (68, 69)

Section 91 — Note 28

1. AIR 1938 Oudh 10 (10, 11) : 13 Luck 625 (DB).

29. Trustee.

A person holding property as a trustee has an interest in the property within the meaning of this section, which would entitle him to redeem a valid mortgage on the property (1)

Section 48 of the Trusts Act provides that where there are more trustees than one all of them must join in conducting the business of the trust (2) It has been held by the High Court of Madras that so far as the question of redemption of a mortgage is concerned the wide language of S 91 entitles one of several trustees to bring a suit to redeem a mortgage of the trust property without averring or proving that the other trustees were asked to join as plaintiffs in the suit (3)

Where *A B C* and *D* are the trustees and *A* and *B* alone grant a mortgage of the trust property without consulting the others, the mortgage is invalid and not binding on the trust The trust, in such a case cannot as has been seen in Note 4 be said to have an interest in the property mortgaged or in the right to redeem the same Consequently it follows that even *A* and *B* cannot, on behalf of the trust, claim to redeem the mortgage In the undermentioned case(4) where the facts were as stated above it was held that *A* and *B* were not entitled to redeem, though the reasoning on which the view was based is not clear

30. Benamidar.

A benamidar executing a mortgage on the property which he holds benami for the real owner can maintain a suit for redemption of the mortgaged property (1) So also a person purchasing the mortgaged property from a mortgagor benami for another person, is entitled to maintain the suit for redemption in his own name (2) The reason is that the benamidar is a trustee for the real owner In *Gur Narain v Sheotal Singh*(3) their Lordships of the Privy Council said

The *benamidar* has no beneficial interest in the property or business that stands in his name he

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Section 91 — Note 29

1. AIR 1920 Lah 480 (481) (DB) (Suit for redemption by purchasers of equity of redemption Mortgagor joined as defendant Mortgagor pleading fraud and undue influence in bringing about sale and denying purchasers right to redeem — Part payment of sale consideration proved — **Held**, even assuming fraud or undue influence purchasers were in position of trustees holding the property for the benefit of the mortgagor and as such had right to redeem it.) ** (1865) 11 LT (NS) 730 (731) : 13 WR (Eng) 367 : 147 RR 796 11 Jur (NS) 130, *Fray v. Drew*. (Where a testator mortgages his freehold estate and then devises the equity of redemption to trustees subject to the payment of his debts the trustees can redeem the mortgage and if they refuse to do so any other person having an interest in the equity of redemption can redeem.)

2. AIR 1920 Mad 746 (747) (DB)

3. (1903) 26 Mad 649 (653) (FB) (Overruling 24 Mad 296) ** AIR 1920 Mad 746 (747) (DB) (Kanom — One of the two uralans of a temple can redeem without the other uralan) ** (1911) 34 Mad 406 (415, 416) (DB)

   [See however AIR 1920 Mad 965 (967) (DB) (Per Sadasiva Aiyar, J (Obiter) So far as acts like the institution of suits etc are concerned, all the trustees must be parties and must act after mutual consultations Discretion has to be used as regards the propriety of redeeming a kanom of the trust properties. One trustee cannot act in such a case without consulting others)]

4. (1912) 16 Ind Cas 435 (435) (DB) (Mad).

Section 91 — Note 30

1. AIR 1933 Mad 635 (635) ** AIR 1920 Pat 21 (24)

2. AIR 1920 Pat 21 (24) * AIR 1933 Mad 635 (636) (Suit by transferees from heirs of a benamidar)

3. AIR 1918 PC 140 (143) : 46 Ind App 1.

represents, in fact, the real owner and so far as their relative legal position is concerned he is a mere trustee for him. Their Lordships find it difficult to understand why, in such circumstances, an action cannot be maintained in the name of the *benamidar* in respect of the property although the beneficial owner is no party to it. ... It is open to the latter to apply to be joined in the action, but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him."

See also Civil Procedure Code, O. 34, R. 1, Note 8 in the Appendix.

31. Guardian of property of minor mortgagor and curator of lunatic mortgagor.

Clauses (d) and (e) of the old section provided that the guardian of property of a minor mortgagor on behalf of such minor and the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot may redeem or institute a suit for redemption of the mortgaged property. These clauses have now been omitted in the new section as being superfluous. (1) Section 103 lays down the procedure where a person incompetent to contract wants to make a tender or deposit under the provisions of Chap. IV of the Transfer of Property Act and O. 32 of the Code of Civil Procedure provides rules for a suit to be instituted on behalf of a minor or a person of unsound mind. There is, therefore, no necessity of making a special provision in this section for such cases.

A suit by lunatic person can be maintained for redemption of mortgage through a next friend or guardian.(2)

32. Trespasser.

A mere trespasser who has not perfected his title by adverse possession has no right to redeem; and if the mortgagee allows such a person to redeem, the true owner can treat the transaction as a nullity. (1) But when he acquires the interest of the mortgagor by adverse possession he is entitled to redeem. (2) Where a trespasser acquires title by adverse possession, there is no mortgage subsisting and therefore a suit by mortgagor for redemption would be incompetent. (3) An agreement to sell mortgaged property was entered into by the mortgagee in favour of the appellant. A suit for specific performance was filed by the purchaser-appellant and directed the appellant to remit the balance amount within certain period. She failed to deposit the amount even within the extended period and therefore the suit for specific performance was dismissed. However she remained in possession of the property for more than 12 years otherwise than in accordance with law and matured right by adverse possession, she did not access mortgage money tendered by the mortgagor nor did she vacate the possession. Therefore the mortgagor filed a suit for declaration of title and confirmation of title.

Held that the suit was not maintainable. Section 91 could not be invoked as she had no interest in the equity of redemption. She was not a mortgagee but was rather a volunteer. Since she had no interest in the equity of redemption, she could not be subrogated in place of the mortgagee.

Section 91 — Note 31

1. See the Report of the Special Committee.
2. 1998 (1) CTC 138 (142) (Mad).

Section 91 — Note 32

1. AIR 1953 Nag 4 (5); 11 R (1952) Nag 238 ** AIR 1919 Oudh 217 (219) (DB).

   [See also 1954 Ker LT 383 (384). (A wayfarer cannot offer the mortgage money and seek redemption from a mortgagee.) ** AIR 1952 Trav Co 105 (111) (DB). (Person claiming title through trespasser redeeming mortgage. Mortgage is not extinguished. Re-Owner can sue him for possession or for redemption.)]

2. Fisher & Lightwood, Law of Mortgage, 7th edn., p. 595 ** AIR 1919 Oudh 217 (219) (DB).
3. AIR 1982 NOC 306 (Pun).

Her right having been matured by adverse possession, the suit filed by the mortgagor was time-barred (4) The fact that the trespasser acquires, by adverse possession the interest of the mortgagor *subsequent to the act of redemption* by him, cannot validate such redemption (5)

33. Person having no interest redeeming mortgage — Effect of.

See Notes on S 92

34. Person with imperfect title to equity of redemption.

If a person seeking to redeem the mortgaged property has, to some extent, an imperfect title at the time when he institutes the suit for redemption, but is able to prove a perfect title at the hearing of the case he should have a decree for redemption (1) Thus *A* purchased the mortgaged property in execution of a money decree against B the mortgagor When *A* instituted the suit for redemption against the mortgagee the sale certificate was not issued in favour of *A* It was however issued subsequently and *A* produced it at the hearing of the suit It was held that a decree for redemption should be passed in his favour (2) But if a person, at the hearing of the case, sets up a new title based upon purchase of rights made after the institution of the suit and not ripening of the prior imperfect title the suit for redemption cannot succeed (3) A person with an imperfect title to the equity of redemption can also make a tender under O 21 R 69 clause (3) of the Civil P C and have the sale in execution of a mortgage decree stopped (4) Thus in the undermentioned case(5) A was a first mortgagee and *B* a second mortgagee. *B* sued on his mortgage and obtained a decree and the property was purchased by *C* on 26-10-1906 in execution of the mortgage decree, but the sale was not confirmed till 9 1 1907 A sued on his mortgage impleading *B* and obtained a decree and applied for execution The property was fixed for sale on 5 11 1906 Before the sale took place *C* deposited the amount under O 21 R 69 (old S 291), and prayed for stopping the sale The lower Court held that *C* had no *locus standi* to make the deposit It was held by the High Court, reversing the decision of the lower Court that when *C* made the deposit and prayed for redemption, he had an inchoate title to the property which was subsequently perfected by the confirmation of the sale and which therefore related back to the time of *C* s purchase of the rights of *B*.

35. Persons entitled to maintenance from an estate.

A mere right to receive maintenance from an estate does not amount to an interest in or charge upon the property mortgaged within the meaning of clause (a) and the person entitled to such maintenance cannot redeem a mortgage on the estate (1)

36. Mortgage by occupancy tenant — Right of person recognised by landlord as tenant to redeem.

Where an occupancy tenant mortgaged his land to *X* and after the death of the tenant)

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4. AIR 1987 Pat 67 (71) · 1996 (1) BLJ 799

5. AIR 1919 Oudh 217 (222) (DB)

Section 91 — Note 34

1. (1882) 6 Bom 139 (142, 143) (DB) ** 1900 Pun LR No 23 (DB) Also see Section 60, Note 1

2. (1882) 6 Bom 139 (142, 143) (DB)

3. 1900 Pun LR No 23 (DB)

4. (1907) 11 Cal WN 495 (496) (DB) ** (1899) 26 Cal 966 (972) (DB)

5. (1907) 11 Cal WN 495 (496) (DB).

Section 91 — Note 35

1. **(1900) 22 All 191 (199) : 27 Ind App 51 (PC).** (Confirming 18 All 253 on appeal) ** (1909) 12 Oudh Cas 37 (39) (A daughter in-law entitled to maintenance from joint family property must establish beyond reasonable doubt that she has interest within the meaning of S 91 to entitle her to redeem)

claimed to redeem the mortgage on the ground that he had been recognised by the landlord as the occupancy tenant, it was held that such recognition was not sufficient to give him a right to redeem a mortgage held by a third party in the absence of evidence that he acquired the rights as heir of the mortgagor **(1)** Thereafter mortgagor of occupancy holding died and there was settlement of land as proprietor with daughter of mortgagor **Held**, daughter being heir of deceased mortgagor had right to redeem.**(2)**

Where after mortgaging his rights as occupancy tenant as such the tenant becomes the owner of the land mortgaged his right to redemption is not extinguished **(3)**

If an occupancy tenant mortgages with the consent of the landlord and subsequently transfers his rights the transferee can redeem the mortgage and even though the mortgagee remains in possession for over 12 years the right of redemption is not extinguished **(4)**

Where the plaintiff was a tenant under the mortgagor and his status as tenant continued in spite of payment of some money under a compromise arrived at it was held that he had an interest in property and he could institute suit for redemption **(5)**

37. Clause (b) — Surety.

Clause (b) gives a surety for the payment of the whole or part of the mortgage debt a right to redeem or to institute a suit for redemption of the mortgaged property **(1)** A surety who undertakes to pay only the *interest* on the principal amount is entitled to redeem the mortgage **(2)** The right to redeem is however given to the surety not because he had any interest in the mortgaged property **(3)** but because he is liable to pay the mortgage debt and has a right on such payment to vest himself of all the creditor's securities.**(4)**

Section 91 — Note 36

1. AIR 1925 All 15 (15, 16)
2. 1983 UPLT (NOC) 12
3. 1982 Cur LJ (Civ) 91 (92) : 1981 Rev LR 565 (566) (Pun)
4. AIR 1973 SC 291 (294, 295) : (1972) 4 Civ App J 287.
5. (1983) 85 Pun LR 558 (561)

Section 91 — Note 37

1. AIR 1932 Nag 171 (171) : 28 Nag LR 214 : Subject to the payment of the policy obtains, under Ss 91 and 92, a charge over the policy ** (1869) 4 Ch App 204 (207) : 38 LJ Ch 220 : 17 WR (Eng) 385 : 20 LT 131 Green v Wynn (Surety for payment of interest only.)

   [See also (1863) 7 LJ 811 (812) : 1 De GJ & Sm 87 : 137 RR 58 : 9 WR (Eng) 32 : 32 LJ Ch 182, Gleaves v Paine. (Where the estate of the wife is mortgaged for the debt of the husband the wife becomes a surety for him and has a right to redeem) 2 Ch 602 (607) : 70 LJ Ch 794 : 50 WR (Eng) 132 : 85 LT 464 (Decision on Section 91)

2. (1869) 4 Ch 204 (207) : 38 LJ Ch 220 : 17 WR (Eng) 385 : 20 LT 131, Green v Wynn ** (1882) 19 Ch D 615 (622) : 51 LJ Ch 690 : 30 WR (Eng) 652, Forbes v Jackson

3. See AIR 1929 Pat 7(11) : 8 Pat 155 (DB) (Section 91 enumerates the classes of persons entitled to redeem and amongst them those who have an interest or a lien upon the property or the right of redemption are put under (1) (c)) ** AIR 1930 Mad 801 (807) : 53 Mad 881 (FB). (Cases contemplated by Clause (c) of the section exhaust the class of cases contemplated by O 34, R 1 Civil P C) ** AIR 1936 Nag 209 (2, 3) : 11 R 1930 Nag 127 (There is a clear distinction between the parties who have a personal right to redeem and those who have the right to redeem by virtue of an interest in mortgaged property.)

4. Fisher and Lightwood Law of Mortgage 7th Edition page 663 (1869) 4 Ch App 204 (207) : 38 LJ Ch 220 : 17 WR (Eng) 385 : 20 LT 131 Green v Wynn (1882) 19 Ch D 615 (622) : 51 LJ Ch 690 : 30 WR (Eng) 652 Forbes v Jackson (1865) 96 RR 501 (504) : 10 Hare 646 : 2 Drew 333. Newton v Chorlton

A surety has no right to redeem if the suretyship is for another debt or for a part of the debt which is not covered by the mortgage.(5) So also, where a person stands surety for another in respect of a debt, and the debtor also executes a mortgage as additional security, the surety is only in respect of the *personal* liability of the debtor and not in respect of the *mortgage*. In such a case, the surety cannot be said to be one for the *mortgage-debt*. Hence, such a surety is not entitled to redeem the mortgage.(6)

38. Clause (c) — Creditors of the mortgagor.

In England the general creditors of the mortgagor have, generally, no right to redeem; but under special circumstances they are given such a right (1) Thus, a creditor who has obtained a decree for sale of the debtor's real estate in a creditor's suit has a right to redeem the mortgagee of the estate (2) Under this Act a creditor has no right to redeem apart from the provisions of clause (c).

39. "May redeem."

Redemption is a legal right and not a liability Therefore a person having that right cannot be forced to exercise it against his will (1) This is clear from the use of the words "may redeem" in the section This is made clear in S 60 also where the words used are "at any time after the principal money has become due, the mortgagor *has a right*." Thus, a subsequent mortgagee who is entitled to redeem a prior mortgage under Cl (a) of this section cannot be compelled to redeem the prior mortgage before he can sue on his own mortgage (2)

40. Partial redemption.

The section provides, in general terms that certain persons, besides the mortgagor, who have an interest in the mortgaged property or in the right to redeem it are entitled to redeem the property. The question whether a person who is *entitled to a share only* of the mortgaged property has the right to insist on redeeming the *whole of the mortgaged property* cannot, however, be decided under this section That question can be decided only by a reference to the provisions of S. 60.(1) See Notes on that section.

[See AIR 1944 Mad 195 (206) ILR (1944) Mad 340 (DB) (A surety for a part only of a debt is on payment of that debt entitled *pro tanto* to the security held by the creditor as cover for the debt as a whole)]

See Sections 140 and 141 of the Indian Contract Act, 1872.

5. Fisher and Lightwood, Law of Mortgage, 7th Edition, page 603, FN (b) ** (1827) 57 ER 747 (749) : 2 Sim 155 : 29 RR 70, Wade v. Coope

6. AIR 1944 Mad 195 (206) : ILR (1944) Mad 340 (DB).

Section 91 — Note 38

1. Fisher and Lightwood, Law of Mortgage, 7th Edition, pages 597, 598.

2. (1872) 62 RR 67 (70) 2 Hare 177 67 ER 74 14 LJ Ch 97 5 Jur 1130, Christian v Field.

Section 91 — Note 39

1. **(1911) 9 Ind Cas 513 (519) (FB) (Mad)** ** AIR 1926 All 480 (487) (DB) ** AIR 1935 Cal 139 (141) 62 Cal 75 (DB) ** AIR 1921 Low Bur 61 (63) 11 Low Bur Rul 119 (DB) ** AIR 1931 Mad 542 (548) (DB) ** AIR 1941 Cal 484 (488) ILR (1941) 1 Cal 514 (DB).

2. **(1911) 9 Ind Cas 513 (519) (FB) (Mad)** ** AIR 1926 All 480 (486, 487) (DB) ** AIR 1916 Nag 120 (122) 13 Nag LR 69 ** (1898) 11 CPLR 75 (78 79) ** (1904) 7 Oudh Cas 330 (332 333) ** AIR 1941 Cal 484 (488) ILR (1941) 1 Cal 514 (DB)

[See also AIR 1942 Cal 290 (291) ILR (1941) 2 Cal 551 (A second mortgagee owes no duty to the mortgagor to redeem the prior mortgage — He is entitled to do so if he thinks it desirable to protect his own interest.)]

Section 91 — Note 40

1. See AIR 1916 Mad 863 (865, 869) : 38 Mad 310 (DB).

41. Order of redemption.

The section merely specifies the persons who, besides the mortgagor, are entitled to redeem or institute a suit for redemption of the mortgaged property, but does not prescribe any order in which such persons may redeem. The general rule, in this respect, is that as between several persons entitled to redeem the person in whom the equity of redemption vests earlier in point of date has a preferential and a prior right to redeem (1). Thus, in *Beevor v. Luck*(2) Sir W. Page Wood V. C. observed as follows :

> 'A general principle however may be traced which is this. Wherever a number of persons some prior to others as to the period of their enjoyment come in under the same instrument as tenants for life and in remainder under a settlement there no successive rights to redeem are given but only one single common right of redemption. But where some of the persons interested are prior to others by reason of priority in the date of the instrument under which they claim as in the case of first second and third mortgagees the person entitled to priority in date has the first right to redeem and in the event of his not redeeming, successive rights of redemption are given to those who follow.

As between a mortgagor himself and any other person interested in the right of redemption, the latter has a preferential right to redeem. Thus, it has been held in England that as between the mortgagor and the second mortgagee the latter has a preferable right to redeem the prior mortgage the reason is that a mortgagor, by mortgaging the property to the second mortgagee, makes him his assign.(3) In the undermentioned case (4) where a subsequent mortgagee had obtained a decree for redemption against the prior mortgagee, it was held that so long as the decree remained in force and executable, the right to redeem the prior mortgage, as betwen the mortgagor and the second mortgagee, was preferentially in the latter.

A prior mortgagee who obtains a decree for foreclosure in a suit on his mortgage without impleading the subsequent mortgagee,(5) or in a suit for redemption by the mortgagor to which the subsequent mortgagee was not made a party (6) or who having obtained a decree for sale on his mortgage without impleading the subsequent mortgagee, himself purchases the property in execution of the decree for sale(7) becomes the owner of the mortgagor's equity of redemption and is, therefore, entitled to redeem the subsequent mortgage in that capacity. But the subsequent mortgagee also has a right to redeem the prior mortgage and that right is not affected by the proceedings in the suit to which he was not a party. Thus *prima facie* the prior mortgagee as owner of the mortgagor's equity of redemption and the subsequent mortgagee have the right to redeem each other's mortgage in such a case. The question, however arises as to which of them is entitled first to redeem the other's mortgage. The general trend of decisions is that the prior mortgagee (who has

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Section 91 — Note 41

1. (1867) 4 Eq Cas 537 (548) : 15 WR (Eng) 1221 : 36 LJ Ch 865. Beevar v. Luck ** (1875) 32 LT 689 (691). Loveday v. Chapman ** (1882) 20 Ch D 724 (727, 730) : 51 LJ Ch 621 : 30 WR (Eng) 716 : 47 LT 208. Teevan v. Smith ** (1878) 39 LT 78 (79). Breeds v. Riches ** (1890) 44 Ch D 161 (166) : 38 WR (Eng) 698 : 59 LJ Ch 567 : 62 LT 802. Smithett v. Hesketh ** (1880) 13 Ch D 639 (650) : 42 LT 169 : 28 WR (Eng) 549 : 49 LJ Ch 209. Mills v. Jennings.
2. (1867) 4 Eq Cas 537 (548) : 15 WR (Eng) 1221 : 36 LJ Ch 865.
3. (1881-82) 20 Ch D 724 (727) : 51 LJ Ch 621 : 30 WR (Eng) 716 : 47 LT 208. Teevan v. Smith.
4. (1912) 35 Mad 42 (43) (DB). (The decree however had become inoperative and therefore mortgagor could redeem the prior mortgage.)
5. AIR 1922 All 135 (137) : 44 All 462 (DB) ** AIR 1924 Nag 198 (199) ** (1890) 3 CPLR 82 (84) ** AIR 1919 Nag 93 (94).
6. (1904) 28 Bom 153 (170) (DB).
7. AIR 1925 All 804 (807) : 47 All 751 (DB) ** AIR 1924 Pat 484 (486) : 3 Pat 435 (DB) (As

obtained the equity of redemption) will have a prior right to redeem the subsequent mortgagee (8). Thus, in *Hussanbhai v. Umaji*(9) Jacob, J., observed :

"The question which is before us is concerned strictly with their legal rights *inter se*. There can be no doubt upon the authorities that a puisne mortgagee, who was not made a party to a suit on a prior mortgage, does not lose his right to redeem that mortgage by sale or foreclosure in that suit. The further question, however, whether the prior mortgagee, who had foreclosed, or purchased under a sale in such a suit, is in his turn entitled to the option of redeeming such a puisne mortgagee, is one that is not so free from doubt. It is true that the interest of the mortgagor was acquired by proceedings in a suit to which the present plaintiff was not a party, and by which he is not therefore bound; but it appears to me that it can only be for the protection of his rights, and not for their enlargement, that the puisne mortgagee under such circumstances can claim to disregard the effects of the previous litigation. If there had been no such former suit for redemption of the prior mortgage, there can be no doubt that the plaintiff would have been liable to be redeemed by the mortgagor. Can he then be allowed to say, in reply to the prior mortgagee, that the foreclosure operates to extinguish the rights of the mortgagor as against him ... If the puisne mortgagee would still be liable to be redeemed, then it is no hardship on him that he should be redeemed at the instance of the prior mortgagee, who has by foreclosure acquired the title of the mortgagor, rather than by the mortgagor **himself or any other private assignee of the mortgagor's interest.**

In *Parasurama Singh v. Pandhohi*(10) Ryves, J., observed :

"It seems to me that both are prima facie entitled to what they claim and the question for the Court under such circumstances, when all the parties were before it and all the necessary evidence was on the record, was to decide once and for all, having regard to the equities of the parties and to prevent further litigation, what the justice of the case demanded. In this view what I think we have to look at in this appeal is not whether the decisions of the Courts below were legally correct but whether we should now do what I think the Courts below should have done, looking at the consequences. If we

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between prior mortgagee and subsequent mortgagee, the former has a prior right to redeem the latter.) ** AIR 1925 Cal 59 (61) (DB) ** (1903) 13 Mad LJ 72 (74) (DB) ** AIR 1915 All 299 (300) ** **(1890) 18 Cal 164 (179, 181) : 17 Ind App 201 (PC)** ** (1908) 8 Cal LJ 173 (175, 176) (DB) ** (1901) 5 Cal WN 232 (233) (DB) ** AIR 1930 Pat 579 (581) : 9 Pat 930 (DB) ** AIR 1921 Mad 648 (649) (DB) ** AIR 1933 Cal 181 (182). (The same rule applies where the auction-purchaser is a stranger instead of the mortgagee.)

Also see Note 7.

[But see (1909) 1 Ind Cas 505 (506) (All). (Even if it were held that the prior mortgagee stands in the shoes of the mortgagor by virtue of the purchase in execution of his decree, the mortgagor's right of redemption does not exist when decree is passed on the puisne mortgage and the property is sold in execution of that decree.) ** (1892) 16 Mad 121 (125, 126) (DB). (Prior mortgagee purchasing the mortgaged property in execution of mortgage decree in a suit to which puisne mortgagee was not a party ... **Held,** prior mortgagee as purchaser of right of redemption was entitled to redeem the puisne mortgagee but puisne **mortgagee was not entitled to redeem the prior mortgagee.)]**

8. AIR 1925 All 804 (807) : 47 All 751 (DB) ** (1904) 28 Bom 153 (170) (DB) ** AIR 1933 Cal 181 (182). (As between two purchasers of mortgaged property the title to the outstanding equity of redemption is determined by the priority not of the respective mortgages but the respective sales and the person who first buys the equity of redemption whether he be the mortgagee himself or a stranger would be entitled to redeem all the subsisting mortgages on the property and thus acquire an absolute title. AIR 1922 All 135 and AIR 1925 All 804 (Foll.) ** AIR 1919 Nag 93 (94) : 3 CPLR 82 (Followed.) ** (1890) 3 CPLR 82 (84, 85) ** AIR 1922 All 135 (137, 139) : 44 All 462 (DB) ** AIR 1915 All 299 (300). (28 Bom 153 approved but a decree in terms similar to that passed in 28 Bom 153 not passed because the prior mortgagee did not claim to redeem the subsequent mortgagee but simply prayed for a dismissal of the subsequent mortgagee's suit for redemption.) ** AIR 1921 Mad 648 (649) (DB).

9. (1904) 28 Bom 153 (173, 174) (DB).

10. AIR 1922 All 135 (137, 139) : 44 All 462 (DB).

uphold this decree, the plaintiffs (puisne mortgagees) pay the decretal amount to the defendants (prior mortgagees), and the next day the defendants will inevitably file their suit to redeem the plaintiffs and so recover the property. All that the plaintiffs are entitled to is to get back their mortgage money. After all, they are merely mortgagees and as such are liable to be redeemed by the owner of the property, that is, the mortgagor or whoever represents him. In this case the prior mortgagees, the defendants, having acquired the equity of redemption, stand in the shoes of the mortgagor and are the owners of the property. I should be content to stop here and base my decision on what seems to me to be required by the equities of the case. As I have already said the decision of the Courts below in this case was legally right, but I do not think it was the proper decision to give having regard to all the circumstances of the case and the pleadings of the parties. I would, therefore, allow the appeal and allow the defendants to redeem the plaintiffs' mortgages on payment to them of the sum due on their mortgages."

The contrary view taken in the undermentioned cases(11) does not appear to be correct.

42. Onus of proof.

Under the English law a person who seeks to redeem a mortgage must show a *prima facie* title to the equity of redemption (1). The same principle applies under this Act also. If a person other than the mortgagor claims to redeem, he must prove that he is one of the persons described in S. 91(2). Thus, where he claims to redeem in the capacity of a puisne mortgagee he must prove the due execution of the puisne mortgage, and this is so even when the mortgagor admits the due execution of the mortgage, as the suit is primarily against the prior mortgagee and not against the mortgagor(3). It is not, however, necessary for a subsequent mortgagee or a purchaser to prove the passing of consideration for the mortgage or transfer (4).

A Muhammadan mortgaged certain property and then died. After his death his major son acting on behalf of his three minor brothers executed a second mortgage in favour of another person. The second mortgagee sued to redeem the prior mortgage. The prior mortgagee contended that the major son had no power to act on behalf of his minor brothers, that therefore the mortgage in favour of the second mortgagee was invalid and that he had no right to redeem the prior mortgage. All the minor brothers (who had now attained majority) accepted the mortgage in favour of the

11. AIR 1924 Nag 198 (199). (Prior mortgagee foreclosing without making puisne mortgagee party to the suit. He cannot offer to redeem puisne mortgagee as thereby he will be taking advantage of his own wrong.) ** (1908) 8 Cal LJ 173 (176) (DB) ** (1903) 13 Mad LJ 72 (74) (DB).

Section 91 — Note 42

1. (1683) 23 ER 402 (402). (1 Vern 182. Lomax v. Bird. (Without showing a prima facie title he cannot say "I shall redeem at my peril.") ** (1793) 29 RR 201 (201). 36 ER 847. Pym v. Bowreman. (Prima facie title is sufficient.) ** (1839) 36 ER 844 (845). 29 RR 200. Majes v. Biou ** (1841) 65 RR 333 (336). 1 Ph 6. 6 Jur 456. Lloyd v. Watt. (Person claiming to be heir of mortgagor has only to make out prima facie case of heirship.)

2. AIR 1926 all 725 (726) (DB). (**Overruled** on another point in AIR 1927 All 1 (FB).) ** (1902) 15 CPLR 175 (176, 177) ** (1909) 12 Oudh Cas 37 (39) ** (1891) 1891 Punjab Re No 101, p 478 (482) (DB). (**Held**, on facts that plaintiff was entitled to redeem.) ** AIR 1914 Mad 23 (23) (DB). (Where in redemption suit a plaintiff relies for his title on a sale for arrears of rent, he must prove the validity of the sale. — But it is not necessary that he should do so in a particular way. It is sufficient if he offers general evidence of the sale, and of the subsequent conduct of parties.)

   [**See also** (1866) 5 Suth WR 163 (164) (DB).]

3. AIR 1926 All 725 (726) (DB) ** (1892) 15 Mad 54 (55) (DB). (Prima facie when the execution of a mortgage or other conveyance is proved, further evidence is not necessary to show that the purchaser has taken the interest which the document purports to convey.)

4. (1892) 15 Mad 54 (55, 56) (DB).

second mortgagee in the pleadings. It was held that as the minor brothers admitted the mortgage it was not open to the prior mortgagee to raise the question of the validity of the second mortgage on the ground of the incapacity of the major son to act as guardian of his minor brothers.(5)

When a person claims to redeem as the heir of the mortgagor under the Muhammadan law and there are several collaterals of the mortgagor, he must prove that he has a preferential right of succession.(6)

(See also S. 60, Note 50).

43. Whether section applies to redemption of charges.

It has been held in England that a charge is not subject to redemption or foreclosure.(1) Where a charge for maintenance was given in perpetuity to X and his heirs, it was held by the Allahabad High Court that such a charge was not capable of redemption so as to free the property from the charge and that all that could be done in such a case was to pay up the arrears of maintenance due and prevent the sale of the property.(2) In the undermentioned case,(3) however, where a Hindu widow obtained a decree for maintenance charging certain properties and in execution of the decree for *arrears* of maintenance, a third party purchased the property subject to the charge for future maintenance, it was held that a subsequent mortgagee of the property could "redeem" the purchaser by payment of the arrears and get subrogated to that extent to the rights of the charge-holder See also the undermentioned cases (4) (See also S 100, Note 13)

44. Law in the Punjab.

The Transfer of Property Act has not been extended to the State of the Punjab; but the principle of the section has been applied to the cases arising in that State.(1)

45. Right of redemption of persons not made parties to suits relating to mortgages.

As for the rights of redemption of persons who are necessary parties to suits relating to mortgages under O. 34, R. 1, Civil Procedure Code, but have not been made so, see Civil Procedure Code, O. 34, R. 1, Note 19.

46. Limitation for suits for redemption of mortgages.

See the AIR Commentaries on the Limitation Act 7th (1997) Edition, Art 61(a).

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5. AIR 1927 Lah 81 (81).

[See also (1891) 4 CPLR 128 (129). (Where property belonging to a minor was by his guardian first mortgaged to one person and then sold to another, the mortgagee could not in a suit to redeem his mortgage by the vendee, impugn the sale and contend that it was not made for the benefit of the minor.)]

6. AIR 1923 Lah 222 (223).

Section 91 — Note 43

1. (1866) 147 RR 129 (132) 35 Beav 234 35 LJ Ch 253 12 Jur (NS) 85 13 LT (NS) 783 : 14 WR (Eng) 298 : 55 ER 885, Earl Poulett v. Hood.

2. AIR 1933 All 934 (938) (DB)

3. AIR 1935 Mad 867 (869) 59 Mad 101 (DB). (But as the mortgage was affected by lis pendens the subsequent mortgagee was deprived of his right to redeem.)

4. AIR 1946 Mad 51 (52) (Charge decree for maintenance — Mortgage of property charged after decree — Mortgagee can redeem before sale in execution of decree is confirmed.) ** AIR 1919 Low Bur 143 (144) 9 Low But Rul 169 (DB) (Money-decree on mortgage by father paid off by one of his heirs who remained in possession by consent of others — The payment created a charge and other co-heirs are entitled to redeem.)

Section 91 — Note 44

1. See AIR 1915 Lah 199 (200) (DB)

^[92. **SUBROGATION.**— Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.]

[A] Sections 92 to 94 were *inserted* by the Transfer of Property (Amendment) Act, 1929 (20 of 1929), S 47

Synopsis

1. Doctrine of subrogation.
1A. Salvage lien and subrogation, distinction between.
2. Law prior to 1929.
3. This section and S. 69, Contract Act.
4. Law in States where this Act is not in force.
5. Section, whether retrospective.
6. Whether section applies to charges.
7. Right of subrogation arises in redemption.
8. There must be relationship of mortgagor and mortgagee.
9. "Other than the mortgagor."
10. Covenant to pay mortgage — Effect of.
11. Redemption by subsequent mortgagee.
12. Redemption by prior mortgagee.
13. Redemption by purchaser.
14. Redemption by surety.
15. Redemption by co-mortgagor.
16. Redemption by volunteer.
17. Redemption by a person claiming under a void or voidable title.
18. Redemption by trespasser.
19. Third paragraph.
19A. Renewal of mortgage — See under Note 20
20. Person who has advanced money to a mortgagor.
21. "Mortgage has been redeemed."
22. Sale or mortgage to pay off prior mortgage — Whether the first or the third paragrpah applies.
23. Fourth paragraph — Mortgage must be redeemed in full.
24. Rights of subrogee.
(A) **Rigts against mortgaged properties.**
(B) **Rigt to possession.**
(C) **Right to prior mortgagee's leasehold rights.**
(D) **Extent of subrogation.**
(E) **Right to claim interest.**
25. Right of subrogation is available to successors-in-interest.
26. Purchaser entitled to subrogation — Preemptor whether can claim that right.
27. Enforcement of rights acquired by subrogation.
28. Limitation.
29. Defence of suborgation is not barred even if suit to enforce it is time-barred.
30. Res judicata.
31. Plea of subrogation.

1. Doctrine of subrogation.

Subrogation in its wide signification means that one person is substituted for another in regard to the latter's rights and liabilities in a certain matter (1) Such substitution may arise in various

Section 92 — Note 1

1. AIR 1955 Pepsu 145 (146) ILR (1955) Patiala 539 ** AIR 1943 Bom 191 (192) (DB) **

ways. The simplest case is where A *assigns* his rights against B to C. C is then "subrogated" to the rights of A. Apart from assignment, a subrogation or substitution of rights may arise by *agreement* between the parties. Thus, if A advances money to B to enable B to pay off his creditor C and B *agrees* that A shall be subrogated to the rights which C may have against B, A will be subrogated to the rights of C. This kind of subrogation is generally known as *"conventional"* or *"contractual"* subrogation.(2) though even the first class of substitution of rights is also sometimes referred to as conventional subrogation.(3)

Independent of assignment or contract, a right of subrogation is recognised *by law* under certain circumstances. This is called *legal subrogation*. Thus, a subsequent mortgagee paying off a prior mortgage on the same property is given the same rights against the mortgagor as the prior mortgagee had in respect of his mortgage. This class of subrogation rests upon doctrines of equity and principles of natural justice and not on privity of contract.(4) One of these principles is that a person who is interested in the payment of money which another is bound by law to pay and who, therefore, pays it is entitled to be reimbursed by the other (5) This principle is found enacted in S 69 of the Central Act. Another principle is that he who seeks equity must do equity (6)

The doctrine of subrogation is not confined in its applicability to *mortgages* though, in this

AIR 1928 All 241 (244) 50 All 569 (DB) (**Reversed** on another point in AIR 1932 PC 74) ** AIR 1916 All 44 (46) (DB) (Subrogation means right of one creditor to stand in the place of another and to avail himself of that other's security) ** AIR 1914 Mad 371 (374) (DB) (Subrogation is substitution of one person in place of another whether as creditor or possessor of any rightful claim.) ** AIR 1934 Oudh 213 (215) (DB) ** AIR 1942 Nag 111 (112) ILR (1942) Nag 393 (Subrogation being a mere substitution, does not create fresh rights but puts the claimant in the shoes of the creditors.)

See also Halsbury, Laws of England, Vol. 13, page 149, para 175

2. **AIR 1945 PC 23 (29) : 12 Ind App 39 : ILR (1945) Kar (PC) 73** ** AIR 1936 Nag 32 (33) 31 Nag LR Supp 169 (**Overruled** on another point in AIR 1937 Nag 372) ** AIR 1937 Pesh 5 (5) ** AIR 1932 Oudh 54 (55, 56) 7 Luck 237 (DB) ** **AIR 1942 Oudh 260 (261) : 17Luck 755 (FB).** (Per Bennet, J.)

3. Ghose, The Law of Mortgage in India, 5th Edn , 1922, page 352

4. AIR 1950 Pat 13 (15) 28 Pat 531 ** (1910) 14 Cal WN 1089 (1095) (DB) (6 Cal LJ 134, Foll) ** AIR 1943 Lah 113 (116) · 209 Ind Cas 75 (DB) ** AIR 1936 Oudh 280 (285) (DB) ** (1907) 6 Cal LJ 134 (137, 138) (DB) ** AIR 1914 Mad 371 (374) (DB) ** (1909) 31 All 166 (168, 169) (DB) ** AIR 1929 Mad 860 (862) (DB) * AIR 1933 9 (12) 7 Luck 655 (DB) ** (1911) 7 Ind Cas 980 (982) (DB) (Cal) (Doctrine of subrogation is founded on facts and circumstances of each particular case) ** AIR 1934 Oudh 213 (215) (DB) (Quoting Jones on Mortgage, Vol. 2, 7th Edn., page 204.)

5. ILR (1966) 2 Ker 388 (396) (DB) ** AIR 1955 Pepsu 145 (146) ILR (1955) Patiala 539 ** AIR 1950 Mad 186 (188) (DB) ** AIR 1949 East Punj 254 (256) (DB) (Following AIR 1937 All 588 (FB) and AIR 1942 Oudh 449 (FB) Note The principle being one of reimbursement, the subrogee cannot claim more than what he has actually paid for redeeming the mortgage to which he is subrogated) ** **AIR 1937 All 588 (591) : ILR (1937) All 580 (FB).**

[**See also** AIR 1932 Cal 126 (132, 133) , 59 Cal 117 (DB) ** AIR 1928 All 241 (244) 50 All 569 (DB). (If a certain party is owning property and his property is relieved from certain liability, it is the duty of the owner to see that the party who relieves is not allowed to suffer This is the principle of subrogation) ** (1905) 2 Cal LJ 288 (299) (DB) ** AIR 1934 Oudh 213 (215) (DB) (Subrogation rests on the principle which equity adopts to compel the ultimate discharge of a debt by him who in good conscience ought to pay it, and relieve him whom none but the creditor could ask to pay it) ** AIR 1931 All 40 (42) · 52 All 1037 (DB) (The principle underlying legal subrogation is that a person claiming it had to pay the debt under grave necessity to save himself a loss)]

6. AIR 1928 All 241 (244) 50 All 569 (DB) ** AIR 1932 Cal 126 (133) 59 Cal 117 (DB).

Act, the doctrine is dealt with only in relation to mortgages (7) In the undermentioned case(8) it has been held by the High Court of Madras that where a trustee or executor or guardian contracts a loan for the benefit of the estate the creditor is subrogated to such rights of reimbursement as the borrower himself may have out of the estate. As to the right of subrogation of an insurer under a policy of marine insurance, see S 79 of the Marine Insurance Act, 11 of 1963 Prior to the passing of that Act the provision found a place in S 135-A of this Act The latter section was repealed by the Marine Insurance Act. The undermentioned case(9) relating to the right of a marine insurer to subrogation was decided under S 135-A (3) of the T P Act

An insurer has no independent cause of action nor has he any independent claim of his own than the assured himself On payment to the assured he acquires all his rights and remedies as from the time of the casualty causing the loss.(10)

Where an insurer of goods consigned by a consignee pays the consignee he is subrogated to rights of the consignee for damages from the Railways (11)

Section 92 of the Act deals with both conventional and legal subrogation in relation to mortgages The first paragraph deals with legal subrogation and the third paragraph with conventional subrogation.(12)

The law as to the right of a redeeming co-mortgagors is the same as it was before the enactment.(13)

1A. Salvage lien and subrogation, distinction between.

For a full discussion of the circumstances under which a salvage lien is acquired under law and of the extent to which the doctrine of salvage lien is applicable to India, see Note 29 on S 100 The following points as to the distinction(1) between a salvage lien and the right of subrogation may be noted here :

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7. AIR 1942 Nag 111 (113) ILR (1942) Nag 393 (Decree by sadar lambardar paid by lambardar — Lambardar's right to compel contribution from his co sharer arises not under S 92 but under Ss 82 and 95 read with S 100 T P Act) ** AIR 1939 Pat 375 (377) 18 Pat 342 (DB) (Incumbrance that is paid off is treated as assigned to the subrogee who is regarded as an assignee in equity The supposed assignment however does not necessarily carry with it all the consequences that would flow from a legal assignment) ** (1913) 16 Oudh Cas 148 (155) (DB)

8. AIR 1939 Mad 538 (542) : ILR (1939) Mad 891 (DB)

9. (1968) 1 Andh LT 317(320) (When the insurer under a policy of marine insurance has paid the owner for a partial loss under the provisions of S 135 A 3) T P Act he does not acquire any title to the goods which were being transported But the insurer is subrogated to all the rights and remedies of the insured person But mere subrogation does not by itself entitle the insurers to enforce the rights in their own names To enable them to do so there must be some statutory provision entitling them to sue or they must get the rights assigned to them by the person concerned.)

10. AIR 1970 Mad 48 : (1968) 2 Mad 497.

11. AIR 1969 Bom 401 : 71 Bom 214.

12. AIR 1951 Mad 917 (920) (DB) ** AIR 1950 Mad 186 (188) (DB) ** AIR 1950 Pat 13 (15) 28 Pat 531 (DB) ** **AIR 1936 Mad 171 (174) : 59 Mad 359 (FB).** (Per Varadachariar, J.) ** AIR 1936 Nag 32 (33) 31 Nag LR Sup 169 ** **AIR 1942 Oudh 260 (261) : 17 Luck 755 (FB). (Per Bennett, J.)**

13. **AIR 1977 Ker 148 : 1977 Ker LT 464 (FB).**

Section 92 — Note 1A

1. AIR 1943 Mad 573 (577) ILR (1944) Mad 44 (Where one of the mortgagees of a Kanomdar

(1) Subrogation arises only where a mortgage or charge is paid off. But a person may acquire a salvage lien although the demand which he has paid off does not amount to a mortgage or charge.

(2) Under subrogation a person only gets the rights of person whose demand he has paid off. But under a salvage lien, a person gets a charge on the property which is available against all the persons whose interests in the proeprty have been saved by the payment.]

See also section 48, Note 11.

2. Law prior to 1929.

Before the passing of this Act in 1882, the Courts applied the rule of convenional subrogation wherever there was an agreement between the parties to that effect.(1) They also applied the doctrine of legal subrogation as being in consonance with justice, equity and good conscience, to cases where a person, for the protection of his own interest, paid off a charge on the property.(2) Thus, a subsequent mortgagee paying off a prior mortgage was held entitled to stand in the shoes of the prior mortgagee in respect of the mortgage paid off.(3)

As regards a subsequent *purchaser* of the equity of redemption paying off a prior mortgage on the property his right of subrogation depended upon the applicability, to the particular case, of the doctrine of *merger*. According to the English law, where the ownership of a property and a charge thereon became united in the same person, the charge was *extinguished* unless the parties *intended* to keep the charge alive. This intention was *presumed* where it was for the benefit of the party paying to keep the charge alive. There was, however, one exception to this rule of intention against merger and that was, where the person paying off the charge was himself *personally liable to pay* the charge. In that case, he could not claim to keep the charge alive.(4)

It may be noted that the rule of intention referred to above was only applicable where a charge and the *ownership* of the property became united in the same person. If, in such a case, there was an intention, actual or presumed, to keep the charge alive, then the person paying off the charge was subrogated to the rights of the charge-holder. Otherwise the charge was extinguished and the question of subrogation did not arise.

The principles mentioned above were applied to cases arising in this country before the Act (5) The leading case on the point is *Gokuldas v. Puranmal* (6) In that case property subject to two

pays the renewal fee to the landlord he is entitled to a prior charge in respect of the sum he paid.)

Section 92 — Note 2

1. 1953 BLJR 227 (231) (AIR 1940 Pat 385 Rel. on) ** **AIR 1940 Pat 385 (394, 395) : 19 Pat 752 (FB).**
2. (1872) 17 Suth WR 480 (482) (DB)
3. (1875) 24 Suth WR 47(48) (DB).
4. Halsbury, Laws of England, Vol. 21, p. 318.
5. **(1883) 9 Cal 961 (971, 977) : 10 Ind App 62 (PC)**** (1910) 14 Cal WN 1089 (1095) (DB)
6. **(1884) 10 Cal 1035 (1046) : 11 Ind App 126 (PC).**

Note.— Before the decision in *Gokuldas's case* there was a difference of opinion in this country as to whether the rule laid down in the English case of *Toulmin v. Steere* (1817) 3 Mer 210 Should be followed. That decision laid down that the purchaser of an equity of redemption could not set up a prior mortgage of his own or which he had got in against subsequent incumbrancers of which he had notice.

The rule was applied in the following cases :

** (1870) 5 Beng LR 463 (466) (DB) * (1875) 11 Bom HCR 41 (43) (DB)

It was not applied in the following case :

** (1971-74) 7 Mad HCR 229 (231, 232) (DB)

Even in England the authority of the decision was questioned. See the following cases :

mortgages in favour of A and B respectively, was sold in execution of a money decree and was purchased by C. C paid off A and then claimed, as against B to stand in the shoes of A. Their Lordships of the Privy Council observed as follows :

> "The obvious question to as in the interest of justice, equity and good conscience is what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest."

In 1882, the Act introduced two provisions in Ss. 74 and 101. The former enacted a rule of legal subrogation where a *subsequent mortgagee* paid off a prior mortgage though the word "subrogation" was not used(7). That section ran as follows :

"**Section 74. Right of subsequent mortgagee to pay off prior mortgagee.**— Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount, and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender."

Although the section in terms applied to the payment, by a subsequent mortgagee, to the "*next*" prior mortgagee(8) it was held by the Courts that the same rule applied to cases were the payment was made to *any* prior mortgagee(9).

(1912) 1 Ch 735 (760) : 81 LJ Ch 457 : 106 LT 430 : Manks v. White : Per Fletcher Moulton, L.J.) ** 1898 AC 321 (333, 335) : 67 LJ Ch 251 : 78 LT 329 : AC 11 (16) : 64 LJ Ch 1 : 71 LT 852, *Thom v. Cann.*

The decision in Gokuldas's case held that the rule in Toulmin v. Steere (1817) 3 Mer 210 was not applicable to India

Also see S. 101, Note 1

7. **AIR 1940 Pat 385 (394) : 19 Pat 752 (FB) ** AIR 1937 All 588 (592) : ILR (1937) All 880 (FB) ** AIR 1936 All 33 (35, 36) : 58 All 602 (FB) ** AIR 1957 Mys 65 (68) : ILR (1957) Mys 1 (DB) ** AIR 1945 Cal 194 (197) : ILR (1947) 1 Cal 313 (DB) ** AIR 1938 Mad 779 (DB) ** AIR 1939 Pat 375 (377) : 18 Pat 342 (DB) ** AIR 1923 Mad 349 (350) (DB) ** AIR 1939 Mad 949 (953) (DB) ** AIR 1937 Mad 826 (829, 830) ** AIR 1931 Mad 110 (111)**

[**See also** AIR 1926 Mad 860 (862) (DB) (Sections 74 and 101 did not profess to exhaustively deal with all aspects of the doctrine of subrogation.)]

8. AIR 1926 All 653 (655) (DB) ** AIR 1929 All 943 (947) : 52 All 139 (DB) ** AIR 1931 Mad 110 (111) ** AIR 1923 Mad 349 (350) (DB)

[**See however** (1910)) 32 All 138 (141) (DB) (A property was mortgaged first to *A* then to *B* and then to *C*. *C* discharged A's mortgage and then brought the property to sale in execution on the decree on his mortgage — *M* purchased the property — *B* brought a suit for sale upon his mortgage — **Held**, that *M* could set up *A*'s morgage as a shield and *B* could not sell the property unless he paid off that mortgage — S. 74 applied — Question of intention also considered.)]

9. **AIR 1937 All 588 (592) : ILR (1937) All 880 (FB) ** AIR 1936 All 33 (36) : 58 All 602 (FB) ** AIR 1939 Mad 949 (953) (DB) ** AIR 1926 All 653 (655) (DB) ** (1899) 12 CPLR 70 (71, 72) ** AIR 1921 Bom 172 (174) : 45 Bom 1112 (DB) ** (1884) 8 Mad 246 (249) (DB)**

[**See also** (1911) 11 Ind Cas 469 (471) (DB) (All) (Mortgages A and B in favour of C — Mortgages D, E and F in favour of G. G paying off mortgages A and B held to have kept alive those mortgages for his benefit.) ** AIR 1925 Nag 21 (22, 23) (Payment by puisne

Section 101 enacted the doctrine of merger referred to above, in a restricted form. It applied only to cases where the owner of a charge *acquired* the property charged. It did not, in terms, apply to cases where a *transferee from the owner* of the property charged paid off the charge. But in such cases, the rule laid down by their Lordships of the Privy Council in *Gokuldas's case* was followed and the charge was treated as kept alive, unless the person paying off was himself personally liable to pay the amount, or it was clear that there was no intention to keep the charge alive**(10)**.

The present section 92 enacts the whole law of subrogation so far as it relates to mortgages. There is a legal subrogation in cases, falling under the first paragraph irrespective of any intention

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mortgagee of the decree amount of the prior mortgage and the production of the receipt for this from the custody of such mortgagee show his intention to keep alive prior mortgage)[

10. (1902) 29 Cal 154 (165) : 29 Ind App 9 (PC) (3 Cal W N 153, Affirmed.) ** AIR 1929 All 943 (946), 52 All 139 (DB) ** AIR 1925 Pat 605 (607) (DB) ** AIR 1920 Pat 251 (254) (DB) ** AIR 1917 Pat 417 (418) (DB) ** AIR 1928 Pat 195 (196) (DB) **** (1912) 39 Cal 527 (554, 555) : 39 Ind App 68 (PC)** ** AIR 1936 Cal 313 (315) ** (1904) 8 Cal WN 690 (694, 695) (DB) ** (1909) 1 Ind Cas 683 (684) (DB) (Cal) (It must be clearly proved that the person claiming the priority paid off the prior incumbrance with the express intention of keeping it alive for his own benefit) ** (1928) 107 Ind Cas 401 (409) (Mad) ** AIR 1925 Nag 21 (24) (Subrogation is open to a person getting a mortgage of property after paying off prior charge — No special assignment is necessary) ** AIR 1933 Nag 155 (156) 30 Nag LR 164 (Third mortgagee paying off first mortgage in pursuance of agreement in his mortgage — He can use first mortgage as shield against second mortgagee) ** AIR 1931 All 347 (348) (Intention does not depend on the morgagee's subsequent declaration but must be gathered from the facts of each case as the time the subsequent mortgage was executed) ** 1894 Pun Re No 38 p 106 (109) (DB) ** AIR 1931 All 76 (81 82) (DB) ** AIR 1930 Oudh 178 (180, 181) 5 Luck 53 (DB) ** (1907) 30 Mad 67 (69) (DB) (Purchaser paying off mortgage as part of consideration for sale — Prior mortgage was extinguished) **** (1891) 13 All 432 (437) (FB)** ** AIR 1922 All 59 (60) (DB) ** (1885) 7 All 568 (569) (DB) (Affirmed on appeal in 8 All 105) ** (1910) 7 Ind Cas 979 (980) (DB) (Cal) ** (1938) 17 Pat 154 (162) (DB) (Purchaser of equity of redemption paying off prior mortgage under arrangement with mortgagor by which portion of purchase money was retained by purchaser for such payment — Purchaser held entitled to benefit of subrogation) ** AIR 1925 Mad 338 (340) ** AIR 1918 Mad 1260 (1260 1261) (DB) (Payment of prior mortgage by purchaser of equity of redemption — Assignment of prior mortgage rights — Intention is to keep mortgage alive by assignment) ** AIR 1919 Mad 818 (819) (DB) (Purchaser of equity of redemption paying prior mortgage out of purchase-money is presumed to keep alive that mortgage) ** AIR 1914 Mad 693 (693) (DB) ** (1884) 7 Mad 127 (128) (DB) (No intention to keep it alive — No subrogation) ** AIR 1937 Lah 665 (667) ILR (1938) Lah 155 (DB) (In absence of express or implied provision intention of purchaser paying off earlier mortgage to keep it alive for his benefit is to be presumed — It is immaterial whether purchaser or his vendor actually paid money to prior mortgagee) ** AIR 1921 Cal 781 (782) (DB) (There is a presumption that a person intends to keep alive the security when it is for his benefit to do so but the Court cannot act upon that unless the question is raised) ** (1882) 6 Bom 64 (67) (DB) ** AIR 1928 All 77 (79) 50 All 218 (DB). (When a purchaser of a property subject to various incumbrances undertakes to discharge all incumbrances out of the sale consideration, the presumption is that he intends to discharge and extinguish all the incumbrances over the property purchased by him and not to keep the prior mortgages alive to be set up as a shield against the claims of puisne mortgagor) ** AIR 1927 All 211 (212) 49 All 233 (DB) ** (1930) 123 Ind Cas 687 (688) (DB) (All) (The fact that money was left with the vendee to pay off both the incumbrances led to an inference that the intention was not to keep them alive) ** (1909) 5 Ind Cas 177 (178) (DB) (All) ** (1907) 4 All LJ 349 (350 351) (No intention to keep alive — Therefore no subrogation) ** 1896 All WN 129 (129) (DB) ** AIR 1925 Rang 89 (92) ** AIR 1955 Mad 1217 (1217) ** AIR 1933 Nag 171 (173) 30 Nag LR 265 (DB) ** AIR 1927 Nag 345 (346).

to keep alive the prior mortgage paid off. There is conventional subrogation in cases under the third paragraph of the section. In view of this provision S. 74 was found unnecessary and has been omitted. The old S. 101 has been substituted by a new one providing a rule against merger.

Apart from the right given by this section, a right of subrogation cannot now be granted on equitable grounds in the case of mortgages(11).

3. This section and section 69, Contract Act.

As seen in Note 1 the right of subrogation rests upon equitable principles and that one such principle is the principle fo reimbursement found enacted in section 69 of the Contract Act. That section provides that a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it is entitled to be reimbursed by the other. Thus, a person paying off a prior mortgage may have two remedies :

(a) to proceed against the mortgagor under S. 69 of the Contract Act, and

(b) to exercise his right of subrogation(1).

Section 69 of the Contract Act, however, confers only a *personal right*. The party claiming it can enforce it in his own right and not in the right of the prior mortgagee. Consequently, the right arises only on the date on which the person discharges the mortgage-debt. By the right of subrogation on the other hand, the person paying off a mortgage acquires the rights and powers of the mortgagee whom he pays off. It is a claim which is enforced in the right of the original creditor. The subrogee does not acquire a new charge on payment. The charge is already there. All that he acquires is the *right to enforce* that charge(2).

[See also AIR 1953 Trav. Co. 536, 537) ILR (1884) 10 Cal. 1035 (11 Ind. App. 126 (PC) Rel. on.) ** (1911) 10 Ind. Cas. 190 (192) (Oudh) ** AIR 1926 Mad. 1082 (1083) (DB) (Discharge of incumbrance by private purchaser after attachment in execution — Such purchaser has a charge for the amount of incumbrance.) ** AIR 1914 Cal. 318 (319) (DB) (Suit upon mortgage — Defendant holding both prior encumbrance and equity of redemption can plead mortgage to be fictitious.) ** (1904) 8 Cal. W.N. 385 (389) (DB) (Two persons purchasing mortgaged property and dividing mortgage-debt between themselves and executing two separate mortgage bonds — **Held**, upon consideration of evidence that intention was to keep alive old mortgage.)]

11. AIR 1950 All. 682 (683) (DB) ** AIR 1939 All. 141 (151, 153) ILR (1939) All. 24 (DB).

Section 92 — Note 3

1. AIR 1922 Pat. 499 (501) 1 Pat. 780 (DB) ** AIR 1927 Cal. 393 (394) 54 Cal. 424 (DB) (Section 74, T. P. Act does not take away the right to bring a suit under S. 69, Contract Act.) ** AIR 1934 Nag. 84 (87) 30 Nag. LR 148 (DB) (Maintenance decree — Mortgagee of property charged, who is joined as defendant is not bound to pay within S. 69 Contract Act — But other judgment debtors being liable he is if he within S. 69 Contract Act — But other judgment-debtors being liable he is if he pays entitled to be reimbursed.) ** AIR 1942 Nag. 111 (113) : ILR (1942) Nag. 393.

[See also AIR 1947 Nag. 43 (45) ILR (1946) Nag. 469 (DB) ** AIR 1922 All. 153 (154, 155) : 44 All. 67 (DB) ** AIR 1925 Pat. 201 (208, 209) (DB).]

2. AIR 1950 Mad. 186 (189) (The personal obligation arising under the circumstances is embodied in S. 69, Contract Act and the equitable right of subrogation under S. 92 T. P. Act. In either case the right to subrogation or reimbursement will arise only on the discharge of the prior mortgage and not earlier.) ** AIR 1922 Pat. 499 (501) 1 Pat. 780 (DB) (Dissenting from AIR 1922 All. 152.) ** AIR 1937 Nag. 402 (406) ** AIR 1937 All. 588 (591) : ILR (1937) All. 880 (FB) ** AIR 1942 Nag. 111 (113) ILR (1942) Nag. 393 (The claim is enforceable in the right of the original creditor.)

[See also AIR 1914 Mad. 371 (374) (DB) (In deciding whether in any particular case it would be equitable to allow the right of subrogation regard should be had to Ss. 68 to 72 Contract Act.) ** AIR 1934 Nag. 84 (87) 30 Nag. LR 148 (A person's right under Ss. 69

There is a distinction between Sec. 135-A (since repealed) and Section 92 of the T P Act Under Section 92 the subrogation results in the extinction of the original mortgagee's rights, whereas a subrogee under Section 135-A acquires right only to the extent of his payment which may be less than the rights of the assured himself Secondly the person who redeems under Section 91 is an interested person or a surety or a creditor, but the subrogee under that Section would get the rights conferred by Section 69 of the Indian Contract Act, because it would be a payment made by a person interested But the insurer pays under his own contract of insurance and is not interested in discharging the liability of the wrongdoer or the tortfeasor(3)

To enforce rights under the Policy of marine insurance a sit for damages for wrongful non-delivery of certain goods entrusted to the railway for carriage is maintainable by the Insurer in his own name(4).

Insurer paying for total loss is entitled to the interest of and gets subrogated to all the rights and remedies of the insured in respect of the subject matter under sub section (2) of Section 135(a), but under sub-clause (3) the insurer does not get the interest of the insured, but is subrogated merely to the rights and remedies of the insured insofar as the insured was indemnified for payment for such loss(5).

As to the periods of limitation for enforcing these rights see Art 62, Note 14 and Art. 23, Note 7 of the AIR Commentaries on the Limitation Act, 1963, 7th (1997) Edition

4. Law in States where this Act is not in force.

The Transfer of Property Act is not in force in the Punjab and Pepsu But the principle underlying this section has been applied to these States(1). The technicality in the third paragraph of the section requiring the agreement to be by a registered instrument is however, not adhered to Such an agreement may be either express or implied(2) Where an agreement is not express, it may be implied from the intention of the parties to keep the prior mortgage alive(3)

Before the application of the T P Act to Travancore a superior mortgagee redeeming a prior mortgage in pursuance of a covenant between him and the mortgagor was not entitled to claim the benefit of subrogation. What is a bar against the mortgagor holds good against his heirs(4)

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and 7, Contract Act, can be kept separate from his right of subrogation, and the right of contribution, which is a personal one should be enforced personally)]

3. (1968) 70 Bom LR 487 : 38 Com Cas 294

4. AIR 1971 Cal 491 (493, 494) : 75 Cal WN 563.

5. AIR 1972 Gauhati 255 (258 to 260) ((1968) 70 Bom LR 487, Diss. from.)

Section 92 — Note 4

1. 1970 Cur LJ 482 (A co-mortgagor paying only part of the mortgaged amount is entitled to subrogation to that extent) ** (1983) 85 Pun LR 558 ** AIR 1959 Punj 490 (493) ** AIR 1959 Punj 170 (172) (DB) ** AIR 1955 Pepsu 145 (146) ILR (1955) Patiala 539 (Pepsu) ** AIR 1952 Pepsu 74 (74) ILR (1952) Patiala 101 (Pepsu.) ** ILR (1957) Punj 79 (85 86) (DB) ** AIR 1949 East Punj 254 (256) (DB) (Rule of justice equity and good conscience) ** AIR 1941 Lah 53 (55) (The Punjab) ** AIR 1936 Lah 390 (392) (DB) (Do)

[See also AIR 1943 Lah 113 (116) (DB) (Punjab) ** AIR 1939 Pesh 34 (37) (DB) (Case from N W F P now forming part of Pakistan where also the Act did not apply) ** AIR 1937 Pesh 5 (5) (Do)]

2. ILR (1957) Punj 79 (85, 86) (DB) ** AIR 1936 Lah 390 (392) (DB) (Oral agreement) ** AIR 1937 Pesh 5 (5). (Implied agreement.)

3. AIR 1941 Lah 53 (53) (Person advancing money to pay off a prior mortgage — No intention to keep alive the mortgage — Held no right of subrogation.)

4. AIR 1979 Ker 47 : 1979 Ker LT 510 (FB).

5. Section, whether retrospective.

This section was inserted in the Act by S. 47 of the Transfer of Property (Amendment) Act, XX of 1929. There have been conflicting decisions upon the question whether or not the section has a retrospective effect. According to the High Courts of Allahabad(1), Bombay(2), Calcutta(3), Nagpur(4), Patna(5) and Saurashtra(6) and the Chief Court of Oudh(7) the section has a retrospective effect except in proceedings pending on the 1st of April 1930. On the other hand, the High Courts of Madras(8), Kerala(9) and Rangoon(10) have held that the section has no retrospective effect.

In *Raja Janki Natth v. Raja Pramatha Nath*(11) the question as to the retrospective effect of the section came up for decision before the Judicial Committee but their Lordships did not find it necessary to express any opinion on the point.

Section 92 — Note 5

1. **AIR 1936 All 33 (42) : 58 All 602 (FB).** (The Legislature has made S. 92 retrospective in order to obviate the difficulty created by the language of the old S. 74.) ** **AIR 1937 All 588 (597) : ILR (1937) All 880 (FB)** ** AIR 1933 All 296 (302) : ILR (1951) 1 All 515 (DB). (AIR 1932 All 489 (FB) and AIR 1937 All 588 (FB). Foll.) ** **AIR 1945 All 239 (243) : ILR (1945) All 733 (FB).** (Per Iqbal Ahmad C. J.) ** AIR 1940 All 237 (239) : ILR (1940) All 141 (DB) ** AIR 1940 All 75 (77) (DB) ** **AIR 1932 All 489 (492) : 54 All 897 (FB).** (Supposing that S. 92 is not retrospective, the rule laid down in the section would be a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the amending Act of 1929.) ** AIR 1934 All 1035 (1036, 1037) (DB). **(AIR 1932 All 489 (FB), Foll.)**

2. AIR 1938 Bom 115 (119) (DB). (Whether S. 92 is retrospective or not, the principle underlying it should be accepted as guide in deciding what the equitable doctrine with regard to subrogation prior to the introduction of S. 92 was.) ** AIR 1942 Bom 227 (229) (DB) ** AIR 1938 Bom 508 (509) (DB).

3. AIR 1945 Cal 194 (196) : ILR (1947) 1 Cal 343 (DB). (42 Cal WN 1106, **Approved.**) ** (1938) 42 Cal WN 1106 (1109).

4. See AIR 1932 Nag 154 (155) : 28 Nag LR 247. (Trial Judge deciding suit for redemption before 1929 — Appeal must be decided according to law prior to 1929.)

5. **AIR 1940 Pat 385 (393) : 19 Pat 752 (FB).** (Manohar Lall, J., dissenting. AIR 1934 Pat 127 **Overruled.**) ** **AIR 1936 Pat 60 (61).**

6. **AIR 1953 Sau 43 (46) : 6 Sau LR 33 (DB).**

7. **AIR 1938 Oudh 127(132) : 14 Luck 71 (FB)** ** AIR 1940 Oudh 97 (101) : 15 Luck 175 (DB) ** **AIR 1942 Oudh 449 (451) (FB).**

   [See AIR 1934 Oudh 213 (219) : 9 Luck 717 (DB). (The claim to be subrogated is not a vested right and such claim even if arising before amendment of 1929 is governed by S. 92 even assuming that the section is not retrospective.) ** AIR 1935 Oudh 399 (401) : 11 Luck 224 (DB). (Even if S. 92 has no retrospective effect, law under that section can be applied to cases arising before 1929 on ground of justice, equity and good conscience.)]

8. **AIR 1956 Mad 354 (363, 364) : ILR (1956) Mad 387 (FB)** ** **AIR 1936 Mad 171 (173) : 59 Mad 359 (FB).** (Section 63 of Amending Act may be a provision *ex majore cautela*.) ** AIR 1938 Mad 779 (780, 781) (DB) ** AIR 1931 Mad 110 (111) ** AIR (1939) Mad 718 (719). (Point conceded.)

9. **AIR 1971 Ker 3 (5) : 1970 Ker LT 313 (FB).**

10. **AIR 1938 Rang 306 (310) : 1938 Rang LR 430 (FB).** (It cannot be inferred that because in S. 63 of the amending Act of 1929 some sections were stated expressly not be retrospective, the remainder are so.) ** AIR 1935 Rang 423 (425) (DB). (AIR 1932 Rang 197, Foll.) ** AIR 1938 Rang 65 (66) (AIR 1936 Rang 152, Foll.) ** AIR 1936 Rang 152 (156) : 14 Rang 494 (DB).

11. **AIR 1940 PC 38 (44) : 67 Ind App 82.**

6. Whether section applies to charges.

This section speaks of subrogation in the case of *mortgages*. "Mortgage" includes a simple mortgage and therefore by virtue of S 100, a person who pays off a charge on a property is subrogated to the rights of the charge-holder(1). It has, however, been held that a charge which a landlord has for rent under S 65 of the Bengal Tenancy Act of 1885(2) or under S 9 of the C P. Tenancy Act of 1920(3) is peculiar to himself The charge exists only for the landlord and, therefore, a person (other than the tenant) who pays rent to the landlord is not subrogated to the rights of the landlord So also it has been held that the section does not apply to a statutory charge which the Government has under S. 7 of the Land Improvement Loans Act (XIX of 1883) for *tagai* advance(4)

However, it is held in the undermentioned case that the tenant paying taxes ultimately payable by landlord is entitled to subrogation to the rights of the Municipality to have first charge over the property(5).

7. Right of subrogation arises on redemption.

A right of subrogation accrues only when the morgagee has been *redeemed* Where there has been no redemption no question of subrogation can arise(1) A landlord, who has a charge on his holding for his rent, does not *redeem* the charge when he brings the property to sale in execution of his rent decree and purchases it(2)

The right of redemption, as provided in S 60, can be exercised until it is extinguished by act

Section 92 — Note 6

1 AIR 1947 Nag 43 (45) ILR (1946) Nag 469 (DB) (Rent due to jahagirdar – First charge on holding — Charge decree — Payment by mortgagee of holding to avoid sale in enforcement of charge — Mortgagee becomes subrogated to rights of charge holder) ** **AIR 1944 PC 96 (100) : 24 Pat 89** (Assumed) ** AIR 1937 Pesh 5 (5) ** AIR 1934 Nag 84 (87) 30 Nag LR 148 (DB) (Maintenance charge) ** AIR 1934 Mad 353 (354) (DB) (Money decree and charge created over property for certain amount — Mortgage of property to *A* — Subsequent mortgage to *B* — *B* paying off decree amount as part of consideration for mortgage — *B* is entitled to priority over *A* to extent of amount paid for discharging decree debt, irrespective of whether *A* had notice of charge or not)

[See also AIR 1932 Nag 171(171 172) 28 Nag LR 214 (The sadar lambardar of a mahal by paying land revenue to Government of the patti of a lambardar obtaines a first charge over the cause — He can enforce this charge by bringing to sale a portion of that estate)]

2. AIR 1934 Pat 70 (72).

3. AIR 1940 Nag 156 (158) (DB)

[See also AIR 1948 Nag 316 (319) ILR (1947) Nag 912 (DB) (The charge is not on the fee simple on the land but on the tenancy rights What the landlord sells at auction in execution of his rent decree is the tenant's interests in the holding and not his (the land lord's) fee simple in the land)

4. AIR 1941 Bom 153 (155) (DB).

5. AIR 1978 (NOC) 192 : (1978) 1 Mad LJ 276

Section 92 — Note 7

1. AIR 1950 Mad 186 (189) (DB) ** AIR 1944 Mad 195 (206) ILR (1944) Mad 340 (DB) (Surety for personal liability of debtor is not surety for mortgage executed by debtor as additional security — He cannot therefore "redeem" the mortgage and so payment of the debts by the surety will not entitle him to subrogation.) ** AIR 1924 Rang 204 (205) 1 Rang 714 (DB) ** AIR 1940 All 540 (543) ** AIR 1934 All 1035 (1037) (DB) (Right of subrogation is not acquired on the dateof the acquisition of the right to redeem.) ** AIR 1937 Cal 336 (337) ** AIR 1927 Nag 150(153) ** AIR 1922 Pat 92 (94) (DB) (Per Das J) ** (1901) 4 Oudh Cas 273 (275)

2. AIR 1948 Nag 316 (321) : ILR (1947) Nag 912 (DB).

of parties or by a decree of a Court. The decree of Court referred to is the final decree in a foreclosure suit under O. 34, R. 3 and the final decree in a redemption suit under O. 34, R. 8 of the Code of Civil Procedure(3). When, therefore, payment is made to the mortgagor before a final decree is passed under O. 34, R. 3 or R. 8 declaring that the mortgagor is debarred from all right to redeem the mortgaged property, such payment will amount to the redemption of the mortgage and will give rise to the right of subrogation.

In regard to suits for sale of the mortgaged property there was a difference of opinion prior to 1929 as to whether a final decree for sale extinguished the right of redemption. In the undermentioned cases(4), which held that it was extinguished, the right of subrogation was denied when payment was made after such decree. The undernoted cases(5) however, which held that it was not extinguished, allowed the right of subrogation even when the payment was made after a final decree for sale.

By the amendment in 1929 of O. 34, R. 5, it is now perfectly clear that the right of redemption can be exercised until the *confirmation* of sale held in pursuance of a mortgage decree. A payment made before the date of confirmation of a sale will now be a redemption of the mortgage entitling the person paying to claim subrogation(6). (For a fuller discussion, see S. 60, Note 26.)

Equitable doctrine of subrogation applies to cases not covered by the T.P. Act. But unless there have been a payment by a party in discharge of the obligation of another and consequently a right of reimbursement accrued to him there is no scope for invoking the doctrine. Where a suit for possession is instituted and the decree is passed on the basis that the entire mortgage amount has become wiped off by adjustment against arrears of michavaram it is not a case where any payment has been made and no right of reimbursement can arise(7).

Calcutta High Court has taken the view in the undermentioned case(8) that even before payment by the guarantor to the creditor, the guarantor by invoking the equitable doctrine of subrogation can apply for temporary injunction.

As seen in Note 4 on S. 60, the right to redeem does not imply *actual* payment. The criterion of the right of redemption is the *right* to pay and recover back the property. Thus, in the peculiar circumstances of a case, a mortgage may be said to have been *redeemed* for the purpose of this section although the debt has been satisfied out of the rents and profits of the property and there is no need to make any payment.

8. There must be relationship of mortgagor and mortgagee.

The question of subrogation under this Act arises only on the *redemption of a mortgage*. This

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3. See section 60, Note 26, Pt. I.

4. AIR 1923 All 171 (172): 45 All 149 (DB) ** AIR 1920 Oudh 253 (254): 23 Oudh Cas 334 ** AIR 1924 Oudh 85 (91) (DB).

5. AIR 1945 Cal 194 (197): ILR (1947) 1 Cal 313 (DB) ** AIR 1927 All 28 (32): 49 All 162 (DB) ** AIR 1926 All 744 (744) (DB) ** (1912) 13 Ind Cas 939 (940) (DB) (All) ** AIR 1926 Pat 23 (24) (DB) ** AIR 1940 All 416 (419, 420): ILR (1940) All 580 (DB) ** AIR 1926 Nag 21 (24): 23 Nag LR 86 (DB) ** AIR 1914 Cal 866 (866) (DB) ** (1906) 28 All 778 (780) (DB) ** (1897) 20 Mad 486 (487) (D) ** (1906) 29 Mad 37 (39, 41) (DB) ** (1905) 2 Cal J 202 (214) (DB) ** AIR 1941 Oudh 295 (296) (DB).

6. AIR 1943 Pat 305 (308): 22 Pat 187 (DB). (Expression "the same rights as the mortgagee whose mortgage he redeem may have" applies even to a case where the mortgagee has already obtained decree on his mortgage. Consequently, a puisne mortgagee can claim the right of subrogation by payment of a decree on a prior mortgage.) ** AIR 1937 Nag 196 (196, 197): ILR (1939) Nag 310 ** AIR 1936 All 33 (42): 58 All 602 (FB). (Overruled on another point in AIR 1945 All 239 (FB).)

7. AIR 1970 Ker 289 (294, 295): ILR (1970) 1 Ker 10.

8. AIR 1987 Cal 280 (284).

presupposes that there exists the relation of mortgagor and mortgagee between the person who is primarily liable for the payment and the person to whom the payment was made. If the relation of the mortgagor and mortgagee does not exist between such persons no right of subrogation will arise in favour of any person(1). In the undermentioned case(2) *A* mortgaged his property to *B* and then to *C*. *B* sued on his mortgage, obtained a decree and purchased the property himself. *B* then sold the property to *D*. *A* sued *D* for possession of the property contending that *D's* purchase was on his behalf. The claim was decreed on condition that *A* should pay to *D* certain amount. In order to pay the amount *A* raised money on mortgage from *E* and discharged the claim. In a suit by *C*, the subsequent mortgagee *E* claimed right of subrogation on the basis of the advance to *A* for discharging *D's* claim. It was held that there was no relation of mortgagor and mortgagee between *A* and *D* and consequently no prior mortgage in discharge of which the payment was utilised and that therefore there was no right of subrogation in *E's* favour.

An agreement to sell mortgaged property was entered into by the mortgagee in favour of the appellant. A suit for specific performance was filed by the purchaser was appellant and the purchaser directed the appellant to remit the balance amount within certain period. She failed to deposit the amount even within the extended period and therefore the suit for specific performance was dismissed. However she remained in possession of the property for more than 12 years otherwise than in accordance with law and matured right by adverse possession. She did not accept mortgage money tendered by the mortgagor nor, did she vacate the possession. Therefore the mortgagor filed a suit for declaration of title and confirmation of title.

Held, that the suit was not maintainable. Section 91 could not be invoked as she had no interest in the equity of redemption. She was not a mortgagee but was rather a volunteer. Since she had no interest in the equity of redemption, she could not be subrogated in place of the mortgagee. Her right having been matured by adverse possession, the suit filed by the mortgagor was time-barred(3).

9. "Other than the mortgagor".

It is well settled that a mortgagor who has created more encumbrances than one cannot set a prior encumbrance which he has discharged against a later encumbrance. This is the principle that a person cannot become his own creditor, and that in setting up the prior encumbrance which he has discharged against a second encumbrance, he would be derogating from his own grant(1). Moreover, when a mortgagor pays off a prior encumbrance created by himself, he does nothing but perform his own obligation(2). As has been seen in Note 2 an exception to the rule of intention against merger is that of payment by a person who is himself liable personally to pay the debt. Hence, even prior to the introduction of this section, the mortgagor discharging a prior debt was not entitled to be subrogated to the rights and remedies of his creditor(3). This has now been expressly recognised by the Legislature in the present section by the use of the words "other than the mortgagor"(4). Thus, a mortgagor, under the pesent section also, cannot claim the right of subrogations(5) and,

Section 92 — Note 8

1. AIR 1916 All 44 (46) (DB).
2. AIR 1929 Mad 890 (892)(DB).
3. AIR 1997 Pat 67 (71) : 1996 (1) BLJ 799.

Section 92 — Note 9

1. AIR 1939 Mad 949 (951) (DB)
2. AIR 1931 All 40 (42) : 52 All 1037 (DB) ** AIR 1936 Cal 42 (43) : 62 Cal 677 ** AIR 1938 Mad 779 (783) (DB) ** AIR 1920 Oudh 204 (208, 209) (DB).
3. See cases in foot-note (2).
4. AIR 1936 Cal 42 (43): 62 Cal 677.
5. AIR 1971 Ker 3 : 1970 Ker LT 313 (FB) ** AIR 1951 Mad 917 (920) (DB) ** AIR 1938

whenever he pays off a prior mortgage, the payment enures for the benefit of a subsequent mortgagee, and enlarges his security by rendering it more valuable(6).

In the undermentioned case(7) it has been held that a mortgagor whose right to redeem a prior mortgage is extinguished can again acquire that right by subrogation if he redeems a subsequent mortgagee whose right to redeem the prior mortgage had not been so extinguished. It was also observed that "the new section does not state that the mortgagor can in no circumstances obtain the right of redemption which that mortggee might have". It is submitted that this interpretation of S 92 does not seem to be correct in view of the words "other than the mortgagor".

The term "mortgagor" includes his successor-in-interest(8) and his agent(9). As to whether it includes purchasers of equity of redemption, see Note 13.

It has been held in the case noted below(10) that where a Hindu father mortgages the family property and subsequently in a family partition to mortgaged property is allotted to the son, the son would be in the position of an assignee from the original mortgagor and would not be barred from the right of subrogation.

If a sub-mortgagee effects the partial transfer of the mortgage right and when mortgage is redeemed in the presence of the sub-mortgagee the sub-mortgage is also redeemed. The test for determining whether the sub-mortgage right remains with the person redeeming as a separate right so as to be subject to redemption by subsequent sub-mortgagee would be to find whether the person redeeming has the right of subrogation in respect of the redeemed sub-mortgage(11).

When a mortgagee relinquishes his interest in favour of the mortgagor or when the mortgagor redeems the mortgage in the absence of sub-mortgagee, it cannot be said that the sub-mortgagee becomes a trespasser on the date of redemption or extinction of original mortgage. He has two distinct remedies (1) against original mortgagor and (2) against his mortgagor. If he were to become a trespasser then he would not be entitled to pursue the said two remedies(12).

10. Covenant to pay mortgage — Effect of.

It has been seen in Note 1 that the doctrine of subrogation rests on the equitable principle now found enacted in S. 69 of the Contract Act, that a person who is interested in the payment of money which *another is bound by law to pay*, and who therefore pays it, is entitled to be reimbursed by the latter. It has also been seen in Note 2 that the equitable rule of intention to keep alive a charge which is paid off is not applicable where the person paying off the charge is *himself personally liable to pay it*. It follows that a person who has *covenanted* with the mortgagor to pay off a liability and who makes the payment in pursuance of the covenant, is merely performing his *own obligation* and is

Bom 508 (509) (DB) ** AIR 1936 Oudh 47, 49) (DB) ** AIR 1939 Mad 718 (719) ** AIR 1939 Mad 949 (951) (DB) ** AIR 1942 Oudh 465 (472), 18 Luck 366 (FB) ** AIR 1915 All 242 (243), 37 All 309 (DB). (Mortgagor inheriting interest of mortgagee under prior mortgage — Prior mortgage is extinguished.)

6. (1907) 5 Cal LJ 95 (101) (DB) ** AIR 1931 Mad 642 (643) (DB). (Mortgagor paying by purchasing in execution of a prior mortgage decree.) ** AIR 1929 Mad 890 (891, 894, 895) (DB) (Do.) ** (1884) 27 Ch D 246 (251), 54 LJ Ch 1145, 32 WR (Eng) 918, 51 LT 424, Platt v. Mendel ** (1906) 29 Mad 113 (114) (DB).

7. AIR 1932 Nag 154 (155) : 28 Nag LR 247.

8. AIR 1983 All 197 (198), (1983) 9 All LR 69 ** AIR 1919 Oudh 150 (151), 22 Oudh Cas 72.

9. AIR 1931 All 40 (42) : 52 All 1037 (DB). (Whether the person who pays is an agent is a question of fact.)

10. AIR 1955 Mad 601 (601).

11. AIR 1971 Ker 3 (6, 7) : 1970 Ker LT 313 (FB).

12. (1988) 102 Mad LW 64 (71).

not paying any money which "another is bound to pay" and cannot therefore claim any right of subrogation(1). Thus, where the purchaser of the equity of redemption(2) or a subsequent mortgagee(3), *covenants* to pay off the prior mortgage-debt, and pays off such debt, he merely performs his own obligation and therefore cannot claim subrogation. However, the Madras High Court has, in *Nachappa v. Samappa*(4), demurred to the Broad proposition that if an alienee undertakes to pay certain mortgages from and out of the amount payable under the alienation taken by him, he cannot claim subrogation in respect of those mortgages.

A purchaser of mortgaged property *subject to the mortgage* cannot, however, be said to have *covenanted* to pay the mortgage-debt, and can, if he pays off the mortgage, claim to be subrogated to the rights of the mortgagee. In *Malireddi v. Gopala Krishnayya*(5), the auction-purchaser had purchased the property subject to the prior mortgages and it was held by their Lordships of the Privy Council that there was no personal covenant to pay the mortgage debt in that case. So also in *Gokuldas v. Puranmal*(6) the auction-purchaser had purchased only the mortgagor's interest in the property and it was held by their Lordships of the Privy Council that "the appellant (auction-purchaser) purchased the interest of the mortgagor only, and did not in any way bind himself to pay off that (mortgage) debt. When he paid the bank (the prior mortgagee) some six months afterwards, it was not because he was under an obligation to do so". The undermentioned case(7) holding that an auction-purchaser of property subject to mortgages must be taken to have agreed to discharge them and cannot therefore claim subrogation by payment thereof is, it is submitted, not correct.

Where a vendee or a mortgagee from the owner covenants to pay a *puisne mortgagee*, he cannot claim subrogation against such mortgagee, in respect of any *prior* mortgage which he might have paid off even though he might not have covenanted to pay off the prior mortgage. This is also based on equitable principles(8). As was observed by Mukherjee, J., in *Bisseswar Prasad v. Lala Sarnam Singh*(9), "just as a person who has satisfied a mortgage which he has undertaken to dis-

Section 92 — Note 10

1. AIR 1947 Mad 18 (24) (DB). (Though the expression 'Covenant excludes subrogation' is a compendious method of expressing one aspect of the law of subrogation is really a misleading statement unless the true implications of the statement are borne in mind.) ** (1905) 2 Cal LJ 288 (298, 299) (DB). (Quoting Jones on Mortgages.) ** AIR 1927 Nag 150 (153). (Jones on 'Mortgages' quoted.)

2. **AIR 1932 PC 99 (101)** ** AIR 1934 Oudh 129 (130) ** AIR 1936 Cal 42 (43). 62 Cal 677 ** AIR 1927 Nag 150 (153, 154) ** (1905) 2 Cal LJ 288 (299) (DB) ** AIR 1936 Mad 901 (904). **(Overruled** on another point in AIR 1943 Mad 429.)

   [**See also** (1921) 62 Ind Cas 621 (622) (DB) (Pat).]

   [**See however** AIR 1947 Mad 18 (27) (DB). (Fact that money paid to earlier mortgagee was part of purchase-money which later vendee convenanted to pay does not deprive vendee of his right of subrogation against intermediate mortgagee.)]

3. AIR 1927 Nag 150 (153) ** AIR 1928 Nag 230 (231).

4. AIR 1947 Mad 18 (25) (DB). (AIR 1924 PC 36 and AIR 1932 PC 99, Explained. AIR 1938 Mad 779 and AIR 1936 Mad 171, Foll. Further, in order to come within the maxim "covenant excludes subrogation" the covenant must be with original mortgagor or his legal heir.)

5. **AIR 1924 PC 36 (38) : 51 Ind App 140.**

   [See AIR 1934 Mad 268 (268, 269) (DB). (AIR 1924 PC 36, **Followed.**)]

6. **(1884) 10 Cal 1035 (1044) : 11 Ind App 126 (PC).**

   Also see Note 13.

7. AIR 1916 Oudh 169 (176) (DB).

8. **AIR 1924 PC 36 (38) : 51 Ind App 140** ** (1907) 6 Cal LJ 134 (137, 139) (DB) ** AIR 1923 All 509 (511) (DB) ** (1933) 14 Pat LT 371 (374) (DB).

9. (1907) 6 Cal LJ 134 (138, 139) (DB).

charge, cannot claim to be subrogated to the rights of the mortgagee as against other incumbrancers, a person who has undertaken to discharge a mortgage, but has defaulted, cannot set up as against that mortgagee, a right of subrogation based on the discharge of another incumbrance'

Where a vendee or a mortgagee from a person covenants to pay off *two* mortgages on the property but pays off only that the earlier of the two, he cannot, as against the second, claim to be subrogated to the rights of the mortgagee who has been paid off(10), firstly, on the ground that in discharging the earlier mortgagee, he is merely performing his own obligation or covenant and secondly, on the principle stated in *Bisseswar Prasad's case*(11) referred to above

11. Redemption by subsequent mortgagee.

A subsequent mortgagee is a person falling under cl (a) of S 91 and has, therefore, a right to redeem or institute a suit for redemption of the mortgaged property On redemption by him, therefore, of a prior mortgage he is subrogated to the rights of the mortgagee whom he redeems under paragraph 1 of this section(1). Even before the amendment in 1929, a subsequent mortgagee had, as has been seen in Note 2, a statutory right of subrogation under the old S 74 of the Transfer of Property Act(2).

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10. (1911) 33 All 101 (104) (FB) ** AIR 1947 Mad 18 (24) (DB) ((1911) 34 Mad 119 AIR 1936 Mad 171, AIR 1924 PC 36 Foll) ** AIR 1918 Mad 103 104 105 41 Mad 513 (DB) ** AIR 1926 Nag 321 (322) (DB) ** AIR 1916 Cal 801 (802) 43 Cal 69 (DB) ** (1909) 2 Ind Cas 207 (208) (All) ** (1894) 17 Mad 62 (64 65) (DB) ** AIR 1927 Nag 150 (153) ** (1905) 2 Cal LJ 288 (291) (DB) ** (1907) 6 Cal LJ 134 138 139 (DB) ** (1910) 6 Ind Cas 781 (782) (DB) (Mad) ** AIR 1930 Mad 51 (54) 53 Mad 188 (DB) (Transferees from the vendee also cannot claim priority) ** AIR 1933 Mad 715 (719) (DB) ** **AIR 1936 Mad 171 (172) : 59 Mad 359 (FB). (Overruling** AIR 1934 Mad 227)

    [See also AIR 1923 All 509 (510) (DB) (Mortgage to *A* in 1896 to *B* in 1907 to *C* 1908 to *B* in 1909 renewing that of 1907 and sale to *A* thereafter — Agreement between *A* and *B* that *A* should hold 1909 mortgage as prior to his own — *A* cannot get priority for any amount over *C*.)]

11. (1907) 6 Cal LJ 134 (138, 139) (DB)

Section 92 — Note 11

1. AIR 1974 Mad 248 (251) (1974) 1 Mad LJ 194 ** (1955) 1 Mad LJ 223 (223) (Mortgagee from separated member of tarwad redeeming previous mortgage binding on tarwad is subrogated to the rights of the previous mortgagee) ** AIR 1953 Sau 43 (45) 6 Sau LR 53 (DB) ** AIR 1950 Pat 13 (16) 28 Pat 531 (DB) ** AIR 1936 Oudh 183 (185) 12 Luck 72 (DB) ** AIR 1940 Lah 269 (270 271) (Every subsequent mortgagee paying off previous mortgagee succeeds to right of priority held by previous mortgagee — Reversed on a different point in AIR 1943 Lah 113) ** (1937) 171 Ind Cas 423 (424, 425) (Oudh) (The need of the subsequent mortgagee need not show that the executants agreed that the mortgagee should be subrogated to the prior mortgagee's rights.)

    [See AIR 1936 All 636 (637) : 58 All 912 (DB).]

    [See also AIR 1936 Pat 60 (61) (DB).]

2. AIR 1939 Mad 949 (953) (DB) ** AIR 1936 All 636 (637) 58 All 912 (DB) ** AIR 1922 All 153 (154, 155) : 44 All 67 (DB) (Under S 74 no doubt the subsequent mortgagee on redeeming the prior mortgage acquired the rights and powers of the mortgagee whom he redeemed but the fact of his redeeming the prior mortgage did not make him an assignee of the mortgage — His rights might be akin to those of an assignee but he was not the actual assignee) ** AIR 1929 All 296 (298) (DB) ** AIR 1927 Pat 117 (121) (DB) ** AIR 1925 Mad 1219 (1220) (DB) ** AIR 1919 Oudh 49 (50) ** AIR 1931 Mad 110 (111) ** **AIR 1931 All 466 (479) : 53 All 1023 (FB)** (The equitable principle underlying S 74 was applied to all subsequent transferees.) ** AIR 1932 Cal 126 (132) 59 Cal 117 (DB) ** AIR 1920 Mad 389 (390) (DB) ** AIR 1930 All 869 (871) (DB) ** AIR 1934 Mad 256 (256) (DB) ** AIR 1930 Pat 570 (572) 10 Pat 197 (DB) ** AIR 1923 Mad 349 (350)

As to the right of subrogation of the subsequent mortgagee paying off a period mortgage out of the amount left with him by the mortgagor, see Note 22

12. Redemption by prior mortgagee.

In the undermentioned case(1) *A* mortgaged his property to *B* and then to *C*. *C* brought a suit on his mortgage and impleaded *B*. *B* stated that he was a prior mortgagee and was willing to redeem *C*'s mortgage. A preliminary decree for foreclosure was passed and *B* paid the decretal amount. *B* then filed a suit against *A* and sought to recover the amount paid in satisfaction of the mortgage in favour of *C* and the amount due on his own mortgage. It was argued that *B* who was a prior mortgagee could not, by redeeming the subsequent mortgage, claim subrogation to it. It was held that though under explanation to O. 34, R. 1, Civil Procedure Code, a prior mortgagee was not a necessary party to a suit on the subsequent mortgage, the explanation did not prohibit the subsequent mortgagee from joining the prior mortgagee as a party to his suit if he chose; after the prior mortgagee had decided that it was convenient for him to be joined in the suit on the subsequent mortgage and had allowed himself to be so joined, he was entitled to claim subrogation after redemption of the subsequent mortgage. As to the prior mortgagee's right to redeem the subsequent mortgage, see S. 91, Note 7.

13. Redemption by purchaser.

Section 59-A provides that the word "mortgagor" will, unless otherwise expressly provided include persons deriving title from him. It has been seen in Note 3 on S. 91 that that section is one of such provisions inasmuch as it distinguishes between a "mortgagor" and persons deriving title from him. This section repeats that distinction and so provides an exception to the general rule laid down in S. 59-A. A purchaser or an auction-purchaser of mortgaged property is not the "mortgagor" for the purposes of this section and has, therefore, a right of subrogation under the first paragraph of the section(1). The contrary view taken in the undermentioned cases(2) is, it is submitted, not correct. Even before the amendment of 1929 it was held by their Lordships of the Privy Council in *Gokuldas v. Puranmal*(3) that an auction-purchaser of the mortgagor's interest paying off a prior

(DB). (No question as to whether the payment is for the benefit of the mortgagor or mortgagee arises in a case where S. 71 has to be applied.) ** (1910) 37 Cal 589 (596) (DB) ** AIR 1917 Nag 152 (153) : 13 Nag LR 217.

Section 92 — Note 12

1. AIR 1929 Nag 135 (136) : 25 Nag LR 171.

Section 92 — Note 13

1. AIR 1960 Mys 289 (291), ** AIR 1954 Mad 604 (621) : ILR (1954) Mad 80 (FB) ** AIR 1942 Bom 98 (99) : ILR (1942) Bom 169 (DB) ** AIR 1934 All 1035 (1036) (DB) ** 1933 Pat 33 (35) (DB) ** AIR 1937 Nag 402 (406) ** AIR 1937 Oudh 493 (497) : 131 Luck 484 (DB) ** AIR 1936 Nag 207 (209) : ILR (1936) Nag 183 (Sale for grossly inadequate consideration or fraudulent — Person purchasing has right of subrogation to sale is avoided under S. 53.) ** (1933) 14 Pat L Tim 371 (373) (DB).

   [See also AIR 1945 Bom 409 (413) (DB) (Under S. 92, the auction-purchaser as stepping into the shoes of one of the co-mortgagors, are subrogated to the rights of the mortgagee.) ** AIR 1932 Cal 126 (133) : 59 Cal 117 (DB).]

   Also see Section 59A, Note 4.

2. AIR 1937 Nag 372 (374) : ILR (1938) Nag 206 (FB) ** AIR 1959 Punj 490 (494) (AIR 1939 All 190 Foll.) ** AIR 1940 Lah 201 (201) (Where a property was subject to two mortgages and the second mortgagee was given the right to redeem the prior mortgage from out of the mortgage-money but the prior mortgage was redeemed by the purchaser of the equity of redemption, a subsequent suit for redemption of the prior mortgage by the second mortgagee does not lie.) ** AIR 1939 All 190 (192) : ILR (1939) All 185 (DB) ** AIR 1918 Mad 103 (104) : 41 Mad 513 (DB).

3. (1884) 10 Cal 1035 (1046) : 11 Ind App 126 (PC).

mortgage was not in the same position as the mortgagor.

As will be seen from the language of the first paragraph, the right of subrogation exists "against the mortgagor or any other mortgagee". Where the purchaser purchases the *whole* of the mortgaged property his right of subrogation will exist only against "any other mortgagee". As there is nothing left in the mortgagor he cannot exercise his right against the mortgagor. Where the purchaser purchases only a part of the property he can exercise his right of subrogation against the mortgagor or any other mortgagee as the case may be.

The law before the amendment of 1929 regarding the purchaser's right of subrogation was the same as it is after the amendment except that the Courts have not to consider the question of intention under the present section, which they had to go into before the amendment(4). The law applied was, as has been seen in Note 2, the rule of intention laid down in *Gokuldas v. Purushottam*(5) and affirmed by their Lordships in *Malireddi v. Gopalakrishnamma*(6). In the latter case their Lordships observed as follows :

> "It is now settled law that where in India there are several mortgages on a property the owner of the property, subject to the mortgagees, may, if he pays off an earlier charge, treat it to itself as having it and stand in the same position as his vendor, or to put it in another way, he may keep the encumbrance alive for his benefit and thus come in before a later mortgagee. It is further to be presumed and indeed the statute so enacts (Transfer of Property Act, S. 101) that if there is no indication to the contrary the owner has intended to have kept alive the previous charge, if it would be for his benefit. So far therefore as Pargada or the respondents can be supposed to have bought the rights of the second mortgagee at the various times when they paid sums to him, so far they are entitled to stand in his shoes and claim priority over the present appellant, who is the third mortgagee. This could hardly be disputed by counsel for the appellant, having regard to the decisions(7) of this Board."

The reason why a purchaser of equity of redemption is given a right of redemption is that unlike the mortgagor, he is not under any *personal obligation* to pay the mortgage-debt to the mortgagee(8). He may, however, covenant with the mortgagor to pay the mortgage debt personally in which case he cannot claim to be subrogated to the rights of the mortgagee whom he discharges(9).

A right of subrogation can be claimed by vendee only if the mortgagor has by a registered instrument agreed that he shall be so subrogated. Where the mortgagor entrusted the vendee with part of the sale consideration for the specific purpose of the same being paid to the mortgagee, no question of subrogation in favour of vendor would arise(10).

Where the plaintiff knowing that the mortgaged property was under attachment before judgment and was sold in Court auction, purchased it from the owner and brought a suit for declaration

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Also see Note 10.

[**See however** (1913) 11 All LJ 478 (480) (DB). (The purchaser of equity of redemption who pays decretal amount to save mortgaged property from sale to first mortgagee is in the position of mortgagor.)]

4. **See** Note 2.
5. **(1884) 10 Cal 1035 (1045, 1046) : 11 Ind App 126 (PC).**
6. **AIR 1924 PC 36 (38) : 47 Mad 190 : 51 Ind App 140.**
7. **(1884) 10 Cal 1035 (1046) : 11 Ind App 126 (PC) ** (1902) 29 Cal 154 (165) : 29 Ind App 9 (PC) ** (1912) 3 Cal 527 (555) : 39 Ind App 68 (PC).**
8. AIR 1976 Mad 44 : (1975) 2 Mad LJ 475 ** AIR 1942 Bom 98 (99) : ILR (1942) Bom 169 **(DB) ** AIR 1934 All 1035 (1036) (DB).**

   [**See** (1913) 18 Ind Cas 704 (705) (DB) (All) ** (1933) 14 Pat LT 371 (373) (DB). (Purchasers of equity of redemption are not liable on the personal covenant in the mortgage and therefore they are entitled to subrogation when they discharge a prior encumbrance.)]
9. **See** Note 10.
10. AIR 1983 All 197 (199) : (1983) 9 All LR 69.

of his title and for possession, it was held that even on the basis of the doctrine of unjust enrichment the plaintiff would not be entitled to a decree for the amount by way of reimbursement. By introducing the doctrine of unjust enrichment, the provisions of S. 92(iii) would be rendered otiose(11).

Where a person does not purchase only the equity of redemption but purchases the property free from encumbrances and then pays off the prior mortgage to protect his own interest, it is needless to say that he is subrogated to the rights of the mortgagee whom he redeems(12).

If A and B mortgaged their joint property to C, and D creditor of B, alone brings the property to sell and purchases the same and redeems C, D is subrogated to the rights of C and A is entitled to redeem his share on paying the due on the mortgage(13).

14. Redemption by surety.

A surety for the payment of the mortgage-debt is a person referred to in clause (b) of S 91 He has therefore a right of subrogation under the first paragraph of this section(1). This is based on the English law The Special Committee in giving the right of subrogation to surety observes as follows :

> "A surety is obviously entitled to be subrogated to the rights of the creditor if he pays him off. To use the argument of Sir S Romilly in *Craythorn v. Swinburn* (14 Ves 160 at p. 162) 'a surety will be entitled to every remedy which the creditor has against the principal debtor to enforce every security and all means of payment, to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety, having the right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor' The same principle has been incorporated in Ss. 140 and 141 of the Indian Contract Act, 1872."

The right of the surety to be subrogated to the position of the mortgagee was recognised in this country even before the passing of the Transfer of Property Act(2). In *Heeralall v. Syed Oozeer Ali*(3), a surety had paid off the mortgage-debt on default by the mortgagor and the question was whether the surety could proceed on the mortgage bond against the mortgagor. Markby, J., after pointing out that there was no authority on the subject in India, observed .

> "Therefore we must decide the question by analogy of the law of other countries; and it appears to us clear that, by the law of England and the law of Scotland, and, as far as we are aware, by the general law of Europe, when a surety has paid off the debt of his principal, not only all the collateral securities are transferred to the surety, but, by what is called subrogation, the right is also transferred to him to stand in the place of the original creditor, and to use against the principal debtor every remedy which the principal creditor himself could have used. .... It seems to us, there-

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11. (1981) 2 Mad LJ 282 : 94 Mad LW 353 (357).
12. AIR 1939 Nag 217 (219) : ILR (1939) Nag 690.
13. AIR 1969 Mad 27 : (1968) 2 Mad LJ 105.

Section 92 — Note 14

1. AIR 1932 Nag 171 (171, 172) 28 Nag LR 214 ** AIR 1993 Kant 288 (294) : 1993 (1) Kant LJ 285.
2. (1874) 21 Suth WR 347 (347, 348) (DB).

   [See also (1863) 1 Bom HCR 135 (136) (DB) (Certain property was mortgaged with a condition that if it be not redeemed within a certain time, the mortgage should be converted into a sale, a third person also stood as surety for the same, agreeing to pay the mortgage-money and to take the mortgage property if it were not redeemed by the mortgagor within the time fixed — On default of the mortgagor, the surety paid the amount and took possession of the land and got it transferred to his name in the revenue books — **Held**, that the mortgagor was entitled to redeem the property from the hands of the surety, because the surety having paid the money to the mortgagee in his character as surety, cannot be regarded as holding the land absolutely as purchaser)]
3. (1874) 21 Suth WR 347 (347, 348) (DB).

fore, that the law of this country may be reasonably taken to be that which has been considered equitable in other countries, namely that the surety is not debarred from proceeding against the original debtor upon the instrument itself which created the debt, by reason of the debt having been paid by himself."

Sections 140 and 141 of the Contract Act where an analogous provision is made are as follows :

"*Section 140.*— Where a guaranteed debt has becoe due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor

Section 141.— A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into whether the surety knows of the existence of such security or not and if the creditor loses or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security."

See also the undermentioned cases(4).

See also S. 91, Note 37 as to the circumstances under which a surety is entitled to "redeem" a mortgage As to a distinction between the right under this section and the surety s right under the Contract Act, see Note 23.

15. Redemption by co-mortgagor.

Before the amendment of this section and of Section 95 by Act 20 of 1929 there was a conflict

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4. 1981 Tax LR (NOC) 12 (Cal) (Where a company entered into agreement with the State Bank of India for advance and/or overdrafts facilities for its business and by virtue of said agreements the Bank advanced loans to the company on guarantee of the Central Government, held that Central Government should be treated as secured creditor to extent of amount paid to bank as surety of loan advanced by the bank and Central Government had also the right to be subrogated in place of Bank in respect of property redeemed by them) ** AIR 1944 Mad 195 (200) ILR (1944) Mad 340 DB) (Even without necessity of transfer the law vests all the rights which the creditor had against the principal debtor in the surety) ** AIR 1919 All 56 (58 59) 42 All 70 (DB) (Under S 140 Contract Act, when the surety has paid off the whole debt he is entitled to stand in the place of the creditor who has been so paid off and under S 141 the surety is entitled to the benefit of every security which the creditor has against the debtor at the time when the contract of surety was entered into) ** (1870) 7 Bom HCR AC 118 (120) (DB) (The rule is undoubted, and it is one founded on the plainest principle of natural reason and justice, that the surety paying off a debt shall stand in the place of a creditor and have all the rights which he has for the purpose of obtaining the reimbursement) ** (1860) 3 LT 313 (314) 2 Giff 449 : 66 ER 188 . 128 RR 192, Goddard v Whyte (Where there is a person holding a security to satisfy the amount of a debt and another person whose liability is in the nature of suretyship, upon the surety satisfying the debt he is entitled to have the benefit of the security) ** (1872) 26 LT 848 (849) 20 WR (Eng) 726 41 LJ PC 161 LR 7 CP 372, Benchervaise v Lewis (A surety has a right as against the creditor when he has paid the debt, to have for reimbursement the benefit of all securities which the creditor holds against the principal.) ** 1869) 4 Ch App 204 207) 38 LJ Ch 220 20 LT 131 17 WR (Eng) 385, Green v Wyan (The surety might call upon the debtor to pay the debt ad in default might himself pay the debt,and charge the debtor with the amount so paid) ** (1882)19 Ch D 615 (621) . 51 LJ Ch 690 . 30 WR (Eng) 652, Forbes v Jackson (A surety who pays off the debt for which he became surety must be entitled to all the equities which the creditor whose debt he paid off, could have enforced, not merely against the principal debtor, but also as against all persons claiming under him) ** (1892) 1 Ch 621 (629) 61 LJ Ch 234 : 66 LT 315 : 40 WR (Eng) 327, In re Walker Sheffield Banking Co v Claton (Surety who pays the debt is entitled to stand in the place of the principle creditor)

of decisions as to the position of a co-mortgagor redeeming a mortgage. Some cases(1) held that the redeeming co-mortgagor stepped into the shoes of the mortgagee whom he redeemed. Punjab and Haryana High Court in the undermentioned case(2) took the view overruling its earlier view in AIR 1982 Punj 182 that a co-mortgagor who redeems the entire mortgage is to be subrogated or to be treated for all intents and purposes as mortgagee qua the non-redeeming mortgages, that a redeeming mortgagor will be subrogated to the extent necessary for his own equitable protection. Undermentioned cases(3) took the view that the redeeming co-mortgagor acquired only a *charge* on the shares of the co-mortgagors as from the date of the payment made by him. The amendment now makes it clear that a redeeming co-mortgagor is subrogated to the rights of them ortgagee whom he redeems(4). One of the co-mortgagors can get the entire property redeemed, even of his co-

Section 92 — Note 15

1. **(1891) 14 All 1 (2, 3) (FB) ** (1894) 16 All 254 (255) (DB).**

   [**See** (1910) 32 All 160 (163) (DB) ** (1892) 15 Mad 331 (332) (DB).]

2. AIR 1984 Punj and Har 351 (353 to 356) : 1984 Pun LJ 256 (DB) (AIR 1982 Punj & Har 185, **Overruled.**)

3. (1901) 3 Bom LR 685 (690) (DB) ** (1902) 26 Bom 500 (503) (DB) ** AIR 1926 Lah 238 (238) ** AIR 1923 Lah 311 (312) ** AIR 1920 Lah 234 (235) ** (1931) 136 Ind Cas 264 (265) (DB) (Lah) ** AIR 1919 Cal 634 (635) : 46 Cal 111 (DB) ** AIR 1927 Oudh 552 (552) : 2 Luck 686 (DB) ** AIR 1920 Oudh 204 (208) (DB) ** AIR 1927 Oudh 347 (349) : 2 Luck 618 ** (1906) 9 Oudh Cas 91 (93, 94) (DB) ** AIR 1921 Mad 326 (326) (DB) * AIR 1918 Mad 19 (23) : 41 Mad 650 (DB) **** AIR 1931 Cal 251 (253) : 58 Cal 1167 (FB)** ** (1888) 11 Mad 416 (417, 418) (DB) ** AIR 1929 Oudh 290 (291) ** AIR 1916 All 134 (136) : 38 All 138 (DB) ** (1884) 8 Bom 497 (500) (DB) ** AIR 1924 Nag 238 (240) ** **AIR 1917 Nag 75 (76).**

4. **AIR 1953 SC 1 (4) : ILR (1952) Punj 495 ** AIR 1952 SC 47 (52) : 1952 SCR 179.** (Where the right to contribution arises out of a morgage S 82 excludes S 43 of the Conract Act — There being no contract to the contrary remedy of party is under S 92 read with S 82) ** AIR 1973 Madh Pra 155 (156) : 1973 MPLJ 211. (Principles of S 92 applied to Gwalior State even before enactment of Gwalior State Act No. 4 of Samvat 2001) ** AIR 1969 Mad 27 (29) : (1968) 2 Mad LJ 105 ** ILR (1966) 2 Ker 388 (395) (DB) ** AIR 1963 Pat 384 (386) (DB) (Mortgaged property falling to shares of *A* and *B* *A* having one-third share and *B* two-third share — *A* alone redeeming by paying entire dues — *A* and after him his descendants become mortgagees in respect of two-third share as having been substituted in place of original mortgagee) ** AIR 1959 Punj 170 (172) (DB) ** AIR 1955 Nag 280 (282) : ILR (1956) Nag 197 (DB) ** AIR 1955 Pepsu 145 (146, 147) : ILR (1955) Patiala 539 ** ILR (1955) Punj 1062 (1071) ** ILR (1953) Punj 333 (337) ** AIR 1953 Sau 43 (45) : 6 Sau LR 53 (DB) ** ILR (1953) Trav Co 48 (50) (DB) ** AIR 1945 Bom 409 (413) (DB) (Under S 92 the auction-purchasers as stepping into the shoes of one of the co-mortgagors are subrogated to the rights of the mortgagee) ** AIR 1945 Bom 69 (72) ** AIR 1943 Cal 330 (332) : ILR (1943) 2 Cal 180 (DB) ** AIR 1942 Lah 135 (136) ** AIR 1936 Mad 752 (764) (DB) ** AIR 1941 Pat 147 (148) : 19 Pat 938 (DB) ** AIR 1934 All 946 (947) ** AIR 1933 All 228 (229) (DB) ** AIR 1930 Nag 300 (303, 304) : 27 Nag LR 152 ** AIR 1934 Nag 97 (100) : 30 Nag LR 1 (DB) (New section did not clothe the persons who under the previous law obtained only a charge with the rights of a mortgage) ** AIR 1935 Oudh 245 (246) : 10 Luck 690 (DB) ** AIR 1938 Oudh 127 (133, 134) : 13 Luck 761 (DB) ** AIR 1936 Oudh 47 (49) (DB) ** AIR 1938 Lah 184 (185) : ILR (1938) Lah 103 (DB) (The position of a co-mortgagor is much stronger than that of a subsequent mortgagee or purchaser who pays off a prior mortgage, for under the law it is incumbent on the mortgagor to pay the entire mortgage charge before he can redeem his own share of the mortgage) **** AIR 1931 Cal 251 (252) : 58 Cal 1167 (FB) ** AIR 1940 Oudh 97 (101) : 15 Luck 175 (DB) ** AIR 1933 All 21 (26) : 54 All 975 (DB) * AIR 1940 Pat 620 (621) (DB)**

   [**See AIR 1950 All 682 (688) (FB).** (Co-mortgagor claiming benefit of subrogation under

mortgagors(5). The redeeming co-mortgagor stands in the position of the mortgagee as regards the non-redeeming co-mortgagors *qua their shares*, but holds his own share free from the mortgage. This position is due to the fact that the co-mortgagors are, in the eye of the law, principal debtors in respect of their own shares of the debt and sureties in respect of the shares of the other co-mortgagors, and as seen in Note 14, a surety satisfying the principal debt is entitled to stand in the position of the creditor and to hold the securities held by the creditor to realise the debt from the principal debtor(6). It has been held that where one of the co-mortgagors enters into possession of the mortgaged property after redeeming the mortgage, a suit by the other co-mortgagors for possession by partition is maintainable without a suit for redemption being brought in the first instance, provided the right of redemption is not barred by limitation at the date of the suit(7). Where, in such a case the other co-mortgagors also claim redemption and deposit the price of redemption fixed by the Court, the mortgage comes to an end and thereafter the possession of the co-mortgagor who first redeemed the mortgage is in the capacity as co-owner and not a mortgagee by subrogation(8). See **also section 82, Note 17 and section 95, Note 1.**

A right of a co-mortgagor to redeem the entire property subject to mortgage stands on the same footing as that of other persons mentioned in Section 91(9).

Right of subrogation does not cease with the passing of the decree in the mortgagee's suit for **recovery of the mortgage money by sale(10).**

A mortgagor redeeming his own share and purchasing the mortgagee rights in respect of the remaining property can acquire the status of the mortgagee and hold the mortgagee rights(11).

Although it is prescribed by O. 34, R. 1 CPC that all persons having an interest either in the mortgage security or in the right of redemption, shall be joined as parties in suit relating to the mortgage but as per Ss. 91, 92 even one of the fractional owners of the equity of redemption may sue to redeem the whole mortgage and the suit is not liable to be dismissed for non-joinder of other co-mortgagers. Therefore even if the legal representatives of co-mortgagors have not been brought on record the Court is not precluded from passing a decree in favour of surviving mortgagor for **redemption of the mortgaged land.(12)**

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first part of this section must be one which redeemed property [illegible] to the share of the other co-mortgagors.) ** AIR 1943 Bom 191 (193) (DB). (Co-mortgagor redeeming property and acquiring possession without being required to make any assignment. Co-mortgagor is surrogated and suit by co-mortgagor to recover possession of his share of mortgaged property is governed by Art. 148, Limitation Act (1908) and not by Art. 144. **Time runs from due date under the mortgage redeemed.)]**

[See also AIR 1934 Lah 248 (249) : 15 Lah 746. (No inquiry as to an intention to keep the mortgage alive would be necessary where the co-mortgagor paying off a prior mortgage and the co-mortgagor who executed a subsequent mortgage are not the same.)]

5. 1996 (4) ICC 634 (640) (Punj & Har).

6. ILR (1966) 2 Ker 388 (396) (DB) ** AIR 1959 Punj 170 (172) (DB) ** AIR 1955 Nag 280 (282). ILR (1956) Nag 197 (DB) ** AIR 1955 Pepsu 145 (147). ILR (1955) Punjab 589 ** ILR (1955) Trav-Co 48 (50) (DB) ** AIR 1933 All 2[illegible] (26). 54 A[illegible] 978 (1[illegible]8) (Per Mukerjee J.) ** AIR 1940 Oudh 97 (101). 51 Luck 175 (DB) ** AIR 1934 Lah 248 (249) : 15 Lah 746.

See also the report of the Special Committee.

7. ILR (1966) 2 Ker 388 (390) (DB) ** AIR 1949 First Punj 254 (255) (DB). (AIR 1943 Bom 191, Distinguished.)

8. AIR 1967 Ker 247 (248) : ILR (1967) 2 Ker 1 (FB).

9. 1966 Ker LT 833 : 1966 Ker LJ 887.

10. 1979 Cur LJ 482

11. AIR 1972 Punj 352 (353).

12. 1996 AIHC 1836 (1838) (Him Pra).

As has been seen in Note 17 on S. 82, S. 95 and S. 82 are not mutually exclusive, and apart from the right of subrogation, the redeeming co-mortgagor has a *charge* for contribution under S. 82 enforceable within 12 years from the date of payment in excess of his share.(13) It has been held that this charge relates back to the date of the mortgage redeemed, for purposes of priority, though not for purposes of limitation.(14)

The principle of Section 92 will apply in the erstwhile Travancore State where T. P. Act wasnot made applicable. The rule of subrogation does not enable a redeeming co-mortgagor to claim to be the mortgagee but it entitled him to be reimbursed of whatever moneys he has spent before possession is recovered from him from other co-mortgagor.(15)

Where a co-mortgagor or a partowner only redeems the whole mortgage, and is thereupon subrogated to the rights of mortgagee under Section 92 of Act, his co-mortgagor or the mortgagors who had not joined in redemption, could redeem him only to extent of his/their share in the property (16)

When the co-mortgagor redeemed the mortgaged property and instituted suit for recovery of contribution held that the suit is for recovery of money The starting point for limitation would therefore be the date on which co-mortgagor made payment and redeemed the mortgage.(17)

When one co-mortgagor gets the right of contribution against other co-mortgagor by paying the entire mortgage debt a correlated right also accrues to the latter to redeem his share of the property and get its possession on payment of his share of the liability to the former. This corresponding right of a non-redeeming co-mortgagor to pay his share of the liability and get possession of his property from the redeeming co-mortgagor subsists as long as the latter's right of contribution subsists This right is purely an equitable right which exists irrespective of whether the right of contribution of the redeeming co-mortgagor amounts to mortgage or not.(18)

Rule of subrogation entitles a co-mortgagor to be reimbursed of whatever moneys he has spent before possession is recovered from him by the other mortgagor.(19)

When a redeeming co-mortgagor gets a right to contribution by other co-mortgagor a correlated right also accrues to the latter to redeem his share of the property and get possession on the payment of the liability to the former and this right subsists as long as the right to contribution subsists.(20)

A suit for redemption against redeeming co-mortgagor is maintainable if filed within 60

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13. AIR 1957 Mys 1 (2) : ILR (1956) Mys 129 (FB) ** AIR 1982 Punj 185 ** AIR 1982 Punj 185 ** AIR 1965 Ker 55 (57) (Rights of contribution and subrogation are not mutually exclusive AIR 1958 Ker 386 Foll) ** AIR 1964 Bom 284 (286) ** AIR 1964 Ker 256 (257) ILR (1964) 1 Ker 526 ** AIR 1958 Ker 386 (392) ILR (1987) Ker 598 (DB) ** AIR 1955 Nag 280 (283) ILR (1956) Nag 197 (DB) ** AIR 1950 Pat 174 (175, 176) 28 Pat 955 (DB) ** AIR 1949 Pat 522 (523) ILR 28 Pat 325 (DB) ** AIR 1945 Pat 192 (195, 196) 23 Pat 953 (DB) (Co-mortgagor paying requisite amount to set aside sale in execution of mortgage decree — Suit on mortgage bond barred — Co-mortgagor can sue for contribution and acquire charge on other co-mortgagors' shares) ** AIR 1942 Oudh 449 (457, 458) (FB)

14. AIR 1944 Oudh 114 (116) (DB).

15. AIR 1976 Ker 62 : 1975 Ker LT 38 (DB).

[See also AIR 1979 Mad 26 : (1978) 2 Mad LJ 267.]

16. AIR 1982 All 129 (137) : 1982 UPLT (NOC) 58

17. AIR 1983 Kant 13 : (1982) 2 Kant LJ 72.

18. AIR 1979 SC 1937 (1942) : 1980 UJ (SC) 312.

19. AIR 1976 Ker 62 : 1975 Ker LT 38

20. AIR 1979 SC 1937 : (1979) 4 SCC 429.

years from the original mortgage under Limitation Act, 1908.(21)

For further discussion, see Notes on S. 82 and Note 3 on Art 61 of the AIR Commentaries on the Limitation Act, 1963, 7th (1997) Edition.

16. Redemption by volunteer.

A volunteer cannot claim the right of subrogation by paying off a mortgage debt (1) The

21. AIR 1975 Mad 100 : (1974) 2 Mad LJ 200 (DB).

Section 92 — Note 16

1. ILR (1962) 12 Raj 957 (962) (A voluntary payment does not create any obligation to repay) ** (1992) 2 Cur LJ (CCR) 224 (Punj & Har) ** AIR 1960 Pat 474 (478) ** AIR 1956 Pat 349 (352) (DB) ** AIR 1952 Pepsu 74 (74) ILR (1952) Patila 101 (Even if the reversioners redeem the mortgage during lifetime of widow they would be in the position of volunteers) ** AIR 1952 Trav-Co 105 (111) (DB) (Where a person who has absolutely no title to the property mortgaged sells it, the purchaser's position is no more than that of an intruder between the mortgagee and the true owner of the equity of redemption) ** AIR 1950 Pat 13 (16) 28 Pat 531 (DB) (Anomalous mortgagee paying mortgage decree in favour of prior mortgagee — Payment made in order to preserve mortgaged property from sale — Payment made is not one by volunteer - Such mortgagee is entitled to subrogation under S 92) ** (1909) 36 Cal 193 (219) (DB) ** AIR 1925 Mad 129 (129) (A person who advances money for the purpose of getting a mortgage and pays the consideration for the mortgage of a prior encumbrancer is not a volunteer) ** AIR 1937 Mad 451 (453, 454) (DB) (A trespasser or a volunteer who pays off a mortgage debt is not entitled to the right of subrogation But if a person believes in good faith that he is entitled to redeem the mortgage either under the belief that he is the mortgagor or that he has some other right in the property which would entitle him to redeem, and pays off a mortgage-debt, he would be entitled to the rights of the mortgagee by way of subrogation or a like equitable principle) ** AIR 1936 Mad 264 (265) (If a person who has a title void *ab initio* and no other interest in the property discharges a prior mortgage he is in the position of a mere volunteer and cannot claim to be subrogated) ** AIR 1925 Mad 1175 (1178) (Where the heir at law who was entitled to certain property which was acquired by the deceased after the execution of the Will and the legatee under the will were living together and the legatee discharged an encumbrance on that property he cannot be considered a mere volunteer even though the said legatee had no real right to that property and the property would pass as undisposed of property to the heir-at law, and the legatee will be entitled to a charge for the amount paid by him to discharge the encumbrance on the property) ** AIR 1928 Mad 541 (542) (A person who claims under a sham transaction which is no transaction at all has no interest in the property conveyed to him — He is only a volunteer and if he pays off a prior mortgage on the property he is not entitled to be subrogated to the rights of the mortgagee whose debt he pays off) ** AIR 1929 Mad 860 (864) (DB) (The right of subrogation extends to strangers provided they are not mere volunteers, that is persons who pay off the other people's debts are not mere volunteers that is persons who pay off the other people's debts without having any concern in them — Where a member of a Malabar tarwad paid off a certain mortgagee of the tarwad properties it was held that he was not a mere volunteer and he was entitled to be subrogated to the rights of the mortgagee) ** (1908) 31 Mad 439 (442) (DB) (A purchaser of land, who while in possession of the land purchased, pays off an encumbrance on it is entitled when his purchase is found invalid, to stand in the shoes of the mortgagee whom he has paid is found invalid, to stand in the shoes of the mortgagee whom he has paid off) ** AIR 1931 Mad 592 (596) 54 Mad 708 (DB) (AIR 1926 Cal 231, **Dissented from.**) ** AIR 1936 Mad 308 (309) ** AIR 1914 Mad 371 (372) (DB) (A person in whose favour there was a collusive sale was held a volunteer) ** (1907) 6 Cal LJ 134 (137) (DB) ** AIR 1931 All 40 (42) : 52 All 1037 (DB) ** AIR 1931 Pat 33 (36, 37) 9 Pat 816 (DB) ** AIR 1934 Mad 256 (257) (DB) (*V*'s mortgage to pay off *M* mortgage — Default by *V* to pay *M* — Subsequent mortgage to *A* to pay off *M* — Mortgagor then mortgaging to *K* to pay off *A* and *K* paying *A* in pursuance of agreement with mortgagor — *K* held, was not mere volunteer)

reason is that no one is entitled to officiously thrust a benefit on another and claim reimbursement As has been seen already, the doctrine of subrogation rests on the same equitable principle as that enacted in S 69 of the Contract Act under which only a person interested in the payment of money which another is bound to pay and who *therefore* pays it is entitled to reimbursement

As stated by Mukerjee, J., in *Gurdeo Singh v. Chandrika Singh*(2) :

> "Subrogation as a matter of right is never applied in aid of a mere volunteer Legal substitution into the rights of a creditor for the benefit of a third person takes place only for his benefit who being himself a creditor satisfies the lien of a prior creditor, or for the benefit of a purchaser, who extinguishes the encumbrances upon his estate or of a co-obligor or surety who discharges the debt or of an heir who pays the debt of the succession Any one who is under no legal obligation or liability to pay the debt, is a stranger and, if he pays the debt he is a mere volunteer"

The principle upon which the above proposition is based, namely, that a voluntary payment does not create any obligation to repay was laid down by their Lordships of the Privy Council in *Ram Tahal Singh v Biseswar Lall*(3) decided before the passing of the Transfer of Property Act Their Lordships observed :

> "Its not in every case in which a man has benefited by the money of another that an obligation to repay that money arises The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality To support such a suit there must be an obligation express or implied, to repay. *It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt.*"

The contrary view taken in the undermentioned cases(4) that a volunteer can claim to be subrogated to the position of the mortgagee whom he pays, is, it is submitted, wrong These cases follow the English decision *Butter v Rice* (5) That case, no doubt, seems almost to go the length of holding that even a volunteer who pays off an existing mortgage would be entitled to the right of subrogation, but the two decisions *Patten v Bond*(6) and *Chetwynd v Allen*,(7) which the case of *Butler v Rice*(8) takes as authority for the view taken in it, do not seem to warrant that conclusion Those were cases in which payment was made by a third person on request and he was therefore

** AIR 1941 Oudh 226 (229) (DB) (2 Indi App 131 (PC), Referred) ** AIR 1924 Oudh 302 (303) 27 Oudh Cas 56 (DB) (Payment by person holding under void transfer creates right of reimbursement but no charge as the principle of subrogation does not apply) ** (1913) 36 Mad 426 (435) (DB) (2 Ind App 131 (PC), **Followed.**) ** AIR 1935 Lah 523 (525) · 16 Lah 1065 (DB) (AIR 1928 Mad 541 and AIR 1929 Mad 860, Relied on) ** (1937) 20 Nag LJ 159 (171, 172) (DB) ** AIR 1931 Mad 110 (111) ** 1864 Suth WR Gap **No. 345 (346) (DB) ** AIR 1924 All 834 (836).**

2. (1909) 36 Cal 193 (219) (DB)

   [See also AIR 1972 Mad 207 85 Mad LW 34 (The principle of subrogation does not apply in the case of a mere volunteer because the principle rests on the same principle of reimbursement as is enacted in section 69 of the Contract Act namely that a person who is interested in the payment of money which another is bound to pay by law and who therefore pays it is entitled to be reimbursed by the other Even in the case of subrogation there must be an obligation express or implied to repay.)]

3. **(1875) 2 Ind App 131 (143) (PC).**

   [**See also AIR 1945 PC 23 (30) : 72 Ind App 39.** (2 Ind App 131 (PC), Foll)]

4. AIR 1916 Bom 302 (304) 40 Bom 646 (DB) ** AIR 1931 Mad 720 (723) ** AIR 1929 Bom 139 (140) : 53 Bom 353 ** AIR 1926 Cal 231 (232) (DB).

5. (1910) 2 Ch 277 (282, 283) : 79 LJ Ch 652 : 103 LT 94.

6. (1889) 60 LT 583 (585, 586) : 37 WR (Eng) 373.

7. (1899) 1 Ch D 353 (353, 357) . 68 LJ Ch 160 : 80 LT 110 · 47 WR (Eng) 200.

8. (1910) 2 Ch D 277 (282, 283) : 79 LJ Ch 652 : 103 LT 94.

rightly held to be subrogated. The undermentioned English cases(9) also support the view that a volunteer is not entitled to a right of subrogation. The learned author Sheldon in his book on *Subrogation*(10) also says :

> "The doctrine of subrogations is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or property of his own."

If a private transfer is effected in violation of the Public Payments Recovery Act the purchaser does not get any subsisting right so as to claim subrogation (11).

17. Redemption by a person claiming under a void or voidable title.

Where a person claiming under a title which is void *ab initio* discharges a prior mortgage, he is in the position of a mere volunteer and cannot claim to be subrogated to the rights of the mortgagee, whom he has discharged (1). But where the person claims under a *voidable* title which is good

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9. (1886) 34 Ch D 234 (241) : 56 LJ Ch 707 : 56 LT 226 : 35 WR (Eng) 143 : *Lucker v. Scottish Imperial Insurance Co.* ** (1899) 1 Ch D 440 (448, 449) : 68 LJ Ch 270 : 6 Mans 218 : 80 LT 130 : 47 WR (Eng) 464, *In re Wexham Mid and Cannah's Quay Railway Co.* (Affirming (1898) 2 Ch D 663.)

10. Sheldon on *Subrogation*, 2nd. Edn., para 240, cited in AIR 1931 Mad 110 (111).

11. AIR 1973 Orissa 98 (101, 102) : (1972) 2 Cut WR 1571

Section 92 — Note 17

1. AIR 1952 Trav-Co 105 (111) (DB) (Where a person who has no title to the property mortgaged sells it, the purchaser's position is no more than that of an intruder between the mortgagee and the true owner of the equity of redemption.) ** AIR 1936 Mad 264 (265, 266) (A private purchaser from the judgment-debtor of property which has been actually sold in execution of a decree on a puisne mortgage, but before the confirmation of the sale, does acquire an interest in that property which he is entitled to protect by the discharge of a prior encumbrance held to be in derogation of the Court's sale and cannot be subrogated to the rights of the prior incumbrancer as against the Court-auction purchaser, as he is not a mere volunteer.) ** AIR 1921 Mad 51 (53, 54) (DB) (A mortgagor's right to redeem and to sue for redemption is determined, when he ceases to be liable for any debt and to be interested in the security. An assignment from a mortgagor whose right has thus come to an end cannot be the basis of a claim for subrogation by the assignee by paying off the mortgage.) ** AIR 1929 Mad 110 (114) (DB) (Mother living with her minor widowed daughter but not managing her property — Mother effecting sale of minor's property and her legal guardian purchasing it — Legal guardian also managing minor's estate — Mother is not *de facto* guardian — Sale is void and purchaser is mere volunteer.) ** AIR 1931 Mad 110 (111, 112) (*A* mortgaging property to *C* and *D*, later being prior mortgagee — *C* becoming owner of property in discharge of his mortgage debt — *D*'s mortgage time barred — *A* selling property to *B* to pay off *D*'s mortgage — Held *B* could not be subrogated to *D*'s rights.) ** AIR 1924 Oudh 302 (303, 304) : 27 Oudh Cas 56 (DB) ** (1916) 32 All 25 (27, 30) (DB) (Sale by minor — Discharge of mortgage by vendee on property sold — Sale not completed — Suit by vendee to recover amount paid to mortgagee — Held vendee was volunteer.) ** AIR 1941 Oudh 226 (229) (DB) ** AIR 1936 Oudh 280 (285) : 12 Luck 185 (DB) ** (1938) 42 Cal WN 226 (229) (DB) ** AIR 1936 Oudh 280 (285) : 12 Luck 185 (DB) ** (1938) 42 Cal WN 1106 (1109). (Invalid mortgage.) ** (1899) 1 Ch 440 (448, 449) : 68 LJ Ch 270 : 80 LT 130 : 47 WR (Eng) 464 : 6 Mans 218 : *In re Wexham Mid and Cannah's Quay Railway*

[See however AIR 1916 Low Bur 113 (114) (An unregistered purchaser of land, where part of the consideration was paid in discharge of a mortgage, does not step into the shoes of the mortgagee as against a subsequent registered purchaser unless there was an intention on his part to keep the mortgage alive.)]

for the time being, and pays off a prior mortgage, he can claim the right of subrogation, though afterwards the transaction under which he claims is declared invalid and set aside.(2)

There are, however, some cases(3) which have not kept in view the distinction between void and voidable transactions, but have held that if a person believes in good faith that he is entitled to redeem the mortgage he would be entitled to the right of the mortgagee by way of subrogation or a

2. **AIR 1926 PC 109 (110) ** (1874) 2 Ind App 7 (17) : 22 Suth WR 409 (411) (PC).** (In appeal from 14 Suth WR 315 ** **AIR 1926 PC 68 (72) : 53 Ind App 142** ** AIR 1936 Mad 264 (265) ** AIR 1931 Mad 110 (112) ** AIR 1937 Nag 330 (333) : ILR (1937) Nag 111. (Purchaser of land paying encumbrance on it — Purchase found invalid — Purchaser is subrogated to rights of mortgagee.) ** AIR 1923 Nag 301 (304) ** (1911) 9 Ind Cas 789 (790) (DB) (Mad) ** (1912) 14 Ind Cas 741 (742, 743) (Mad). (Obiter.) ** AIR 1922 Pat 499 (500) : 1 Pat 780 (DB) ** AIR 1928 Nag 246 (247) (S contracting to purchase and obtaining decree for specific performance against *C* — Mortgage by *C* to *A* in the meantime — *Y* purchasing subsequent to decree and redeeming mortgage — *Y* is clothed with rights of *A*.) ** AIR 1934 Pat 127 (132) : 13 Pat 111 (DB) (**Overruled** on another point in AIR 1940 Pat 385.) ** (1884) 9 Bom 35 (39) (DB) ** AIR 1933 Lah 1000 (1001). (Of property belonging to two brothers mortgage by one of them — Other not ratifying it — Mortgagee paying off pre-existing encumbrances which were valid charge on share of brother not joining in mortgage — Held, though mortgage was invalid against him, his share was liable to prior encumbrances.) ** (1983) 17 Bom 741 (744) (DB) ** AIR 1924 All 315 (316) : 46 All 38 (DB) ** AIR 1930 Oudh 397 (339) (DB) (Mortgage by *A* to *B* — Sale of same property to *C* who paid *B's* mortgage out of consideration — Property already purchased by *D* in execution — *C* held to have been subrogated to rights of *B*.) ** (1906) 31 Bom 271 (289) ** (1910) 33 Mad 334 (339) (DB) (Transfer to defraud creditors.) ** AIR 1936 Nag 207 (208, 209) : ILR (1936) Nag 183 (Do). ** AIR 1916 Mad 649 (651) (DB) (Do.) ** AIR 1925 Nag 73 (74) : 21 Nag LR 21 (Do.) ** (1911) 35 Bom 438 (442) (DB) ** (1893) 18 Bom 86 (90, 91) (DB).

3. **AIR 1945 Mad 500 (501).** (*A* mortgaging property to *B* and then to *C* — *C* believing in good faith that *A* had title to property at time of mortgage paying off *B's* mortgage — *A* found not to have title to property at time of mortgage to *C*. *C* was entitled to redeem under Section 91 and therefore subrogated to rights of *B*.) ** AIR 1945 Mad 175 (176) (Purchaser paying off mortgages prior to sale deed — Sale becoming ineffective because of prior sale deed to third person registered subsequently — Purchaser having bona fide believed that he has legal interest in property was entitled to be subrogated to the rights of the mortgagee.) ** AIR 1937 Mad 451 (453, 454) (DB) (Mortgage by karnavan of tarwad — Assignee of mortgagee executing surrender deed in favour of person claiming to be karnavan of same tarwad — Such person paying off mortgage in bona fide belief of his right to do so — Such person held entitled to subrogation.) ** (1937) 20 Nag LJ 159 (171, 172) (DB) ** (1912) 15 Ind Cas 206 (210) (DB) (Mad) ** AIR 1923 Mad 392 (394) (DB) (Per Spencer, J.) ** (1897) 21 Mad 143 (144) (DB) (*A* mortgaged land to *B* — He then agreed to sell it to *C* but sold to *D* in whose favour he executed a conveyance bearing a date prior to the contract with *C* — *C* sued *A* and *D* to have the conveyance set aside and his contract specifically performed and a decree was passed in his favour — During the pendency of this Suit *D* paid off *B* and then sued *A* and *C* to recover the money — Held, the payment was made bona fide and *D* stepped into the shoes of the mortgagee *B*.) ** (1911) 10 Ind Cas 556 (558) (DB) (All) ** (1912) 16 Ind Cas 27 (28) (DB) (Mad) ** (1908) 31 Mad 439 (441) (DB) ** AIR 1921 Mad 51 (54, 55) (DB) (Belief must relate to the actual existence of an interest in the property and not in future acquisition of it.) ** AIR 1934 Pat 681 (683) (DB) (In such a case, if the plaintiff reversioner does not impute bad faith on the part of the purchaser, the latter is not bound to allege or prove good faith.) ** (1873) 19 Suth WR 422 (422, 423) (DB) ** AIR 1927 Mad 204 (205, 206) ** AIR 1919 Mad 105 (107, 109) (DB) (Purchaser from trespasser redeeming mortgage by true owner is entitled to be subrogated.)

like equitable principle. Some of them(4) rely upon the prior decision in *Nasiruddin v. Ahmad Hussain.*(5) In that case *A*, a manager of a joint Hindu Family, contracted to sell the family property to B. Subsequently, he sold the land to *C*. *C* discharged a prior mortgage on the property. **B** sued for specific performance of his contract. In granting the decree their Lordships observed.

> "It seems that the appellants (C) have, in virtue of their claim to be purchasers, discharged mortgages upon the property. In respect of any money paid by way of such discharge, they are entitled to stand **in the shoes of the mortgagees whom they have paid off.**"

It is submitted that there is nothing in the above decision to warrant the view that it proceeded on the ground of good faith, irrespective of whether the title was void or voidable.

A distinction should be made between a transaction which is void or voidable and transaction which is only a sham or nominal one. A sham or nominal transfer is no transfer at all. A person claiming under such a transaction has no interest in the property and cannot claim the right of subrogation.(6)

Where a person entitled to the right of subrogation pays off a mortgagee in possession and obtains possession from the mortgagee, he is entitled to hold the mortgage as a shield to a claim for possession by the real owner and cannot be ousted unless and until he has been redeemed. But where such a person enters into possession by virtue of the *transfer* in his favour and the mortgage which he pays off does not give him any right to possession, he cannot use the payment of the mortgage-money as a shield to a suit for possession by the real owner but must surrender it to him. He can, however, enforce his rights under the mortgage is proper proceedings taken for that purpose.(7)

18. Redemption by trespasser.

Mere possession is not sufficient to support aclaim of subrogation unless that possession is accompanied by some interest in the property which the person in possession is entitled to protect.(1) A trespasser who is in wrongful possession of the mortgaged property, paying off a mortgage-debt has no such interest and therefore cannot claim subrogation.(2)

19. Third paragraph.

As seen in Note 1 this paragraph deals with what is known as *conventional* or *contractual* subrogation. This class of subrogation arises, where a person advances money to the mortgagor to pay off a prior mortgage or charge under an agreement that he should be substituted for the mortgagee or the charge-holder and the mortgage or charge has been so paid off. Thus, in conventional

4. AIR 1937 Mad 451 (453) (DB) ** (1937) 20 Nag LJ 159 (172) (DB).

5. AIR 1926 PC 109 (110).

6. AIR 1928 Mad 541 (542) ** AIR 1923 Mad 392 (399) (DB) (Per Devadoss, J.) ** AIR 1914 Mad 371 (372) (DB). (Nominal and collusive sale.) ** AIR 1919 Mad 700 (703-706) (DB).

7. AIR 1937 All 119 (121) ILR (1937) All 225 (DB) ** (1933) 145 Ind Cas 277 (278) (DB) (All) ** (1875) 7 NWPHCR 201 (202) (DB).

[See AIR 1929 PC 288 (289). (Mortgagees, whose mortgages are not usufructuary, cannot resist a suit for possession by a purchaser of the equity of redemption.)]

Section 92 — Note 18

1. AIR 1936 Mad 264 (265) (This, however, may possibly be qualified if the discharge of the prior encumbrance was necessary to prevent an immediate dispossession.)

[See also AIR 1931 Mad 207 (213), 53 Mad 952 (DB) (Where a plaintiff's alleged title is found to have been false and he has not succeeded in showing that he held possession of the property in good faith believing it to be true, a payment made to discharge a mortgage debt does not stand on any better footing than a payment made to discharge an unsecured debt.)]

2. AIR 1937 Mad 451 (453) (DB).

subrogation, it is the *mortgagor*, and not the person advancing money, who redeems the mortgage with the money advanced by the latter, and the person advancing money acquires a right of subrogation because there is an agreement in his favour by the mortgagor that he should obtain that right. In other words, the right referred to usually as "conventional or contractual" subrogation is founded upon the principle of an agreement between a borrower and a lender that the lender shall be subrogated to the rights of the original creditor.(1)

Where a person advances money to redeem a usufructuary mortgage and obtained possession from the mortgagee but was ousted by subsequent mortgagee he is entitled to be subrogated to the mortgagee who was redeemed by funds provided by him and get possession from the subsequent mortgagee.(2)

A person claiming benefit under Sec. 92(1) must show that he had pre-existing interest or charge on the property, that he redeemed the same in full and that he paid the amount from his own pocket and his own money for protection of his interests.(3)

This paragraph has to be distinguished from the first paragraph of the section. The difference is that the first paragraph deals with a person redeeming the mortgage and the third paragraph deals with a person who advances money with which the mortgage is redeemed. A person advancing money may or may not be a person interested in the property. Where he has an interest in the property, but does not himself redeem the mortgage, he cannot claim subrogation under the first paragraph.

In *Hiraysingh v. Jaisingh*(4) Sulaiman, C. J., stated the distinction between the first and the third paragraphs of the section as follows :

> "The difference in the language of the two paragraphs is obvious. The first paragraph refers to a person who redeems and who on redeeming the property acquires the rights of the person whose mortgage he redeems. The third paragraph refers to a person who has advanced to a mortgagor money, with which the mortgage has been redeemed, who acquires the rights of the mortgagee whose mortgage has been redeemed. Thus, the third paragraph does not require tht the person who has advanced to a mortgagor the money, should himself have redeemed. All that it requires is that the money advanced by him shouldhave been utilized for the purpose of redeeming the mortgage. That is why instead of the words 'whose mortgage he redeems' as used in the first paragraph, we have the words 'whose mortgage has been redeemed'. Now, it is well known that subrogation can arise in two ways, (1) by agreement and (2) by operation of law. The first paragraph deals with subrogation arising by operation of law and the third paragraph deals with subrogation by agreement. It is necessary that there should be an agreement for subrogation, that the agreement should be in writing and that it should be a registered instrument. It would be impossible to hold that these two paragraphs overlap each other, for the third paragraph requires certain stringent conditions which are not found in the first paragraph. They must therefore be mutually exclusive. The basic difference underlying these two paragraphs consists in this that the first paragraph refers to a person redeeming property and the third paragraph to a person who advances money with which a mortgage is redeemed.(5)"

Section 92 — Note 19

1. AIR 1945 PC 23 (29) : 72 Ind App 39 : ILR (1945) Kar (PC) 73 ** AIR 1958 Mad 508 (510) : ILR (1958) Mad 917 (FB) ** AIR 1950 Pat 13 (15) : 28 Pat 531

2. 1977 Andh LT 486

3. AIR 1970 Guj (77 to 80) : 11 Guj LR 108.

4. AIR 1937 All 588 (594, 595) : ILR (1937) All 880 (892, 893) (FB).

5. ILR (1955) Cut 163 (172, 173) (DB). (Distinction between cl. (1) and cl. (3).)

Also see the following cases :

AIR 1932 Oudh 54 (56) : 7 Luck 237 (DB) ** AIR 1939 Pat 375 (379) : 18 Pat 342 (DB) ** (1909) 36 Cal 193 (210, 221) (DB) ** AIR 1936 Rang 152 (156, 157) : 14 Rang 494 (DB). (Basis of the doctrine of equitable subrogation is a fictional agreement by quasi-

Prior to the introduction of this paragraph in 1929, there was no provision dealing with conventional subrogation. But the right was recognised as existing and was granted both where the agreement to subrogate was express(6) and where it was implied(7). An agreement to subrogate was implied where it could be gathered that the parties intended to keep the mortgage alive (8). Where there was no such agreement, express or implied, the mere fact that the money borrowed by a debtor was used to pay off a prior mortgage did not entitle the lender to the benefit of the discharged security (9). A mere stranger who had lent money to the mortgagor to redeem the mortgage and who was neither a surety of the mortgage debt nor interested in the property had in order to succeed on the equitable doctrine of subrogation to prove that there was an agreement between him and the debtor or the creditor that he should receive and hold an assignment of the debt as security (10). In some cases(11) the question whether a person who advanced money to the mortgagor for paying off a prior mortgage was subrogated to the rights of the mortgagee was held to be governed by the rule of intention referred to in Note 2 above. Under this section, there can be no subrogation in such cases unless there is an agreement therefor and the agreement is evidenced by

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lender with the debtor or creditor that he should receive and hold an assignment of the debt and security — **(Overruled on anoher point in AIR 1938 Rang 306.)**

6. **AIR 1940 PC 38 (44) : ILR (1940) 1 Cal 291 : ILR (1940) Kar (PC) 182 : 67 Ind App 82** ** AIR 1938 Bom 386 (387, 388) (DB) (Express agreement — Case pending when S. 92 came into force — Subrogation allowed in the absence of a registered deed holding that the new S. 92 was not applicable.) ** AIR 1937 Cal 194 (199) (DB) (Affirmed in AIR 1940 PC 38.)

7. AIR 1934 Mad 256 (257) (DB) (AIR 1929 Mad 870 followed.) ** AIR 1927 Mad 1180 (1181) (DB) ** AIR 1916 All 44 (46) (DB) ** AIR 1919 All 138 (139) : 41 All 372 (DB) (In certain cases the agreement may be presumed from the circumstances of the transaction.) ** AIR 1922 Pat 92 (95) (DB) (Per Buckmil, J.) ** AIR 1925 Nag 21 (23) ** (1910) 7 Ind Cas 980 (981) (DB) (Cal) ** AIR 1938 Mad 161 (162, 163) (DB) (A advancing money to *B* to pay off a mortgage on understanding that *B* would execute mortgage in favour of A to secure repayment — Deed not executed — Not mere intended keeping up subrogation.) ** AIR 1924 Oudh 85 (90) (DB).

8. *See Note 2 and also the undermentioned cases.* AIR 1947 Mad 18 (29) (DB) (Conventional subrogation — Earlier mortgagee paid off with money advanced by lender — Intention to keep earlier mortgage alive — Intention presumed — Express or implied that later mortgagee should be [illegible] ** AIR [illegible] (DB) (Subsequent mortgagee paying off prior mortgage — Not be assumed according to rule of justice, equity, and good conscience to have intended to keep the first mortgage alive and is entitled to stand in the position of prior mortgagee.)

9. AIR 1917 Low Bur 168 (171) (DB) ** AIR 1932 Oudh 255 (260) : 8 Luck 40 (DB) (Mortgage executed to discharge prior mortgage — Money advanced by mortgagee's bank for that purpose — Mortgagor to be personally liable for any excess due — No intermediate encumbrance — Intention held to extinguish mortgage and no subrogation allowed.) ** AIR 1917 Pat 417 (417) (DB) (Charge whether to be extinguished or kept alive depends on intention of parties.)

[**See also** (1909) 12 Oudh Cas 285 (287) (Case under S. 74 now repealed by the amending Act of 1929.)]

10. **AIR 1945 PC 23 (29, 30) : 72 Ind App 39.**

11. **AIR 1924 PC 36 (38) : 51 Ind App 140** ** (1910) 8 Ind Cas (659) (DB) (Cal) ** AIR 1920 Mad 941 (943) (DB) (Subsequent encumbrancer paying off prior encumbrance with consideration money — Presumption is that he does so with intention to keep prior encumbrance alive.) ** (1913) 18 Ind Cas 497 (498) (DB) (Low Bur) ** AIR 1933 Mad 398 (399) : 56 Mad 517 (DB) ** AIR 1924 Oudh 374 (376) ** AIR 1923 Pat 199 (200) (DB) (Evidence showed that money advanced was specifically to pay off the prior mortgage — Lender and

a *registered instrument*.(12) The right can no longer be claimed or granted as before 1929, on very slight evidence or what may be described as the semblance of an agreement evidence.(13) The money must be advanced to the mortgagor and the mortgagor must have agreed, by a registered instrument, to the subrogation.(14)

In cases where the person advancing money takes a mortgage or sale of the mortgaged property for the amount he had advanced, an agreement to subrogate can be effected by the same deed of mortgage or sale, by introducing a recital to that effect.(15) But the agreement for subrogation

even aware of prior mortgage — No subrogation in absence of intention) ** AIR 1932 Oudh 314 (317) 7 Luck 26 (DB) ** (1909) 5 Low Bur Rul 138 (139, 140) (DB) ** AIR 1920 Pat 251 (254) (DB) ** AIR 1929 Pat 325 (327) 8 Pat 360 (DB) ** AIR 1928 Mad 703 (704, 705) (DB) (Intention to keep alive the mortgage paid off need not be express — Person paying need not have notice of the intermediate encumbrance) ** (1909) 1 Ind Cas 264 (279) (DB) (Cal) ** **(1891) 13 All 581 (585) (SB).** (Intention was held to be to keep alive the mortgage.) ** AIR 1918 Pat 299 (300) (DB) ** 1885 All WN 21 (24) (DB) (On facts held that there was no intention to keep prior mortgage alive) ** AIR 1914 All 443 (444) (DB). (Simple mortgage to pay off prior usufructuary mortgagee out of the consideration — Mortgagor taking possession of property **Held,** there was no intention to keep alive prior mortgage for the benefit of simple mortgagee) ** 1896 Bom PJ 629 (629, 630) (DB) ** **(1884) 10 Cal 1035 (1046) : 11 Ind App 126 (PC)** ** (1902) 29 Cal 25 (30) (DB) ** (1906) 33 Cal 1133 (1154) (DB) ** (1900) 4 Cal WN 769 (775) (DB) (Presumption in absence of any evidence to the contrary is that prior mortgage is intended to be kept alive — Hence slight evidence is sufficient to prove such intention.) ** (1896) 19 Mad 105 (107) (DB) (On facts held that intention of the parties was to extinguish the prior mortgage) ** AIR 1934 Lah 806 (806). (Taking back paid up prior mortgage-deeds shows intention to keep those mortgages alive.) ** AIR 1933 Lah 810 (811) (DB) ** AIR 1992 Pat 181 (182) : 1 Pat 332 (DB).

Also see S. 101, Note 1.

12. **AIR 1963 SC 1879 (1882) : (1962) 2 SCR 753 : 41 Pat 402.** (As subsequent mortgage by *A* in favour of *D* said nothing about earlier mortgage in favour of *B* and that money was left with *D* to redeem the earlier mortgage in favour of *B* an agreement in the mortgage of *D* that he would be subrogated to the rights of *B* could not be inferred.) ** AIR 1956 Andh 114 (115) ** AIR 1956 Pat 349 (352) (DB) ** 1953 BLJR 227 (231) ** AIR 1950 Orissa 150 (155) (DB) (Person paying money to mortgagor to redeem — Endorsement on back of mortgage bond to the effect that the person was invited to make the payment and to hold property in possession in lieu till amount was repaid — Endorsement not registered — It cannot serve purpose of effecting subrogation.) ** AIR 1946 Mad 145 (146) (Sale in execution of prior mortgage — Setting aside under O 21, R 89, Civil P.C Deposit made with money realised by private sale — Subsequent suit by puisne mortgagee — Right of private purchaser to subrogation — No subrogation in absence of registered instrument by mortgagors giving the right of subrogation) ** AIR 1938 Bom 115 (119) (DB) ** AIR 1938 Bom 386 (387) (DB) ** **AIR 1936 Mad 171 (172) : 59 Mad 359 (FB)** ** AIR 1938 Pat 532 (533) : 17 Pat 666 (DB) ** AIR 1934 Oudh 213 (219) : 9 Luck 717 (DB) ** AIR 1932 Oudh 54 (57) : 7 Luck 237 (DB) ** AIR 1942 Mad 751 (752, 753). (In absence of registered agreement no charge can be given even on equitable grounds as it would defeat object of amendment of 1929.)

Also see Note 22

13. AIR 1956 Pat 349 (352) (DB) ** **AIR 1945 PC 23 (30) : 72 Ind App 39.**

14. **AIR 1945 PC 23 (29, 30) : 72 Ind App 39.** (Mortgage of idol's property by one of managers along with others claiming the property as their own, to pay off mortgage decree against idol — Mortgagors agreeing to the lender being subrogated to decree-holder's rights — Mortgagee not entitled to subrogation.)

15. **AIR 1940 PC 38 (44) : 67 Ind App 82** ** AIR 1942 Pat 166 (168, 169) (DB) ** AIR 1939 Mad 949 (956, 957) (DB).

will not *ipso facto* become a mortgage (16)

Where the requirements of this paragraph have been fully satisfied an agreement between the mortgagors *inter se* that the mortgage would be discharged by one of them personally would not take away the right of the person advancing money to claim a right of subrogation (17)

The word 'mortgagor' in this paragraph does not necessarily mean all the mortgagors where there are more than one Hence one of the mortgagors can, by a covenant give the right of subrogation.(18)

19A. Renewal of mortgage.

See under Note 20.

20. Person who has advanced money to a mortgagor.

The words "who has advanced to a mortgagor money" will include not only a simple creditor(1) but also a mortgagee(2) or a vendee(3) who has advanced money to the mortgagor in consideration of his mortgage or sale as the case may be According to a Full bench case of the Nagpur High Court,(4) however the expression will not apply to the case of a *vendee* as in the case of a sale, it cannot be said that the money has been *advanced* the word rightly contemplates a loan and the relation of a debtor and creditor Such an interpretation of the expression advanced is it is submitted, against the general trend of the judicial decisions

It was held in the undermentioned case(5) that the words do not refer to mortgagee who has advanced money on a subsequent mortgage for the purposes of redeeming a prior mortgage in his own favour A contrary view, however, was expressed in *Kanhaiya Lal v. Gulab Singh*,(6) in which it was held that, on principle, it made no difference whether the money raised under a latter mortgage was applied in satisfaction of the earlier mortgage of a third person or in satisfaction of an earlier mortgage of the subsequent mortgagee himself This view accords also with a Full Bench decision of the Allahabad High Court in *Munna Lal v. Chunni Lal*(7) in which it was held that the renewal of a first mortgage after a second mortgage in favour of another will entitle the renewed mortgage to priority over the second mortgage.

It has been held that the word "mortgagor" in the expression "A person who has advanced

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16. AIR 1958 Pat 508 (510) : 1958 Cri LJ 1217 (FB).

17. AIR 1951 Mad 917 (919) (DB)

18. AIR 1951 Mad 917 (919) (DB) (If in the first paragraph of the section the right of subrogation in a co-mortgagor who redeems the mortgage is recognised it would be repugnant to the subject and to the context to construe the word mortgagor in the third para as meaning only all the mortgagors and not one of several mortgagors.)

Section 92 — Note 20

1. AIR 1937 All 588 (595) : ILR (1937) All 880 (FB) ** AIR 1939 Mad 949 (956) (DB)

   [See also (1879) 11 Ch D 1 (18) : 48 L J Ch 168 : 27 WR [illegible] 641 Cockerell v. Jansan. (Under English Law, such person is treated as equitable assignee.)]

2. AIR 1937 All 588 (595) : ILR (1937) All 880 (FB). (Impliedly overruling AIR 1936 All 336) ** AIR 1939 Mad 949 (956) (DB) ** AIR 1936 Mad 171 (172) : 59 Mad 359 (FB) (Per Cornish, J.)

   [See also AIR 1940 Pat 620 (621) (DB)]

3. AIR 1937 All 588 (595, 596) : ILR (1937) All 880 (FB) ** AIR 1939 Mad 949 (956) (DB)

4. AIR 1937 Nag 372 (375) : ILR (1938) Nag 206 (FB).

5. AIR 1940 Pat 64 (65).

6. AIR 1933 Oudh 9 (12) : 7 Luck 655 (DB).

7. AIR 1945 All 239 (243) : ILR (1945) All 733 (FB). Mortgagors to renew prior mortgage without consent of mesne mortgagee (Per Iqbal Ahmad, C J., Allsop and Hamilton, JJ Verma, J. contra.))

money to a mortgagor" in paragraph 3 must be understood to mean the original mortgagor who was personally bound to pay and his legal heir (8) But this view does not seem to be correct in view of the new S 59A which has not been referred to in the judgments

21. "Mortgage has been redeemed".

In *Janki Nath Roy v Pramatha Nath Roy*(1) the Judicial Committee interpreted the expression "the mortgage has been redeemed" in the third paragraph as "payment off of the mortgage-money." Negativing the contention that redemption was only complete when a re-conveyance or what in India takes the place of re-conveyance, is made their Lordships observed as follows :

> "This contention, however, loses sight of the distinction between the redemption of a mortgage and the redemption of the property mortgaged In their Lordships' opinion, it is clear that the words in the section, "mortgage has been redeemed," refer merely to the payment off of the mortgage-money, and not to an extinction of the mortgagees' rights over the mortgaged property If such rights had become extinguished there would be none to which the person advancing the money, could be subrogated The fourth paragraph moreover seems to contemplate that a mortgage may be redeemed in part, and this clearly shows that by redemption is meant no more than payment of the mortgage-money."

The fourth paragraph relates to the right of subrogation both under the first and the third paragraphs and it is conceived that though the first paragraph uses the expression "on redeeming property subject to the mortgage" it must, in the light of the observations of their Lordships quoted above, be interpreted to mean nothing more than mere payment of the mortgage-money

Where the mortgaged property has been sold in execution of the mortgage decree but the sale is set aside under C P.C., O 21, R. 89 and the mortgage discharged with the money advanced by the creditor, the creditor may be subrogated under paragraph 3 The fact that the mortgage is discharged *after* the decree and sale on the mortgage does not affect the question.(2)

By obtaining an unregistered receipt from the mortgagee purporting to extinguish the mortgage the purchaser cannot be deemed to have subrogated to the rights of the mortgagee as such a receipt does not amount to redemption of the mortgage (3)

22. Sale or mortgage to pay off prior mortgage — Whether the first or the third paragraph applies.

The subject may be discussed with reference to the following illustrative classes of cases

Illustration I.

A mortgages property worth Rs 2000, to B for Rs 1800 and then sells the property to C for Rs 200 subject to B's incumbrance C pays Rs. 1800 to B in discharge of the mortgage

In this case, *C* as a purchaser of equity of redemption is a person interested in the property and pays *B* from his own pocket in order to protect his own interest. He comes under the first paragraph and is entitled to the right of subrogation, if he has not himself covenanted to pay the amount.(1)

Illustration II.

A mortgages property worth Rs 2000, to B for Rs 1800 and then sells the same to C for Rs

8. AIR 1951 Mad 917 (921) (DB) (The expression includes persons deriving title from the original mortgagor.) ** AIR 1947 Mad 18 (28) (DB).

Section 92 — Note 21

1. AIR 1940 PC 38 (44) : 67 Ind App 82.
2. AIR 1947 Mad 18 (31) (DB).
3. AIR 1979 Punj 212 : 1979 Pun LJ 444

Section 92 — Note 22

1. See Note 13

2000 free of incumbrances. A receives the whole consideration of Rs. 2000 and pays B Rs. 1,800 in discharge of his mortgage.

In this case, the mortgagor himself redeems the mortgage, and the question of subrogation under the first paragraph does not arise. *C*, however, may be entitled to a right of subrogation under the third paragraph, if A has by a registered instrument agreed that *C* should be so subrogated (2). The right of subrogation under the first paragraph may also arise, if *A fails to pay off B and C* is compelled to pay off B in order to protect his own interest. In this case, C is a person interested in the property and is out of pocket to the extent of Rs. 1800 in excess of what he has paid to *A* as consideration for his sale.

Illustration III.

A mortgages property worth Rs. 2000, to B for Rs. 1,800 and then sells the same to C for Rs. 2000 free of incumbrances but leaves Rs. 1,800 in the hands of *C* for paying off *B*, and C accordingly pays him off.

In this case, what C pays to B is really part of the purchase-money, that is, A's money. It is therefore, really A, the mortgagor, who redeems (3). There can be no question of subrogation under the first paragraph. But the money with which A pays off B comes from C. C is therefore a person who has advanced money to A, the mortgagor, and will be entitled to claim subrogation under the third paragraph, only if A has, by a registered instrument, agreed that C shall be so subrogated (4).

Illustration IV.

A mortgages property worth Rs. 2,000 to B for Rs. 1,800 and then mortgages the same to C for Rs. 2,000. A receives the whole consideration and pays off B.

In this case there can be no question of subrogation under the first paragraph inasmuch as the mortgagor himself has redeemed the mortgage. The right may arise under the third paragraph, if *A* agrees by a registered instrument that *C* should be subrogated to the rights of *B*.(5) *C* will be

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2. See AIR 1946 Mad 145 (146) (Sale in execution of prior mortgage — Setting aside under O. 21, R. 89, Civil P.C. — Deposit made with money realised by private sale — Private purchaser not entitled to subrogation in absence of registered instrument conferring such right on him.)

   See Note 19.

3. **AIR 1937 All 588 (595) : ILR (1937) All 880 (FB)** ** AIR 1939 Mad 949 (956) (DB) ** **AIR 1937 Nag 372 (375) : ILR (1938) Nag 206 (FB)** (**Overruling** AIR 1936 Nag 32 according to which it was *C* who redeemed.) ** AIR 1938 Pat 532 (533) : 17 Pat 666 (DB).

4. AIR 1956 Andh 114 (115) (No subrogation in the absence of agreement.) ** AIR 1953 All 296 (302) : ILR (1951) 1 All 515 (DB) (Prior mortgagee purchasing mortgaged property — Sale consideration consisting of amount of his own mortgage and also that of subsequent mortgage — Amount of subsequent mortgage kept with vendee — Vendee mortgagee not subrogated to right of subsequent mortgagee in the absence of agreement.) ** **AIR 1950 All 682 (687) (FB)** (No subrogation in the absence of agreement.) ** AIR 1950 Mad 186 (189) (DB) (Where a puisne mortgagee purchases the mortgaged property and the consideration for such sale is the amount due on his own mortgage and also the amount due on a prior mortgage which he undertakes to discharge, the case falls within the third para of S. 92.) ** **AIR 1937 All 588 (595) : ILR (1937) All 880 (FB)** ** AIR 1939 Mad 949 (956) (DB) ** AIR 1938 Pat 532 (533) : 17 Pat 666 (DB) ** AIR 1941 Bom 153 (155) (DB).

   [See AIR 1947 Mad 18 (29) (DB) (In this case which was decided according to the law prior to the amendment of the section in 1929, the vendee was held to be subrogated on the rights of the mortgagee paid off by him on the principle of implied intention to keep alive the mortgage — See also Note 19.)

5. See **AIR 1945 PC 23 (29) : 72 Ind App 39.** (Mortgage decree against idol — Mortgage of

entitled to claim subrogation under the first paragraph only if *A* fails to pay off *B* and he is required to redeem *B* in order to protect his own interest.(6)

In *Sitaram v. Kartar Singh*,(7) it was, however, held by the High Court of Lahore that the payment to the prior mortgagee *(B)* though by the hand of the mortgagor (A) must be regarded as having been made by *C* and that *C* could claim subrogation on the basis of the payment. It is submitted that his view is not correct on principle.

Illustration V

A mortgages property worth Rs. 2,000 to B for Rs. 1,800 and then mortgages the same to C for Rs. 2,000. A receiving only Rs. 200, and leaving the balance with C himself who pays off B with that amount.

In this case, when *C* pays to *B*, he pays only A's money and not his own. It is, therefore, only *A* who redeems the mortgage, *C* being considered merely as the hand of *A*(8). So, the question of subrogation under the first paragraph will not arise. *C* however, may, as a person advancing money to *A*, be entitled to claim the right of subrogation under the third paragraph, if *A* has agreed by a registered instrument that *C* shall be so subrogated.(9)

A subsequent mortgagee redeeming a prior mortgage with money reserved with him by the mortgagor is not entitled to the benefit of Section 92.(10)

According to a Full Bench of the High Court of Madras(11) the reason why *C* cannot claim subrogation under the first paragraph is not that the payment must be regarded as a payment by the mortgagor himself but that paragraph applies only where a person having a *pre-existing interest* in the mortgaged property pays off the mortgage, and not where he gets the interest for the first time by advancing money to the mortgagor to enable him to pay off the mortgage. Varadachariar, J., observed as follows :

> There is a well-established distinction between cases in which a person who has a pre-existing interest in property pays off a prior charge on that property for the protection of his own interest, and cases in which a person acquires an interest in property only by reason of his advancing money to pay off an existing mortgage debt. It seems to me that clause (1) of S. 92 must be held to relate to the first type of cases above referred to and clause (3) to the second type."

It is submitted that this view introduces restrictions not waranted by the words of the section. A person advancing money and taking a sale or mortgage from the mortgagor is a person having an interest in the property and is entitled to redeem under S. 91; and if he is to be considered as redeeming the earlier mortgage with his own money (as the Full Bench assumes) there is no reason why the first paragraph should not apply. Again, suppose in the above illustration, *C* has to pay Rs. 2,200 instead of Rs. 1,800, to *B*. It is obvious that *C* cannot, if the distinction pointed out by the Full

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Idol's property by manager and some others claiming property as their own, for paying off the mortgage decree — Agreement by these persons granting subrogation rights — No such rights created because it is only a mortgagor that can borrow money for paying off a prior mortgage and confer on the lender by registered instrument rights of subrogation.)

6. See Note 19.

7. AIR 1933 Lah 416 (417) (DB).

8. AIR 1937 All 588 (594, 595) : ILR (1937) All 880 (FB). (AIR 1932 All 489 (FB) Overruled.) ** AIR 1939 Mad 949 (956) (DB) ** AIR 1942 Bom 98 (100) ILR (1942) Bom 169 (DB) ** AIR 1941 Lah 53 (55).

9. AIR 1963 Mad 211 (212) * AIR 1956 Andh 114 (115) ** AIR 1937 All 588 (596) : ILR (1937) All 880 (FB). (AIR 1932 All 489 (FB) and AIR 1936 All 336 Overruled.) ** AIR 1939 Mad 949 (956) (DB) ** AIR 1940 All 237 (239) : ILR (1940) All 141 (DB).

10. 1931 Ker LT 1024.

11. AIR 1936 Mad 171 (172, 174) : 59 Mad 359 (FB).

[See also AIR 1942 Mad 751 (752) (Following AIR 1936 Mad 171 (FB))]

Bench is correct, claim subrogation even as regards Rs 400 which he had paid over and above the amount undertaken to be paid by him, unless he had a registered agreement in his favour. I conclu sion which is obviously not correct.(12)

It has also been held by a Full Bench of the Chief Court of Oudh(13) that *C*, in the above illustration, when he pays off *B* must be regarded as redeeming *B* with his own money and can not, therefore, claim subrogation under the first paragraph of the section. The reason given is that the case of a mortgage differs from that of a sale, in that the unpaid consideration [illegible] in the hands of the mortgagee cannot be considered, as in the case of a sale, as be[illegible] to the mortgagor. A similar view has also been taken in the undermentioned cases (14). It is submitted that this view is not correct. It may, no doubt, be correct to say that as long as a portion of the consideration money in the hands of the mortgagee remains unpaid, it is the mortgagee's money, but still when it is paid to the prior mortgagee *B*, it is paid as mortgage consideration and therefore as the mortgagor's money. As has been rightly pointed out by Bennet J., in his dissenting judgment in the Oudh Full Bench case, there is a very definite pronouncement as early as 1883 by their Lordships of the Privy Council in Moheshlal v. Mohant Bawan Das(15) on the question of title to the money left with the mortgagee for the purpose of paying off the prior mortgage; their Lordships in that case observed,

> 'Although the money was paid by the plaintiff (C) [illegible] to Lachmandas [illegible] it was paid with the money borrowed from the plaintiff (C) by Manmal [illegible] Manmal was liable to him (*B*). The mortgage was therefore paid off by Manmal (A) and not by the plaintiff (C).'

In a recent case,(16) decided by the High Court of Bombay, *A* who was a mortgagee in possession of some lands of *B* sued *B* on a money claim and attached before judgment the above lands amongst others. Subsequently *B* mortgaged the above lands to *C* and [illegible] consideration with *C* to redeem *A*'s mortgage. On such redemption, *C* was bound to take possession of the mortgage lands. *C* deposited the amount in Court and presented an application under S. 83 [illegible] accepted the amount in full satisfaction of the mortgage debt and delivered possession to *C*. Subsequently *A* obtained a decree in his money suit and wanted to sell the mortgaged land in execution. *C* claimed that the property should be sold subject to the prior charge acquired by subrogation under the first paragraph. On behalf of *A*, it was contended that as the money was left with *C* for redeeming *A*, the deposit was made only as an agent of the mortgagor. The first paragraph therefore could not apply, nor could *C* claim subrogation under the third paragraph as there was no registered agreement. It was held that as *A accepted the deposit from* C and made by a person entitled under S. 91 to sue for redemption, he could not now be permitted to say that the deposit was not made on his own behalf but as an agent of the mortgagor. *C* was therefore entitled to subrogation under the first paragraph.

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12. **AIR 1937 All 588 (594, 595) : 11 R (1937) All 880 (FB).** (Where mortgagee or vendee pays sum in addition to what he is under his contract bound to pay, he is paying his own money.) ** AIR 1955 Nag 280 (282, 287) : 11 R (1956) Nag 197 (DB) (AIR 1937 All 588, **Foll.**)

13. **AIR 1942 Oudh 260 (261) : 17 Luck 755 (FB).** (Per Full Bench, Bennet, J., contra.)

14. (1937) 171 Ind Cas 423 (425) (Oudh) (**Overruled** in AIR 1941 Oudh 226 on different ground.) ** AIR 1935 Oudh 399 (401) : 11 Luck 224 (DB) (It is doubted whether [illegible] left with the mortgagee to pay off a prior mortgage should be held to be money belonging to the mortgagor.) ** AIR 1933 Nag 155 (157) : 30 Nag LR 164 (When an amount is specifically set apart for redemption of the first mortgage, it cannot be treated as absolutely belonging to the mortgagor for even if he himself had taken money he would have been bound to apply it to the discharge of the first mortgage.) ** AIR 1931 Nag 138 (141) (Money [illegible] to pay off prior mortgagee. — Money utilized for redeeming prior mortgagee. — Subsequent mortgagee held acquired rights of subrogation under S. 74.)

15. **(1883) 9 Cal 961 (977) : 10 Ind App 62 (PC).**

16. AIR 1942 Bom 227 (231) (DB).

When right of mortgagor to redeem is lost by foreclosure decree it cannot be revived by redemption of first mortgage by puisne mortgagee A mortgagor executed usufructuary mortgage and later executed second mortgage, which was simple mortgage. First mortgagee being dispossessed obtained a decree for foreclosure but puisne mortgagee was not made a party The second mortgagee brought suit for redemption and obtained a decree Thus second mortgagee was not made a party in a suit for foreclosure he could redeem the first mortgage and acquire all the rights of first mortgagee and mortgagor will not be entitled for redemption of first mortgage (17)

Where a person having some interest in the property pays the money in order to save the property from loss or destruction he has first charge on property for payment Here puisne mortgagee obtained partial discharge of a prior mortgage without redeeming the mortgage, to save the property from being sold Though right of subrogation may not be available to puisne mortgagee, but he is entitled to charge on property for the amount spent to save the property from being sold.(18)

23. Fourth paragraph — Mortgage must be redeemed in full.

The last paragraph of the section provides that the right of subrogation shall not be claimed unless the mortgage in respect of which the right is claimed has been *redeemed in full*.(1)

A merely partial redemption of the mortgage cannot give rise to any right of subrogation (2)

The object of this provision is to avoid complications and difficulties in apportioning the claims arising from subrogation (3) Before the introduction of this paragraph in 1929 there was no provision similar to this paragraph and the judicial decisions were not unanimous on the point The general trend was that in order to entitle a person to a right of subrogation there must be complete discharge of the mortgage-debt and that a partial discharge of the prior mortgage was not sufficient.(4) A contrary view was however taken in the undermentioned cases (5) In view of the express provisions in the present paragraph, the latter view is no longer good law

This paragraph assumes that the mortgage has not been split up. Where it is split up, the mortgage has to be looked upon as several distinct mortgages Consequently, if there is a redemption of one independent portion in full, then the provisions of this paragraph are complied with so

17. 1978 MPLJ 257 : 1978 Jab LJ 394.

18. AIR 1982 Ker 53

Section 92 — Note 23

1. AIR 1944 PC 96 (100). (Partial subrogation is now disallowed by para 4 of S. 92) ** **AIR 1940 PC 38 (44) : 67 Ind App 82** ** AIR 1959 Punj 490 (493, 494) ** 1955 Andh WR 316 (317) ** AIR 1943 Oudh 407 (409) 19 Luck 260 (DB) ** AIR 1940 All 75 (77) (DB) ** AIR 1938 Mad 779 (781) (DB) (Partial subrogation is permissible when charge on a distinct item of the property mortgaged is completely discharged) ** AIR 1935 Oudh 245 (250) (DB) ** AIR 1938 Oudh 22 (24) (DB).

2. **AIR 1971 Ker 3 (5) : 1970 Ker LT 313 (FB).**

3. See the Report of the Special Committee.

   ** **AIR 1940 PC 38 (44) : 67 Ind App 82** ** (1909) 36 Cal 193 (220) (DB).

4. **AIR 1944 PC 96 (100) : 24 Pat 89** ** (1909) 36 Cal 193 (220) (DB) ** **AIR 1940 PC 38 (44) : 67 Ind App 82** ** AIR 1924 Rang 204 (205) 1 Rang 714 (DB) ** AIR 1922 Mad 441 (442 443) (DB) ** AIR 1932 Oudh 268 (271) 8 Luck 103 (DB) ** AIR 1930 Nag 166 (171) *(Obiter)* ** AIR 1918 Pat 668 (671) (DB) ** AIR 1926 Pat 23 (24) (DB) (Only partial redemption by subsequent mortgagee — No subrogation allowed) ** (1912) 35 Mad 183 (185) (DB) (Mortgage partly satisfied — No subrogation) ** AIR 1916 Mad 959 (960) (DB) (Do) ** **AIR 1928 Mad 713 (718, 727, 728) (FB)** ** AIR 1923 Nag 301 (304) ** (1913) 36 Mad 183 (DB).

5. AIR 1916 All 81 (82) 38 All 502 (DB). **(Held no longer good law in AIR 1940 All 75.)** ** AIR 1922 Mad 249 (251, 252, 253) (DB) (The general rule laid down by the Privy Council

far as that part is concerned **(6)** In the undermentioned case**(7)** *A* who owned a one-tenth share, and *B*, who owned the remaining share in a property, jointly mortgaged it first to *C*, and then to *D*. *C* sued on his mortgage and obtained a decree under which *A* and *D* were entitled to redeem the one-tenth share on payment of Rs. 18,000 and *B* and *D*, to redeem the nine-tenth on payment of Rs. 4,000. *D* as a subsequent mortgagee, redeemed *B*'s share by paying the amount and claimed to be subrogated in respect of the nine-tenth share of *B*. It was argued that as *D* had redeemed only a part of the mortgage, he could not claim subrogation. It was held that the mortgage was split up by the decree of the Court and that *D* having paid off the entire debt on B's share, could claim subrogation on the principle stated above. As to when a mortgage security is split up, see Note 41 on Section 60.

The redemption of a mortgage in full does not mean that the *entire* amount due on the basis of the mortgage must have been paid. If the mortgagee agrees to let the mortgage be redeemed on payment of a lesser amount, such payment also will give rise to the right of subrogation **(8)**. Similarly, it is not necessary that the redemption must always be by payment in cash only. Where a mortgage was redeemed partly by paying cash and the balance by execution of a fresh mortgage**(9)** or by giving a *hundee*(**10**) in favour of the mortgagee, it was held that the mortgage had been redeemed in full.

It is unnecessary that the redemption should be by only one person. A, B, C can join together in redeeming the mortgage and when they do so each will be entitled to subrogation to the extent of the amount each has contributed towards redemption **(11)**. In such a case it is not necessary that all must pay simultaneously nor can it be said that it is only the person who paid last that has redeemed the mortgage and that he alone is entitled to subrogation **(12)**. Where a person advances money to the mortgagor to redeem a mortgage and the money advanced forms only a part of the amount that went towards redemption, the person advancing the money will be entitled to claim subrogation to the extent of the amount he advanced.**(13)**

It has been held that though a right of *subrogatum* under this section may not arise unless the

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decision in 10 Cal 1035 : 11 Ind App 126 has been subjected to various exceptions and should be construed liberally.)

6. AIR 1964 Pun 281 (283) ** AIR 1939 Nag 215 (216) (DB) ** AIR 1926 Nag 21 (24) : 23 Nag LR 86. (Release by mortgagee of a part of security on accepting part of the mortgage debt splits up the mortgage security and hence partial redemption can be allowed.)

[**See also** AIR 1940 Lah 247 (249) (DB). (Mortgage by *J* to *S* — Property sold by *J* to *M* and mortgaging it to *B* and then selling to *R* — In suit by *S* on his mortgage *R* making certain payment in discharge of *S*'s mortgage — Suit by *B* on his mortgage — *R* held subrogated to rights of *S* and property could be sold in execution of *B*'s decree subject to *R's* charge.)]

7. AIR 1939 Nag 215 (216) (DB).

8. AIR 1936 All 62 (63) ** **AIR 1934 Mad 31 (37, 38) (FB)**. (Prior mortgagee accepting less amount in complete discharge of the mortgage debt — Persons paying the amounts entitled to claim subrogation only to proportionate part of the amount that went to discharge prior mortgages.)

9. **(1938) 42 Cal WN 1106 (1110)**

10. AIR 1920 Pat 678 (684) (DB)

11. AIR 1953 Trav Co 69 (69) : ILR (1952) Trav-Co 911. (Plaintiff is entitled to the benefit of S. 92 in respect of the amount paid by him in partial discharge of the prior mortgage provided the whole mortgage has been extinguished.) ** **AIR 1937 All 588 (598) : ILR (1937) All 880 (FB)** ** **AIR 1922 Mad 249 (251, 252) (DB).**

12. **AIR 1941 Mad 563 (563, 564) : ILR (1941) Mad 924**

13. AIR 1953 Trav Co 69 (69) : ILR (1952) Trav Co 911 ** AIR 1933 Mad 715 (718) (DB) ** (1938) 42 Cal WN 1106 ** AIR 1929 All 621 (623) : 51 All 920 (DB) ** AIR 1959 Pat 375 (380) : 18 Pat 342.

surety has redeemed the mortgage in full, this principle will not apply where the circumstances of the case do not give rise to a right of *subrogation* but to a right under S. 140, Contract Act. It has been held that under the latter section the surety who has paid off a *part* of the mortgage-debt may nevertheless claim the benefit of the security in respect of the amount paid by him.(14)

24. Rights of subrogee.

Under this section a person entitled to subrogation enjoys, so far as regards redemption, foreclosure or sale of the mortgaged property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.(1) A subrogee, however, will not acquire any rights which the prior mortgagee might have acquired otherwise than as such mortgagee.(2) Thus, suppose *A* mortgages properties *x* and *y* to *B* then property *y* alone to *C*. *B* and *C* obtain decrees for sale on their respective mortgages without making each other a party to his suit, and purchase the property themselves. *C* then redeems *B*. *C* thus becomes entitled to the rights of *B* by subrogation, and the effect is that *C* as a purchaser of property having paid off B, becomes an absolute owner of property y. As regards property however, *C* has a mortgagee right only. *B*'s rights as an auction-purchaser of property are not affected by *C*'s redemption and hence *B* can redeem property x from *C*.(3) Similarly, the subrogee is not entitled to claim the advantages and benefits which he may personally derive by the act of redemption. Thus, where a co-mortgagor redeems the mortgaged property by paying an amount which is much less than the amount actualy due on the mortgage, the other co-mortgagors are entitled to claim their share by paying proportionately the amount actually paid by the redeeming co-mortgagor. The subrogee is not entitled to

14. AIR 1944 Mad 195 (200) : ILR (1944) Mad 340 (DB). (Surety for simple debt. *X* — Debtor subsequently executing mortgage for *X* and other debts, as additional security — Surety paying off *X* — Surety not entitled to subrogation as he was not surety for mortgage-debt but for personal liability — But surety is entitled to security under Contract Act, S 140, though he has not paid whole of mortgage-debt.)

[See however AIR 1927 All 538 (540) : 49 All 640 (DB). (Case under Contract Act, S 140 — Surety discharging only a part of principal debtor's debt — He does not step into the shoes of the creditor so paid.)]

Section 92 — Note 24

1. AIR 1948 All 331 (332, 333) : ILR (1948) All 421 (FB). (Puisne mortgagee redeeming prior mortgage — Suit by puisne mortgagee against mortgagor agriculturist for recovery of redemption money paid by him by enforcing his rights acquired by subrogation — Suit is one on basis of loan within S 2(9), U P Debt Redemption Act — Mortgagor can claim benefit under S 9 U P Debt Redemption Act.) ** AIR 1945 Cal 194 (200) : ILR (1947) 1 Cal 313 (DB). (It is sometimes spoken of as equitable assignment which means not that there is an assignment in fact but that on principles of natural justice the subrogagee is given the same position as if he was an assignee of the charge.) ** AIR 1942 Nag 111 (112) : ILR (1942) Nag 393. (Subrogation does not create fresh rights but merely puts the claimant in the shoes of the creditors.)

[See (1899) 22 Mad 332 (335) (DB). (The language of S 74 makes it clear that the second mortgagee is, by tender of the mortgage money, to acquire no other rights than those possessed by the first mortgagee.)]

[See also AIR 1943 Mad 573 (577) : ILR (1944) Mad 44. (Distinction between salvage lien and subrogation pointed out — By salvage lien the person making the payment gets a charge which is enforceable against all persons whose interests in the property are saved by the payment — Under subrogation a person only gets the rights of the person whose dues are paid off.)]

2. (1902) 24 All 185 (188) (DB).
3. (1902) 24 All 185 (188) (DB).

claim their proportionate shares of the mortgage debt due on the date of redemption by him **(4)** The reason is that the right of subrogation is based on the doctrine of reimbursement **(5)**

This section only confers on the subrogee the *rights* of the mortgagee whom he redeems. The subrogee is not necessarily entitled to the *remedies* of the mortgagee whom he redeems **(6)**

(A) Rights against mortgaged properties.

A subrogee can enforce his right of foreclosure or sale against the property against which the mortgagee, whom he has redeemed, could have proceeded. Thus, if *A* mortgages properties *x* and *y* to *B* and then mortgages *y* alone to *C*, *C* on redeeming *B*, can foreclose or sell both the properties *x* and *y* in enforcement of his right of subrogation **(7)** Similarly, where *A* and *B* owning property *x* jointly, mortgagee it to *C* and subsequently *A* alone mortgages his share to *D*, *D* on redeeming *C*, can exercise his right of subrogation by foreclosure or sale of the entire property **(8)**

A subrogee can, however, proceed against those properties only against which the prior mortgagee could proceed *on the date of* redemption by the subrogee and not necessarily against all the property which may originally have been comprised in the mortgage. Thus, suppose *A* mortgages his properties *x*, *y* and *z* to *B*. *B* releases property *x* from his mortgage. Subsequently, *A* mortgages property *z* to *C* who redeems *B*. *C*, as a subrogee, can proceed only against properties *y* and *z*, as these alone were subject to mortgage on the date of redemption by *C* and not *x*, *y* and *z* originally comprised in B's mortgage.**(9)**

A subrogee, who is also entitled to *contribution*, instead of enforcing his right of subrogation in respect of the entire mortgage as an indivisible whole, may split up the mortgage and distribute the mortgage liability over different portions of the mortgaged property in the respective possession of different subsequent transferees **(10)**

(B) Right to possession.

Where the mortgagee who is redeemed is entitled to retain in possession under his mortgage, the subrogee is also entitled to retain possession of the property until he is paid off. **(11)** But

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4. AIR 1953 SC 1 (4) : 1953 SCR 243. (AIR 1949 FP 254 Affirmed.) ** AIR 1967 Ker 45 (46) ** ILR (1966) 2 Ker 388 (396) (DB) (AIR 1953 SC 1 Ref.) ** AIR 1959 Mad 555 (557) : ILR (1959) Mad 883 ** AIR 1959 Pun 170 (172) (DB) ** AIR 1949 East Pun 254 (256) (DB)

5. ILR (1966) 2 Ker 388 (396) ** AIR 1949 East Pun 254 (256) (DB) (Following AIR 1937 All 588 (FB), AIR 1942 Oudh 449 (FB).)

6. AIR 1939 Pat 375 (378) : 18 Pat 482 (DB). (Pursne mortgagee paying off decree on prior mortgage — Pursne mortgagee cannot execute decree paid off — He can only see to enforce his rights — Cause of action for such suit arises on payment. Note — On latter point there is a conflict of decisions. See AIR Commentaries on the Limitation Act, 1963, 7th (1997) Edn. Art. 62, Note 14.)

** AIR 1943 Pat 305 (309) : 22 Pat 187 (DB). (Pursne mortgagee paying off decree on prior mortgage — Remedy of prior mortgagee decree holder to execute the prior mortgage — Remedy of prior mortgagee decree holder to execute the decree not available to a pursne mortgagee subrogee — Subrogee's remedy is to bring a suit to enforce those rights.)

7. AIR 1941 Pat 276 (277) (DB).

8. AIR 1927 Pat 379 (381) (DB). (Appeal from AIR 1927 Pat 377 — Mortgagee of an undivided share held in common who redeems the whole property is entitled to enforce the prior mortgage against the whole property.)

9. (1896) 18 All 189 (193, 194) (DB)

10. AIR 1943 Pat 305 (307) : 22 Pat 187 (DB). (Such apportionment is not inconsistent with right of subrogation — Form of decree to be passed in a case indicated.)

11. AIR 1945 Bom 69 (72) ** AIR 1943 Bom 191 (192) (DB). (Redemption by co-mortgagee.) ** AIR 1931 Oudh 144 (145) (DB) ** (1913) 16 Oudh Cas 119 (121) (DB)

where the prior mortgage is a simple one and a subsequent usufructuary mortgagee redeems him, the latter cannot, when he is himself redeemed, resist delivery of possession on the ground of subrogation **(12)** Similarly, a person who claims to be subrogated to the rights of a mere charge-holder cannot claim possession of the property charged, if the charge-holder has merely a right to put the property charged to sale and has no right to possession.**(13)** In the undermentioned case**(14)** a usufructuary mortgagee paid off a prior simple mortgage after the latter had obtained a decree for sale, and sought to bring the property mortgaged to sale for the purpose of recovering the amount of the simple mortgage, retaining his own lien as a usufructuary mortgagee It was held by the Allahabad High Court that he was entitled to retain possession, under S 72, of the mortgaged property as a usufructuary mortgagee until the amount due on both mortgages was discharged No doubt, under the circumstances of the case, the subsequent mortgagee had under S 72 a right to add the money spent by him to preserve the mortgaged property from sale to the principal money of his own mortgage and to retain possession thereof till the recovery of such amount But, as has been seen under Notes on S 72, the right under that section is only an *additional* one and not the *sole* remedy It is, therefore, open to the usufructuary mortgagee as a *subrogee* under S 92 to sell the mortgaged property for the recovery of the amount spent to redeem the prior mortgage.

(C) Right to prior mortgagee's leasehold rights.

Where a mortgagee is redeemed all subsiduary rights created on the mortgaged property, such as lease hold rights *ipso facto* come to an end A subrogee, therefore, cannot get the prior mortgagee's rights as a landlord as against the tenants **(15)** See however, the undermentioned case**(16)** for a contrary view.

(D) Extent of subrogation.

As the doctrine of subrogation rests on the doctrine of reimbursement, the subrogee can claim subrogation only to the extent to which his money has been utilised in relieving the burden of the prior mortgage **(17)** If the *whole* of the prior mortgage has been discharged with his money, he will be subrogated to the entire mortgage rights of the prior mortgagee **(18)** But if the amount advanced or paid by him has gone only in part satisfaction of the prior mortgage, the balance being paid the mortgagor himself, he will be subrogated only to the extent of the amount paid by him which has gone in satisfaction of the prior mortgage, and not to the entire rights of the mortgagee.**(19)**

Where under the terms of the mortgage, a mortgagee is entitled to recover at the time of

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12. AIR 1935 Mad 390 (393)

    [See AIR 1937 All 119 (121) * ILR (1937) All 225 (DB) ** (1933) 145 Ind Cas 277 (278) (DB) (All).]

13. **AIR 1944 PC 96 (100) : 24 Pat 89.**

14. (1905) 27 All 403 (405) (DB).

15. AIR 1921 Mad 393 (393) (DB)

16. AIR 1925 Nag 90 (95) (Subsequent mortgagee redeeming prior mortgage is bound by the tenancy created by the prior mortgagee in favour of the mortgagor.)

17. ILR (1966) 2 Ker 388 (396) (DB) ** AIR 1943 Lah 113 (116) (DB) (And not to the extent of the debt due under the puisne mortgage where subrogation is claimed by the puisne mortgagee)

    [See (1907) 6 Cal LJ 46 (54, 55) (DB).]

18. AIR 1926 Nag 214 (214, 215) 21 Nag LR 165 **11 Ind Cas 469 (471) (DB) (All) ** AIR 1934 All 1035 (1037) (DB) ** AIR 1939 Pat 375 (378) 18 Pat 342 (DB)

19. AIR 1926 All 744 (745) (DB) ** (1888) 11 Mad 345 (354) (DB) ** AIR 1931 Bom 545 (547) (DB) ** AIR 1916 Mad 637 (637, 638) . 38 Mad 548 (DB) ** (1893) 16 Mad 94 (96) (DB). (Partial discharge of prior mortgage-debt by subsequent mortgagee — He is entitled to priority only to that extent.)

redemption, any amount spent by him on improvement of the mortgaged property, a subrogee to his rights making improvements is entitled to claim under the terms of the mortgage, the amount spent by him over improvements.(20)

Where out of the consideration of a sale a portion was left with the buyer to pay off a prior mortgage decree and owing to the delay on the part of the buyer the property was sold but the sale was set aside on payment of the decretal amount together with the auction-purchaser's *solatium* under O. 21, R. 89 of the Civil Procedure Code, it was held that the buyer could not, as a subrogee, claim subrogation in respect of the auction-purchaser's *solatium* inasmuch as the money did not go to the mortgagee.(21)

(E) Right to claim interest.

A subrogee on redemption of a prior mortgagee stands in the shoes of the prior mortgagee and can claim interest on the amount paid by him to discharge the mortgage, in the circumstances in which the prior mortgagee could have claimed it.(22)

Where the purchaser of the equity of redemption redeems a prior simple mortgage and is in possession, there is a difference of opinion as to whether interest should be allowed to the subrogee on the amount spent by him towards redemption. One view is that, as he enjoys the usufruct, he cannot be allowed interest for the period of possession (23) The second view is that an account of the profits enjoyed by the purchaser must be taken and if the profits fall short of the interest, only then should the balance of interest be allowed (24) The third view is that the purchaser is entitled to interest even though he is in possession. The reason given is that the purchaser has two distinct rights, namely, a right as owner of the equity of redemption and a right as second mortgagee. By virtue of his first right, he is entitled to usufruct of the land. In his right as mortgagee he is entitled to interest, and neither of these rights must be made subservient to the other (25) It is submitted that the last view is to be preferred. The first two views proceed on the assumption that the purchaser enjoys the possession and the usufruct in his capacity of a mortgagee. This is incorrect as the mortgage that is redeemed being a simple one, did not give the subrogee any right to possession and hence any right to the usufruct.

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20. AIR 1926 Lah 430 (431) : 7 Lah 212 (DB)

21. AIR 1932 PC 99 (101).

22. AIR 1943 Lah 113 (116) (DB) (Interest is allowed from the date of payment and subrogagee is entitled to priority in respect of interest also.) ** AIR 1922 Nag 155 (156) : 17 Nag LR 200 (If prior mortgagee is not debarred by the rule of *damdupat* from getting interest in excess of *damdupat*, the puisne mortgagee paying off prior mortgagee's decree should not be debarred from getting it.) ** AIR 1939 Pat 375 (380) : 18 Pat 342 (DB) (Interest allowed by a decree on prior mortgage redeemed by the subrogee — Subrogee entitled to interest at the rate of interest given by the decree.) ** AIR 1938 Mad 660 (662) (DB) (No interest allowed as the mortgagee who was redeemed was not entitled to it being a usufructuary mortgagee and hence could be redeemed by paying the principal only.)

23. (1903) 26 All 185 (187, 188) (DB) ** 11 Ind Cas 649 (652) (DB) (Cal.) * AIR 1922 All 185 (187) : 44 All 9 (DB) ** AIR 1934 All 1035 (1038) (DB).

[See also AIR 1932 PC 99 (101). (The High Court disallowed interest on the ground of purchaser being in possession. The Privy Council affirmed this decision but whether the question of interest was raised before the Board or not does not appear from the very judgment.)]

24. AIR 1935 Mad 360 (362) (DB) (AIR 1920 Mad 389, Disting.) ** AIR 1918 Mad 103 (105, 109) : 41 Mad 513 (DB).

25. AIR 1920 Mad 389 (390, 391) (DB) (Affirmed in AIR 1924 PC 36, but the question of interest was not raised before the Privy Council.) ** AIR 1930 Mad 471 (472) ** AIR 1934 Mad 268 (269) (DB).

25. Right of subrogation is available to successors-in-interest.

The right of subrogation conferred by this section is not confined to the first person only who redeems the prior mortgage. Every other person, who succeeds to the entire right possessed by the subrogee by redemption, transfer or otherwise will also be clothed with the right of subrogation (1). In the undermentioned case (2) a certain land was mortgaged to *A*, then to *B* and then to *C*. *C*'s mortgage was effected to satisfy A's mortgage decree. *C* thus became subrogated to A's rights. In order to pay off *C*'s mortgage decree, the land was sold to *D*, who borrowed the purchase money from *P* to whom he mortgaged it on the day of the sale. It was held that *P*'s mortgage was entitled to priority over *B*'s mortgage to the extent to which the loan secured thereby had gone to discharge *A's* mortgage.

26. Purchaser entitled to subrogation — Pre-emptor whether can claim that right.

Where a purchaser has, by redeeming a prior mortgage, obtained a right of subrogation, it has been held that the person who obtains the property from him by preemption is also entitled to the right of subrogation.(1)

27. Enforcement of rights acquired by subrogation.

The right of subrogation cannot only be set up by way of defence(1) can be enforced by a suit (2) Where a mortgage has been redeemd before a decree has been obtained on it the subrogee can enforce his right by way of a suit based on the redeemed mortgage.(3)

Section 92 — Note 25

1. AIR 1943 Lah 113 (116) (DB) (Mortgages in favour of *A*, then in favour of *B*, then in favour of *C* and then in favour of *D* — *C* redeeming *A* is subrogated to *A*'s rights — *D* by redeeming *C* can claim *A's* rights — Subrogation in such cases arises not by act of parties but by operation of law — **Reversing** AIR 1940 Lah 269 on a different point.) ** AIR 1926 Nag 214 (214, 215) : 21 Nag LR 165 (Transferee from subsequent mortgagee subrogee.) ** AIR 1934 Mad 256 (257) (DB). (Mortgage to *B* to pay off prior mortgagee of *A* and then mortgage to *C* to pay off *B* — *C* paying off *B* as per agreement with mortgagor — *C* thereby acquires *A*'s mortgagee rights by subrogation.) ** AIR 1922 Mad 249 (253) (DB). (Assignee from subrogee.)

   [See also AIR 1920 Mad 585 (586) (DB).]

2. (1893) 16 Mad 94 (96) (DB).

Section 92 — Note 26

1. 1899 Pun Re No 67, p. 303 (304).

Section 92 — Note 27

1. AIR 1932 PC 99 (101) ** (1904) 27 All 308 (310) (DB) (Subrogee is entitled to hold up the amount of the mortgage which he has redeemed as a shield against any claim brought against him for ousting him from possession of the mortgaged property.) ** AIR 1939 All 190 (191, 192) : 11 R (1939) All 185 (DB) * AIR 1922 Mad 249 (256) (DB) ** (1906) 29 Mad 37 (42) (DB) ** **AIR 1940 PC 38 (44) : 67 Ind App 82** ** AIR 1934 All 1035 (1037) (DB). (Vendee borrowing money and paying off prior mortgage — He acquires a right to bring a suit on the basis of that mortgage — If he fails to sue within period of limitation he is only entitled to claim the equitable relief of using the previous payment as a shield against the subsequent mortgagee suing him.) ** (1907) 6 Cal LJ 46 (54) (DB).

   [See also (1903) 26 All 185 (187) (DB).]

2. AIR 1940 Pat 385 (393) : 19 Pat 752 (FB) ** AIR 1919 Mad 818 (819) (DB) ** (1912) 34 All 102 (104) (DB).

3. AIR 1943 Pat 305 (309) : 22 Pat 187 (DB) (Suit will be based on the cause of action on the original mortgage. Consequently limitation for such a suit will run from the date when the cause of action on the original mortgage arose.) ** AIR 1936 Mad 814 (815, 816) : 59 Mad 1042 (DB) ** AIR 1934 All 1035 (1037) (DB).

Where payment is made, after a preliminary decree has been passed on the mortgage, by a person competent to redeem under S. 91 who is a party to the suit the subrogee is entitled to be substituted for the plaintiff-mortgagee and can apply for a final decree to be passed in his name **(4)** Where, however, a final decree has been passed, it has been held that a payment of such a decree satisfies it and no one can proceed with its execution. The only remedy for the subrogee in such a case is by way of a suit **(5)** Such a suit is not barred by S. 11 or S. 47 or O. 2, R. 2 of the Code of Civil Procedure **(6)** As to the starting point of limitation for such a suit, see the AIR Commentaries on the Limitation Act, 1963, 7th (1997) Edition, Article 62, Note 14.

Where a subsequent mortgagee pays off a prior mortgage and steps into the shoes of the prior mortgagee by subrogation, his position is the same as that of a person who holds two mortgages in his favour on the same property by the same mortgagor. As seen in Notes on S. 67-A, if such a mortgagee has a right to obtain the same kind of decree in respect of both the mortgages, he will be *bound* to sue on both the mortgages together **(7)** The same consideration would apply where the subsequent mortgage is to pay off the prior mortgage and only part of the consideration is utilized to redeem the prior mortgage. In such a case also, the person advancing the money stands in the position of the prior mortgagee in respect of the amount utilized to discharge it, in addition to the position of a subsequent mortgagee in respect of the balance.

It has been held that a person advancing money on a mortgage to pay off a prior mortgage, can claim priority for his advance in a suit based on his own mortgage **(8)**

28. Limitation.

See the following references in the AIR Commentaries on the Limitation Act 1963, 5th (1976) Edition :

(1) Note 14 on Art. 62 (suit to enforce right of subrogation).

(2) Note 10 on Article 62 (suit by redeeming co-mortgagor against other co-mortgagors).

(3) Note 2 on Art. 61 (suit for redemption against subrogee).

(4) Note 3 on Art. 61 (suit for contribution by non-redeeming co-mortgagor against redeeming co-mortgagor for recovery of his share).

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4. AIR 1928 Nag 145 (146) : 24 Nag LR 119 (Both under O. 1, R. 10 and O. 22, R. 10, Civil P.C., the substitution of a subsequent mortgagee sued as one of the defendants to a foreclosure suit as a plaintiff is permissible.) ** AIR 1931 Nag 163 (164) : 29 Nag LR 183 ** AIR 1925 Nag 15 (17) ** (1902) 24 All 179 (183, 184) (DB) (Payment by puisne mortgagee, defendant in prior mortgagee's suit — He is entitled to be substituted as plaintiff — Separate suit for foreclosure by him is not maintainable.)

   [**See also** AIR 1939 All 190 (192, 193) : ILR (1939) All 185 (DB) (He cannot maintain a separate suit.)]

5. AIR 1945 Cal 194 (199) : ILR (1947) 1 Cal 313 (DB) ** AIR 1943 Pat 305 (307) : 33 Pat 187 (DB). (Such a suit will not be on the mortgage but on the decree.)

   See also cases cited in foot-note (5)

6. (1913) 24 Mad LJ 28 (29) (DB) ** AIR 1925 Mad 80 (83, 84) ** (1913) 18 Ind Cas 610 (611) (DB) (Mad). (Section 11 and O. 2, R. 2 are not a bar.) ** AIR 1925 Mad 129 (129, 130). (Section 47 is no bar.) ** AIR 1922 All 153 (154) : 44 All 67 (DB) ** (1905) 27 All 325 (332, 333) : 32 Ind App 123 (133) (PC) ** AIR 1954 Tr & Kch 248 (249) : 1954 Ker LT 746

   [**But see** (1899) 9 Mad LJ 177 (178, 179) (DB) (Remedy was by proceeding in execution and not by a separate suit.)]

7. AIR 1917 Lah 396 (397) : 1917 Pun Re No. 1 (DB) (Puisne mortgagee paying off prior mortgage to protect his interest is entitled to recover amount from mortgagor in a suit brought on his own mortgage.)

8. (1912) 34 All 102 (104) (DB) ** (1906) 28 All 778, 781) (DB) ** (1893) 16 Mad 194 (196) (DB) ** AIR 1942 Pat 166 (168, 169) (DB) ** (1897) 20 Mad 486 (487) (DB)

(5) Note 2 on Art. 61 (suit for recovery of property from a volunteer who pays off a mortgage and gets into possession).

See also the undermentioned decisions.(1)

29. Defence of subrogation is not barred even if suit to enforce it is time barred.

Limitation only bars the remedy but does not generally destroy the right. Hence, although a suit to enforce a right may be barred by limitation such right may be set up in defence. Thus, a person who is subrogated to the rights of a mortgagee may set up the mortgage as a shield although a suit for enforcing such mortgage may be barred by limitation.(1) A contrary view has been taken by a single Judge of the Madras High Court in the undermentioned case(2). It is submitted that this view is not correct.

30. Res judicata.

Under the Explanation to O. 34, R. 1, Civil Procedure Code, 1908, a prior mortgagee is not a necessary party to suit for foreclosure or sale by a puisne mortgagee but a subsequent mortgagee is a necessary party to such a suit as being interested in the equity of redemption. Where a first mortgage is executed in favour of *A*, the second in favour of *B*, and the third in favour of *C* and *C* redeems the mortgage in favour of *A*, *C* has dual capacity: (i) as a prior mortgagee, and (ii) as a

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Section 92 — Note 28

1. AIR 1967 Punj 270 (271) (DB) (Suit by non-redeeming co-mortgagor to contribute and take his share from redeeming on mortgagor in possession — Period is either sixty years from date of original mortgage under Art. 148 or twelve years from date of redemption by redeeming co-mortgagor under Art. 132, Limitation Act (1908) — AIR 1964 Mad 269 (FB), Foll. AIR 1965 Punj 351 **Reversed**.) ** ILR (1966) 2 Ker 388 (395) (DB) (Suit by co-mortgagor for redemption of his share of mortgagee and for possession from co-mortgagor who was in possession on redemption of possessory mortgage — Article applicable is 148 and not 132, Lim. Act (1908) — Period of limitation would begin to run from time when original mortgage became redeemable and not from time when redeeming co-mortgagor redeemed it. **AIR 1964 Mad 269 (FB) Not foll.**) ** **AIR 1956 Pat 414 (421) : 35 Pat 449 (FB).** (Puisne mortgagee who pays off a prior mortgage decree is not subrogated to the position of a decree-holder. He does not get a fresh starting point of limitation for enforcing his charge from the date of payment fixed in the mortgage decree. AIR 1945 Cal 194, **Diss.**) ** 1955 Mad WN 106 (107) (AIR 1945 Mad 500, Foll.) ** ILR (1955) Punj 1062 (1071) (Co-mortgagor redeeming mortgage — Suit by other co-mortgagor to redeem his share — Limitation is sixty years from date of original mortgage under Art. 148 of Limitation Act of 1908.) ** **AIR 1945 All 239 (243) : ILR (1945) All 733 (FB).** (Subrogation — Limitation to enforce priority runs from date of payment whether decree on prior mortgage was obtained or not — AIR 1936 All 33 (FB) **Overruled**.)

   ** AIR 1945 Cal 194 (201) — ILR (1947) 1 Cal 313 (DB) (Prior mortgagee obtaining decree on his mortgage — Puisne mortgagee satisfying decree — Suit by puisne mortgagee to enforce his rights as subrogee — Art. 132, Limitation Act (1908) applies and starting point is the date of payment fixed by the preliminary decree.) ** AIR 1945 Mad 500 (501, 502) (*A* paying off decree on prior mortgage — Suit by *A* as subrogee to recover sum paid by him — Limitation runs from date of original mortgage and not from date of payment — *A* has also right for reimbursement of money paid — Such claim whether regarded as one under S. 69 or S. 70, Contract Act will be governed by Art. 61 and not Art. 120, Limitation Act of 1908.)

Section 92 — Note 29

1. See Illustration 4 in Note 15 on S. 3 of the AIR Commentaries on the Limitation Act (1963) 7th (1997) Edition. ** **AIR 1936 All 578 (581) : 58 All 1056 FB)** ** AIR 1919 Oudh 370 (373) : 22 Oudh Cas 32 (38) (There is in general no limitation against defence. AIR 1919 **Oudh 379, Foll.**) ** **AIR 1926 Nag 21 (23) : 23 Nag LR 86.**

2. AIR 1939 Mad 678 (680, 681).

subsequent mortgagee. He is a necessary party to a suit by *B* on his mortgage in his capacity as a subsequent mortgagee but not so in his capacity as a prior mortgagee. Where he is made a party to a suit on the mortgage by *B* but the prior mortgage is not impugned or sought to be postponed in any way, he need not set up the prior mortgage, as such a plea is a paramount claim not affecting the claim made on the puisne mortgage of *B* and therefore not a ground of defence (1). Thus, if *B* admits the validity of the prior mortgage in his plaint *C* need not set up his rights under the first mortgage and a subsequent suit on the first mortgage by *C* is not barred as *res judicata* (2). If, however, *B* impleads *C* only in his capacity as a *subsequent mortgagee*, thus impliedly negativing the priority under the first mortgage, *C* must, by way of defence, set up his priority under the first mortgage otherwise he will be barred from doing so later on the grounds of *res judicata* (3).

B sues on his mortgage in Munsif's Court and impleads *C* as a *subsequent mortgagee*. *C* does not set up his rights as a subrogee in that suit. *C* then institutes a suit on the prior mortgage in the Court of Subordinate Judge as the claim exceeds the pecuniary limits of the jurisdiction of the Munsiff's Court. Such a suit is not barred, as the Munsiff was not competent to try the subsequent suit (4).

31. Plea of subrogation.

A transferee from the mortgagor who claims a right of subrogation against the plaintiff mortgagee by virtue of payment of certain prior mortgages must aver that the mortgagor in the prior mortgages was the mortgagor of the plaintiff, that the properties mortgaged were the same and that the payment had been made by or on behalf of himself (1). A plea of subrogation depending upon investigation of facts cannot be raised for the first time in second appeal (2) or before the Supreme Court.(3)

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^[93. **PROHIBITION OF TACKING.**— No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security, and, except in the case provided for by Section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.]

[A] See Foot-note (A) under section 92.

Section 92 — Note 30

1. See sub-heading "suits by puisne mortgagee against the mortgagor and the prior mortgagee" in Note 40 on S. 11 of the AIR Commentaries on the Code of Civil Procedure, 10th (1985) Edn. Also see O. 34, R. 1, Note 10.
2. AIR 1936 All 578 (583, 584) : 58 All 1056 (FB).
3. See sub-heading "suits by puisne mortgagee against the mortgagor and the prior mortgagee" in Note 40 on S. 11 of the AIR Commentaries on the Code of Civil Procedure, 10th (1985) Edn. Also see O. 34, R. 1, Note 10.
4. AIR 1939 Pat 375 (377) : 18 Pat 342 (DB).

Section 92 — Note 31

1. AIR 1942 Cal 153 (164) : ILR (1942) 1 Cal 326 (DB).
2. AIR 1954 Andhra 15 (16, 17).
3. AIR 1963 SC 1607 (1610) : (1964) 2 SCR 324. (Subrogation — Presumption in favour of — Plea that presumption was discharged raised in argument before Supreme Court — Plea being one of question of fact held could not be raised.)

Synopsis

1. Legislative changes.
2. English and Indian Law of tacking compared. See Note 1 on S. 79
3. Scope.
4. "With or without notice."
5. "Intermediate mortgage."
6. "Subsequent advance" — Meaning of.
7. Except in the case provided for by S. 79 — See Notes on S 79.

1. Legislative changes.

The present section corresponds word for word with the old S 80. The old S 93 was repealed by Act V of 1908 and re-enacted as O 34, R. 8 of the Civil P. C. The old S 80 was re-numbered as S 93 and inserted after S 92 by the Transfer of Property (Amendment) Act, 1929 The reason for the change given in the Report of the Special Committee is . "As the principle of tacking is closely allied to subrogation, we propose to put S 80 as S 93"

2. English and Indian law of tacking compared.

See Note 1 on S. 79.

3. Scope.

This section deals with two classes of cases, namely,—

(1) where a mortagee pays off an earlier mortgage with or without notice of an intermediate mortgage, and

(2) where a mortgagee makes a subsequent advance to the mortgagor with or without notice of an intermediate mortgage.

As to the first class of cases the section provides that the mortgagee cannot tack on his mortgage to the mortgage which he has paid off As to the second class of cases it provides that the mortgagee cannot, except as provided by S 79, tack on his subsequent advance to his mortgage. The effect of S 79 and this section is that where a mortgage to secure future advances expresses the maximum to be secured, but after certain advances within maximum have been made, a second mortgage is executed, the second mortgagee, if he had notice of the prior mortgage, will have to yield to the prior mortgagee in respect of further advances made after the second mortgage by the latter up to the maximum stated, although such advances may be made with knowledge of a subsequent mortgage, but if no maximum was expressed or if the subsequent mortgagee had no notice of the prior mortgage, the prior mortgagee making further advances after the second mortgage will have no priority in respect of such advances Section 93 is thus complimentary to S. 79.(1)

The basis of this section is to be found in the general principle, enunciated by the maxim *qui prior est tempore, potior est jure* (where the equities are equal, the first in time shall prevail) and which is found enacted in S. 48 The effect of the section is, in fact, to state that the general principle cannot be defeated by the mortgagee claiming to tack his mortgage on to a prior mortgage paid off by him or to tack on to his mortgage a subsequent advance made by him, to the prejudice of intermediate mortgagees (2) the section only enacted what had already been regarded before as settled law in India.(3)

Section 93 — Note 3

1. AIR 1955 Cal 194 204) (DB)
2. (1912) 15 Oudh Cas 211 (213) ** 1904 Pun Re No. 30, page 105 (108) . 1904 Pun RR No. 139 (DB)
3. See Note 1 on Section 79

This section and S. 79 deal with a case where there are two different mortgagees and have no relevancy in a case where there is only one mortgagee and will not apply to the question relating to the character or constitution of the said mortgage.(4)

4. "With or without notice."

Notice of the existence of an intermediate mortgage is immaterial under this section, except in cases falling under 79.(1)

5. "Intermediate mortgage."

The section, in terms, applies only to the question of priority of an intermediate *mortgage* over a subsequent mortgage or a subsequent advance, where the mortgagee pays off a prior mortgage or the subsequent advance is made by the prior mortgagee. The principle on which the section is based is, however, applicable even to intermediate *purchasers* of the property. In *Bhagwan Das v. Sham Das*(1), *X* mortgaged his property to *A* in February 1893, and *sold* a portion of the equity of redemption to *B* in August 1894. *A* subsequently advanced a further sum of money to *X* in 1895. *B* claimed to redeem the mortgage of 1893 and was met by the plea that he should pay up the subsequent advance also before redemption. It was held by the High Court of Allahabad that to allow such a plea would violate the principle laid down in old S. 80 corresponding to this section.

6. "Subsequent advance" — Meaning of.

Meaning of. It has been held by their Lordships of the Privy Council in *The Imperial Bank of India v. U Rai Gyaw Thu and Co. Ltd* (1) that the word "subsequent" in this section must, from the context, be taken to mean subsequent to an intermediate mortgage and that an advance when made after another mortgage is granted becomes a "subsequent advance". A mortgaged his property to B in 1874. He subsequently mortgaged the same property to C in March 1877 and thereafter to *B* in November 1877. *B* obtained a decree on both his mortgages without impleading C, got the property sold in court auction, and took the sale proceeds in satisfaction of both the mortgages. C then sued on his mortgage, obtained a decree, and then claimed to recover the surplus proceeds of the said sale in the hands of *B* after satisfying the first mortgage of 1874. It was held that he was entitled to do so and that to allow *B* to retain the proceeds in satisfaction of *both* his mortgages would be against the provisions of old S. 80 corresponding to this section.(2)

A deposited title deeds with S. I. Bank at Coimbatore and secured a loan the amount of which he placed in fixed deposit in the same Bank. He deposited the receipt with the branch of that Bank at Salem and obtained the facility of operating a current account to the extent of the amount lying in fixed deposit. Subsequently he again created a mortgage by deposit of title deeds over the same properties in favour of C Bank. Later the dues under the current account at Salem were adjusted by S. I. Bank by transferring the fixed deposit amount. Both the S. I. Bank at Coimbatore and C Bank obtained decrees on their mortgages and the question arose whether C Bank was entitled to priority because the transaction in favour of S. I. Bank was only a mortgage to secure future advances at Salem and that such advances were made only subsequent to the mortgage in favour of C Bank. It was held that the suit of S. I. Bank at Coimbatore was not in respect of moneys due to their

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[See (1876) 25 Suth WR 171 (174) (DB).]

4. AIR 1955 Cal 194 (199) (DB).

Section 93 — Note 4

1. AIR 1923 PC 211 216) : 50 Ind App 283.

Section 93 — Note 5

1. (1901) 23 All 429 (431) (DB).

Section 93 — Note 6

1. AIR 1923 PC 211 (215) : 50 Ind App 283.
2. (1890) 12 All 546 (547) (DB).

branch at Salem. The debt due to the Salem branch had been wiped out by adjustment of the amount of fixed deposit. The equitable mortgage in favour of S. I. Bank at Coimbatore must be deemed not ans mortgage to secure future advance to a limit but to have become an effective mortgage to secure the entire sum when the amount was credited in his current account. As admittedly the mortgage in favour of C. Bank was of a subsequent date, it was not entitled to priority.(3)

7. Except in the case provided for by S. 79.

See Notes on Section 79.

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^[94. **RIGHTS OF MESNE MORTGAGEE.—** Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.

[A] See Foot-note (A) under S. 92.

Synopsis

1. **History of the section.**
2. **Principle.**
3. **"The same rights.....as he has against the mortgagor."**
4. **Rights of persons deriving title from mesne or prior mortgagees.**

1. History of the section.

The old S. 94 of the Act of 1882 dealt with the question of costs of the mortgagee in mortgage suits. It was repealed in 1908 and was re-enacted in the Civil Procedure Code, 1908, as Order 34, Rule 10.

This section is new and is a re-enactment of the latter portion of the old section 75 which ran as follows :

"Every second other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any)as he has against his mortgagor."

The first portion of the above section is covered by Ss. 91 and 92 of the Act (1).

The provisions of O. 34, R. 11 of the Code of Civil Procedure as they were in 1908 and which corresponded to the repealed S. 75, have also been repealed by Act XXI of 1929.

2. Principle.

This section is an enactment in part of the well-known principle expressed by the phrase "redeem up and foreclose down" (1). It provides that a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor (2). The reason is that the posterior

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3. AIR 1958 Mad 132 (133) (DB).

Section 94 — Note 1

1. **See** Clause 46 of the Report of the Special Committee.

Section 94 — Note 2

1. **See** Clause 46 of the Report of the Special Comittee.

   See Snell, Principles of Equity, 11th Edn., p. 307. AIR 1967 Mad 418 (420) : ILR (1967) 1 Mad 378 ** (1911) 10 Ind Cas 748 (751) (Bom)

2. **(1891) 13 All 432 (459) (FB) ** (1911) 9 Ind Cas 513 (516) (FB) (Mad) **** AIR 1967 Mad 418 (420) : ILR (1967) 1 Mad 378 ** AIR 1926 Mad 101 (102)

mortgagee whose interest has only been carved out of the mortgagor's interest remaining after the anterior mortgage, cannot, as against the latter, be in any better position than the mortgagor himself.(3)

The section, in terms, deals with the rights of *mesne* mortgagees. But it cannot be doubted that the same principle is applicable to the *first* mortgagee also who will have, against subsequent mortgagees, the same rights as he has against the mortgagor (4) The words "second or other subsequent" occurred in the old S 75, and the word "mesne" was used in the corresponding O 34, R 11 of the Civil Procedure Code as it stood before 1929 They were properly used in those provisions as the rights of a mortgagee were dealt with in relation to *prior* as well as *subsequent* mortgagees In the present section, the rights of mortgagees are dealt with as against *posterior* mortgagees alone The word "mesne" seems to have been inadvertently retained

Lis pendens does not apply to successive mortgages created prior to any suit in a Civil Court or in matters arising for enforcement of the rights under such mortgages Consequently sale in execution of second mortgagee's decree cannot affect the rights of the prior mortgagee (5)

Since the mortgagee failed to repay loan the State Financial Corporation obtained decree and in execution thereof the mortgaged property was sold and the sale was concluded The mortgagee had also obtained loan from a Bank, by executing a simple mortgage The Bank filed a suit for recovery of loan and ex parte decree was passed and, the property was sold and delivered to purchaser. The suit instituted by the Bank was finally disposed of and decreed prior to the sale of property in proceedings initiated by the Corporation and therefore the Bank was not affected by the sale concluded in favour of the Corporation There was no lis pendens The principle of lis pendens does not apply to the previously existing transfers including mortgages(6)

3. "The same rights..... as he has against the mortgagor".

Sections 67 to 73 deal with the rights of mortgagees against mortgagors This section provides that a mortgagee can also exercise all such rights against *mortgagees posterior to himself* Thus, a prior mortgagee can require the subsequent mortgagee to redeem him or in default to submit to a foreclosure or sale of the property(1) (Section 67) Again where under the terms of the prior mortgage, the mortgagee is entitled to get possession of the mortgaged property under certain circumstances, he can, on the happening of such circumstances, sue a subsequent usufructuary mortgagee for recovery of possession(2).

This section must, however, be read subject to the proviso to sub-s (1) of S 68 That proviso enacts that a transferee from the mortgagor shall not be liable to be sued for the mortgage-money in a case falling under Cl. (a) of that sub-section. A prior mortgagee will not, therefore, be entitled to a personal decree for the mortgage-money, against the subsequent mortgagee, though he may be

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3. *See the following cases which proceed upon this principle :*

(1882) 6 Bom 404 (411, 412, 413) (FB) ** AIR 1926 All 480 (482, 483) (DB) ** AIR 1929 Lah 207 (208).

4. **AIR 1929 Lah 207 (208) ** (1900) 23 All 1 (4) (DB)**

5. **AIR 1980 Andh Pra 305 (310) : (1989) 2 APLJ (HC) 152 (DB)**

6. **AIR 1999 Ker 213 (224) : 1999 AIHC 2281 . 1999 (1) Ker LT 637 (FB).**

Section 94 — Note 3

1. AIR 1967 Mad 418 (420) ILR (1967) 1 Mad 378 ** (1908) 31 Mad 425 (428) (DB) ** **(1912) 14 Ind Cas 449 (453) (DB) (Mad).**

[See also AIR 1930 All 826 (827) (When a property is sold in execution of a decree obtained on the basis of a prior mortgage in a suit to which the subsequent mortgagees are parties, the only right of the subsequent mortgagees is to redeem the prior mortgage in time.)]

2. **(1912) 14 Ind Cas 735 (Oudh) ** AIR 1929 Lah 207 (208)**

entitled to such a decree against the mortgagor(3).

The "rights" referred to are the rights of the mortgagee, *under the mortgage*, that is, rights flowing from the terms constituting the mortgage. It will not include rights, for instance, on covenants by the mortgagor not to alienate his properties, which do not form part of the terms of the mortgage. See Note 18 on section 10.

As to the effect of joinder and non-joinder of prior and puisne mortgagees as parties to suits on mortgages, see Note 19 on section 67.

4. Rights of persons deriving title from mesne or prior mortgagees.

By virtue of S. 59 A, a person deriving title from a mesne or prior mortgagee will stand in the same position as the mortgagee himself in respect of the enforcement, against the mortgagor, of the rights under the mortgage. Thus, a *purchaser* from a prior or mesne mortgagee will have the same rights against posterior mortgagees as the prior or mesne mortgagee himself has against the mortgagor.

A[95. RIGHT OF REDEEMING CO-MORTGAGOR TO EXPENSES.— Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.]

[A] Sections 95 and 96 were *substituted* for the original section 95, by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S 48 Original S 96 was *repealed* by the Code of Civil Procedure, 1908 (V of 1908), S 156 and Schedule V

Synopsis

1. **Scope of the section.**
2. **"Redeems".**
3. **"Expenses properly incurred".**
4. **Interest.**
5. **Co-mortgagor's liability to contribute.**
   See Notes 3 and 17 on S. 82.
6. **Such proportion as is attributable to their share in the property.**
7. **Persons deriving title from the mortgagor.**
8. **Personal remedy.**
9. **Limitation.**
10. **Section, if retrospective.**

1. Scope of the section.

In cases arising prior to the Act it was held that a co-mortgagor redeeming the mortgage obtained a lien on the shares of other co-mortgagors for their proportionate share of the mortgage-money with a right to retain possession until such share is paid by them(1).

Section 95 of the Act gave legislative effect to this view and enacted as follows :

"Where one of several mortgagors redeems the mortgaged property, and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession."

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3. AIR 1930 Lah 791 (792) (DB).

Section 95 — Note 1

1. (1882) 4 All 58 (60) (DB) ** (1884) 8 Bom 497 (500) (DB) ** (1881) Bom PJ 57 (DB) ** 1880 Bom PJ 300 (DB) ** (1879) 2 Mad 223 (225) (DB).

The section, however, gave rise to various interpretations as to the nature of the right acquired and the conditions requisite for the acquisition of the right. One set of cases(2) held that the redeeming co mortgagor had only a *charge* on the property and another set of cases(3) held that the right acquired was one of subrogation of the rights of the mortgagee whom he had redeemed According to a third set of cases(4) he was only a charge-holder with rights of priority over intermediate mortgagees or purchasers.

There was also a difference of opinion as to the class of mortgages to which the section applied. It was held in some cases(5) that the section applied only to mortgages under which possession was obtained, while other cases(6) held a contrary view Their Lordships of the Privy Council in *Ahmad Wali Khan v Mussamat Shamsh ul Jahan Begum*(7) took the latter view and observed as follows :

> "That section might be so strictly construed as to limit its operation to mortgages under which possession passes, and therefore, on redemption properly repasses But it seems to their Lordships more reasonable to construe the section distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is from the nature of the mortgage possible and in other cases to make the charge follow upon redemption."

In cases of usufructuary mortgages it was held that a co-mortgagor should obtain possession and retain it in order to enable him to claim a charge(8) If he obtained possession, he could retain

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2. (1906) 9 Oudh Cas 91 (93 94) (DB) ** (1901) 3 Bom LR 685 (690) (DB) ** (1902) 26 Bom 500 (503) (DB) (He is not a mortgagee within the meaning of Art 148 Limitation Act.) ** AIR 1933 Bom 114 (116) ** **AIR 1931 Cal 251 (256) : 58 Cal 1167 (FB)** ** AIR 1915 Cal 759 (762) (DB) ** AIR 1921 Mad 326 (326) (DB) ** AIR 1936 Mad 500 (502) (Article 132 Limitation Act applies) ** AIR 1929 Bom 139 (140) 53 Bom 353 ** AIR 1922 Bom 150 (151) 46 Bom 213 (DB) ** AIR 1916 All 134 (136) 38 All 138 (DB) ** AIR 1919 Oudh 39 (43) 22 Oudh Cas 928 ** AIR 1923 Lah 311 (312) ** AIR 1920 Lah 234 (235) ** AIR 1934 Pat 612 (614) 13 Pat 356 (DB) * AIR 1927 Oudh 552 (552) 2 Luck 686 (DB) ** AIR 1927 Oudh 347 (349) 2 Luck 618 ** AIR 1930 Nag 300 (303) 27 Nag LR 152 ** AIR 1933 Lah 91 (92) ** ILR (1941) Nag 434 (436) (DB) ** 1906 AWN 179 (179) ** 1906 AWN 178 (178)

   [See also AIR 1945 Cal 194 (198) ILR (1947) Cal 323 (DB) (Under old S 74 the right was not merely a charge but subrogation — It would be wrong to apply S 95 (old) to cases **under old S. 74 and hold only that a charge was created.)]**

   See also Note 17 on Section 82

3. AIR 1921 Cal 166 (169) (DB) (**Overruled** in AIR 1931 Cal 251 (FB) but the case is good law after the amendment of this section in 1929) ** (1899) 22 Mad 332 (335) (DB) ** AIR 1924 Oudh 85 (89) (DB).

   See also Note 15 on Section 92

4. (1909) 31 All 166 (169, 170) (DB) ** (1906) 4 Cal LJ 79 (84) (DB) ** (1910) 5 Ind Cas 165 (168) (DB) (Cal) ** AIR 1934 Pat 612 (615) 13 Pat 356 (DB) ** AIR 1928 Cal 593 (595) 55 Cal 1193 (DB) (Per Mukherji J) ** AIR 1919 Oudh 39 (42) 22 Oudh Cas 278.

   [But see AIR 1925 Oudh 613 (615) (Charge cannot be enforced against *bona fide* purchaser for value.) ** **(1906) 9 Oudh Cas 259 (267) (DB) (Do.)]**

5. (1899) 22 Mad 332 (335) (DB) ** (1905) 9 Cal WN 865 (867) (DB)

6. (1901) 4 Oudh Cas 273 (276) ** AIR 1928 Mad 950 (951) 51 Mad 810 (DB) ** AIR 1925 Oudh 613 (613) ** (1907) 3 Nag LR 92 (93) ** **(1904) 26 All 407 (417) (FB)** ** (1904) 26 All 227 (232) (DB) ** AIR 1918 Pat 322 (323) : 3 Pat LJ 490 (DB).

7. **(1906) 28 All 482 (487) : 33 Ind App 81 (PC).**

8. AIR 1924 Oudh 209 (217) (DB) (Constructive possession is sufficient) ** AIR 1917 Oudh 50 (52) . 20 Oudh Cas 72 ** (1906) 9 Oudh Cas 259 (266) (DB) ** AIR 1925 Oudh

it till he was paid by the co mortgagors the amount representing their share of the mortgage-money(9). He could not sue for sale(10). See also the undermentioned cases(11).

Co-mortgagor pending his suit to redeem the mortgage extinguishing ownership of the property by selling equity of redemption enables the other mortgagor to redeem the mortgage by bringing fresh suit(12) See also undermentioned case(13).

The conflict of opinion has now been set at rest by the present amended section, recognising the right of the redeeming co-mortgagor to subrogation under S. 92(14) In enforcing such right of subrogation the redeeming co-mortgagor has, under this section, a right to add, to the mortgage-money recoverable from his co-mortgagors, such portion of the expenses properly incurred in such redemption as is attributable to their share in the property

Apart from the right of *subrogation* given by this section and S 92, a redeeming co-mortgagor has a right to a *charge* for contribution against his co-mortgagors under S. 82 read with S. 100(15) It has been held that this charge relates back to the date of the mortgage redeemed for purpose of priority against subsequent mortgagee though not for the purpose of limitation(16). But

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629 (630) (DB) (Redeeming mortgagor obtaining constructive possession) ** AIR 1933 Oudh 28 (31) (DB).

9. 1892 Bom PJ 412 (DB) ** AIR 1931 All 76 (82) (DB) * (1905) 27 All 178 (182) (DB)

[See also AIR 1935 Oudh 245 (248) (DB)]

10. AIR 1914 Oudh 234 (235)

11. AIR 1916 All 130 (131) (A mortgagor relieving his co-mortgagors of a burden, whether under compulsion of law or as a private transaction can claim that his co-mortgagors should pay him, what he has paid for their benefit and he need not be put in possession of the property of the co-mortgagors) ** AIR 1915 All 450 (452). (He could sue for possession) ** AIR 1919 Mad 284 (285) (DB). (He can only enforce the charge) ** (1888) 11 Mad 416 (418) (DB) (He has as well a right of obtaining possession) ** AIR 1928 Mad 950 (951) : 51 Mad 810 (DB) (Puisne mortgagee purchased of part of mortgaged property paying off prior mortgage has a charge under S 95) ** AIR 1922 All 153 (154) 44 All 67 (DB) (Puisne mortgagee paying off prior mortgage is entitled to subrogation under S 74.) ** AIR 1928 All 241 (244) 50 All 569 (DB) (Puisne mortgagee purchaser of part of mortgaged property paying off prior mortgage — **Reversed** on another point in AIR 1932 PC 74.) ** AIR 1927 Pat 117 (121) (DB) (Puisne mortgagee from co-mortgagor paying off prior mortgage) **** AIR 1931 Cal 251 (253, 254, 255) : 58 Cal 1167 (FB). (Purchaser from co-mortgagor paying off mortgage.)**

12. (1971) 1 Cut WR 140

13. AIR 1982 All 129 (137) 1982 UPLT (NOC) 58 (Redemption of entire mortgage by one of mortgagees — Co-mortgagor's suit for partition of their share against former — Equities of parties can be adjusted in it — Latter need not be relegated to a fresh suit for redemption.)

14. **AIR 1931 Cal 251 (252) : 58 Cal 1167 (FB) ** ILR (1955) Punj 1062 (1071) (Period of limitation for a co-sharer to bring a suit to redeem his share is sixty years from the date of the original mortgage) ** ILR (1953) Trav Co 48 (50, 51) (DB) ** AIR 1941 Pat 147 (148)**

[See also AIR 1943 Bom 191 (193) (DB) (One of co-mortgagors redeeming usufructuary mortgage - Other co-mortgagors must sue for redemption and not merely for possession.)]

See the Report of the Special Committee, clause 47

15. AIR 1957 Mys 1 (2) (These are remedies independent of each other and not mutually exclusive) ** AIR 1945 Pat 192 (196) 23 Pat 935 (DB) **** AIR 1942 Oudh 449 (457) (FB) ** AIR 1942 Nag 111 (113) : ILR (1942) Nag 393**

16. **AIR 1944 Oudh 114 (116) (DB)**

it is not clear on what principle this view can be sustained. Possibly the view is that the charge under S. 82 is a *contingent* charge even before the mortgage is discharge when the right to *sue* on the charge will arise. The charge cannot, however, like a right of subrogation, be enforced against a *bona fide* transferee without notice of the charge. See also Note 17 on section 82.

2. "Redeems".

As to the meaning of "redemption" generally, see Note 4 on S. 60. The payment of the *balance* due upon a mortgage is as much a redemption as the payment of the whole sum due in a case where there has been no part payment previously. So where one of several co-mortagors pays off the balance due on the mortgage he would be entitled to the rights given by this section(1).

3. "Expenses properly incurred".

The redeeming co-mortgagor can, under this section, claim a proportion of such expenses only as have been *properly incurred*(1). The *solatium* of five per cent on the purchase-money paid to the auction-purchaser in order to set aside under O. 21, R. 89 of the Code of Civil Procedure is not an expense that can be said to have been properly incurred(2). In the undermentioned case(3) of the Madras High Court it has been held that the poundage fee chargeable from the mortgagor who seeks to set aside a sale under O. 21, R. 89 of the Civil Procedure Code is not an expense properly incurred in redeeming the mortgage. This section has now resolved the doubt that existed before as to whether the words "expenses properly incurred" meant only the expenses of redemption or included the mortgage-money also(4) by treating the expenses so incurred should be added to the mortgage-money recoverable from the other co-mortgagors.

The amounts spent by a redeeming co-mortgagor by way of poundage in saving property by having the sale set aside is entitled to recover as a contribution from co-judgement debtors though the sum may not come under Section 82(5).

A and B mortgaged their joint property to C. B was individually indebted to D on a pro note in respect of which he obtained a decree against B, putting the property to sale and purchased the same on redeeming C's charge. It was held, that D was subrogated to rights of C. A was entitled to redeem his share by paying his dues on mortgage and expenses to D(6).

4. Interest.

The old section did not contain any provision for payment of *interest* on the proportionate share of the redemption amount attributable to the other co-mortgagors. It was held in some cases arising thereunder that the redeeming co-mortgagor was not placed completely in the position of

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Section 95 — Note 2

1. See AIR 1918 Pat 322 (323) : 3 Pat LJ 490 (DB) (Case under old section — Co-mortgagor paying balance was held entitled to a charge under S. 95.)

Section 95 — Note 3

1. (1912) 15 Ind Cas 500 (506) (DB) (Bom) (Per Beaman J.) ** AIR 1928 Nag 246 (248)
2. AIR 1943 Mad 429 (433) : ILR (1943) Mad 531 (FB) (Per Patanjali Sastri J. in Order of Reference.) ** AIR 1945 Pat LJ (196) : 23 Pat 195 (DB)

   [See also AIR 1931 Pat 394 (402) : 10 Pat LJ 528 (DB) (Case, however, under Ss. 69 and 70 of the Contract Act.)]

   [See Note 24 on Section 82.]
3. AIR 1943 Mad 429 (433) : ILR (1943) Mad 531 (FB). (Per Patanjali Sastri J. in Order of Reference.) — Poundage fee chargeable from the mortgagor under Rule 293 of the Madras Civil Rules of Practice forms no part of the amount payable to mortgagee decree-holder but is a payment made to regain his property because he was late with his money.
4. AIR 1931 Cal 251 (253) : 58 Cal 1167 (FB) ** (1906) 9 Oudh Cas 259 (266) (DB)
5. AIR 1978 All 412.
6. AIR 1969 Mad 27 (29) (DB)

the mortgagee whom he redeemed and that the question of payment of interest on the redemption amount and of the date from which it was payable was a matter of *discretion* of the Court(1). In other cases(2) it was held that the redeeming co-mortgagor was not entitled to claim any interest before suit unless he had *demanded* interest by notice to the other co-mortgagors. In the undermentioned case(3) the Chief Court of Oudh held that Article 115 of the Limitation Act 1908) applies to a claim for such interest and that therefore no interest for a period over three years prior to date of suit could be awarded.

Under the present section the redeeming co-mortgagor is entitled by "subrogation" under S. 92 to the rights of the mortgagee paid off and, will, it is conceived, be entitled to claim interest in the same way as the prior mortgagee could have done See Note 24 on section 92. But the redeeming co-mortgagor will not be entitled to claim interest on the *expenses of redemption to* which he is entitled under this section to add to the mortgage money(4).

5. Co-mortgagor's liability to contribute.

See Notes 3 and 17 on Section 82.

6. Such proportion as is attributable to their share in the property.

The proportion attributable to the co-mortgagor's share in the property must be ascertained by reference to S 82 The redeeming co-mortgagor has to contribute *pro tanto* to the extent of the value of his share and can recover only the balance from the other co-mortgagors(1). This right to recover the balance is, however, not a right to recover from all the other co-mortgagors *in solidum* the mortgage-money He has to split up his claim into a claim against each co-mortgagor in consonance with S 82(2) He is not entitled to a sale of the other co-mortgagors' shares jointly on their failure to pay their proportion of the mortgage-debt As each co-mortgagor's liability is separate, the redeeming co-mortgagor is entitled to separate decrees against each of the co-mortgagors in default of payment of their proportionate shares(3).

A co-mortgagor satisfying a mortgage *decree* and obtaining an *assignment* of the decree is, however, entitled to execute the decree as a transferee of the decree against the other co-mortgagors and, in the execution proceedings, the matters relating to contribution based upon the value of their

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Section 95 — Note 4

1. AIR 1934 Pat 612 (614) 13 Pat LJ 356 (DB) (6 per cent was awarded from the date on which he became entitled to the charge) ** (1910) 5 Ind Cas 165 (168) (DB) (Cal) ** 1898 All WN 39 (40) (DB) (Redeeming co-mortgagor is entitled to reasonable interest from the date of redemption) ** (1906) 4 Cal LJ 79 (83) (DB) (12 per cent , rate higher than that provided in the document) ** AIR 1919 Nag 80 (80) (Interest at 12 per cent was awarded.) ** AIR 1928 Nag 246 (248).
2. AIR 1925 Bom 484 (484) 49 Bom 591 (DB) (Interest at 6 per cent allowed from date of suit) ** AIR 1929 Oudh 290 (292) ** AIR 1931 Pat 394 (402) 10 Pat 528 (DB) (Case under Ss 69 and 70 of Contract Act — Interest at 6 per cent allowed from date of suit)
3. AIR 1925 Oudh 613 (614)
4. AIR 1948 Nag 256 (258) ILR (1947) Nag 668 (AIR 1925 Bom 464, Foll.)

   [See also AIR 1945 Pat 192 (196) 23 Pat 953 (DB) ("Redeeming co-mortgagor is not entitled to interest prior to date of institution of suit" — *Note* — This is an ambiguous statement — If the reference is to interest on the *mortgage money*, (as distinguished from *the expenses of redemption*) the view does not seem to be correct.

Section 95 — Note 6

1. AIR 1932 All 250 (251, 252) (DB).
2. AIR 1931 Cal 251 (255) : 58 Cal 1167 (FB) ** AIR 1928 All 241 (245) : 50 All 569 (DB). (Reversed on another point in AIR 1932 PC 74.)
3. (1901) 4 Oudh Cas 273 (276)

respective properties cannot be urged(4).

7. Persons deriving title from the mortgagor.

Under the old section there was some difference of opinion as to whether the section was restricted to mortgagors in the sense of persons who have actually executed the mortgage or whether it included cases where the mortgage is originally made by a single mortgagor but subsequently the equity of redemption vests in several persons by devolution of transfer. The general trend of opinion was that the section included the latter class of cases(1), some cases, however, taking the contrary view(2). The introduction of S. 59-A by the amending Act of 1929 now makes the position clear. "Mortgagor" under that section includes person deriving title from him and where the equity of redemption vests in several persons, such persons would be "several mortgagors" within the meaning of this section(3).

A lessee or an assignee of a *mokurrari* interest of one of several mortgagors cannot, however, be considered "one of several mortgagors" and cannot claim relief under this section(4).

A vendee of a *sham* title from the mortgagor gets no interest by the transfer, and cannot claim any rights under this section(5).

8. Personal remedy.

There is a difference of opinion as to whether one co-mortgagor can sue for a *personal decree* for contribution against the other co-mortgagors under Ss. 69 and 70 of the Contract Act. See Note 14 on S. 82 and the undermentioned cases(1). As to whether such a suit is cognizable by a Court of Small Causes, see Note 27 on that section.

9. Limitation.

See Notes 10 and 14 on Art. 62 and Note 3 on Art. 61 of the AIR Commentaries on the Limitation Act 7th (1997) Edition.

10. Section, if retrospective.

It has been held by the Madras High Court in the undermentioned Full Bench decision(1) that

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4. AIR 1939 Cal 425 (427) (DB). (O. 21, R. 16, C.P.C. does not apply to a mortgage decree.)

Section 95 — Note 9

1. AIR 1928 Mad 950 (951): 51 Mad 810 (DB). (A purchaser of a portion of the mortgage property must be deemed to be one of the mortgagors.) ** AIR 1928 Cal 593 (596): 55 Cal 1193 (DB). (Do.) ** AIR 1919 Oudh 267 (269): 22 Oudh Cas 112 (Do.) ** AIR 1915 Cal 759 (762) (DB). (Do.) ** (1906) 9 Oudh Cas 259 (265) (DB). (Do.) ** (1907) 5 Nag LR 92 (93). (Do.) ** AIR 1927 All 626 (626, 627) (DB). (Do.) ** AIR 1914 Oudh 234 (235). (Purchaser from some of several heirs of mortgagor redeeming mortgage.)

   [**See also** AIR 1923 Mad 533 (535). (The principle in S. 95 is equally applicable in a case where part of the mortgaged property has been purchased by the mortgagee.)]
2. (1905) 9 Cal WN 865 (867) (DB). (The words 'one of several mortgagors' do not cover one of several representatives of a deceased mortgagor.) ** AIR 1929 Mad 860 (862) (DB). (Mortgage by deceased karnavan — Member of tarward owning property is not one of several mortgagors.)
3. AIR 1936 Oudh 47 (49) (DB).
4. (1906) 4 Cal LJ 79 (85) (DB).
5. AIR 1923 Mad 392 (396) (DB).

Section 95 — Note 8

1. **AIR 1931 Cal 251 (253, 256) : 58 Cal 1167 (FB).** (Can claim personal remedy against co-mortgagors under S. 69, Contract Act.) ** (1878) 4 Cal 369 (373) (DB). (Do.) ** (1905) 9 Cal WN 865 (867, 868) (DB). (Do.)

Section 95 — Note 10

1. AIR 1956 Mad 354 (364). (AIR 1920 Mad 326 (1) and AIR 1918 Mad 19. **Held** correctly decided.)

neither this section nor S 92 has retrospective operation. The Chief Court of Oudh has, however, taken the view that this section is retrospective in operation(2).

[A][96. MORTGAGE BY DEPOSIT OF TITLE-DEEDS.— The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.]

[A] *See* Foot-note (A) under section 95

Synopsis

1. **History of the section.**
2. **Scope.**

1. History of the section.

This section is new. It has been inserted by S 48 of the Transfer of Property (Amendment) Act XX of 1929. Before the amendment, the Act did not define a mortgage by deposit of title-deeds. The only provision relating to equitable mortgages was that contained in the last paragraph of the old S 59 of the Act, by which the legal formalities required in respect of other mortgages were dispensed with in the case of a mortgage by deposit of title deeds in certain towns.

The law in relation to such mortgages as administered prior to 1929, was neither uniform nor clear. The High Courts followed the practice observed in their own Courts(1). The High Court of Bombay held that an equitable mortgagee was entitled to maintain an action for foreclosure or sale governed by the 60 years' period of limitation under Art 147 of the Limitation Act of 1908(2). The High Court of Calcutta, though it allowed a suit for foreclosure or sale to be instituted, granted a decree only for *sale*(3). In Madras(4), Rangoon(5), and Sind(6), the procedure relating to simple mortgages was being followed. In the undermentioned cases(7) a *bona fide* purchaser for value of property subject to an equitable mortgage, without notice of the mortgage, was held entitled to the property free of the equitable mortgage. See also section 67, Note 17.

With a view to remove these anomalies, a new definition of a mortgage by deposit of title-deeds was inserted in S 58, Cl (f), and the present section was enacted making the provisions relating to simple mortgages applicable to equitable mortgages(8).

In order to provide against hardships likely to be caused by this section in provinces where a different view had been taken, S 15, sub-s (2) of the Transfer of Property (Amendment) Supplementary Act, XXI of 1929, provided as follows :

> Notwithstanding anything contained in S 9 of this Act, in the Presidency of Bombay and such other territories as the Central Government may, by notification in the Official Gazette, specify in this behalf, a suit by a mortgagee for foreclosure or sale on a mortgage by deposit of title deeds may be

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2. AIR 1942 Oudh 449 (456) : 203 Ind Cas 285 (FB). (Per Agarwal, J.)

Section 96 — Note 1

1. (1890) 14 Bom 269 (273) (DB) ** (1897) 24 Cal 348 (350). (English practice not followed.)
2. (1890) 14 Bom 269 (272, 273) (DB)
3. (1886) 13 Cal 322 (326) (DB) ** (1897) 24 Cal 348 (350).
4. AIR 1928 Mad 909 (913) (DB) ** AIr 1928 Mad 919 (922) (DB).
5. AIR 1929 Rang 107 (109).
6. AIR 1928 Singh 17 (20) : 22 Sind LR 222
7. (1862) 9 Moo Ind App 303 (322, 323) (PC) ** (1869) 1 NWPHCR 166 (168) (DB).
8. See Clause 47 (now clause 49) of the Select Committee's Report and S 48 of Act XX of 1929

instituted within two years from the date of the commencement of this Act or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first, and no such suit instituted within the said period of sixty years immediately after the coming into commencement of this Act, either in a Court of first instance or of appeal, shall be dismissed on the ground that the twelve years' rule of limitation is applicable."

Section 96 of the Transfer of Property Act, 1882 was repealed in 1908 by the Code of Civil Procedure, 1908, as it related to proceedings and a corresponding provision was inserted in that Code in the chapter relating to suits on mortgages. (See O. 34, R. 12).

As a result of the enactment of this section, O. 34, R. 15 of the Code of Civil Procedure has been newly added making applicable to equitable mortgages the provisions of the Code relating to simple mortgages. In a mortgage by deposit of title deeds a decree is to be passed in a suit of a simple mortgage can only be passed. A decree for foreclosure cannot be passed in a suit of mortgage by deposit of title deeds(9).

2. Scope.

This section makes such of the provisions of Ss. 59 to 95 as relate to simple mortgages applicable to mortgages by deposit of title deeds(1). But these provisions would be applicable only "so far as may be" to mortgages by deposit of title deeds. Thus the second paragraph of S. 59 of the Act requires a simple mortgage for not less than Rs. 100 to be effected only by a registered instrument signed by the mortgagor and attested by two witnesses. Again, S. 60 entitles a mortgagor on redemption to require the mortgagee to deliver the mortgage-deed and to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished, in addition to the return of all the documents of his property mortgaged, in his possession. These two provisions cannot be [illegible] to mortgages by deposit of title deeds, inasmuch as no deed of mortgage is necessary to be executed in such cases.

A mortgage by deposit of title deeds by the partner of a firm of the deposit of title deeds of firm run by joint family is binding on the sons by virtue of the deed(2).

The list to be applied to conclude whether the letter written at the time of deposit of title deeds or thereafter requires registration or not depends on the nature contained in the letter and if it recites that through this letter the mortgage was created, then it would require registration otherwise not, where the equitable mortgage was already created and the letter written thereafter only confirmed the act of deposit of title deed, it does not require registration(3).

Where a loan is taken under a pro note and equitable mortgage is created at the same time by depositing original title deeds, the memorandum executed subsequently to evidence deposit of title deeds already made need not be registered and is admissible in evidence(4).

Even if a house was constructed on mortgaged property subsequently after creation of equitable mortgage, the mortgagee-Bank is entitled to recover the loan amount from the house because any construction raised on a mortgaged property will automatically be deemed to have been mortgaged with the creditor(5).

Where the property is secured in favour of the Bank by way of equitable mortgage an act of

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9. AIR 1992 All 111 (115) : 1991 All WC 886 ** AIR 1993 Ker 184 (188) : 1992 (2) Ker LJ 802

Section 96 — Note 2

1. AIR 1953 Cal 208 (210) (By the combined operation of S. 96 and S. 58(b) an equitable mortgage where the mortgagor binds himself personally to pay the mortgage-money.)
2. AIR 1970 Punj 67 (FB).
3. 1997 (4) Andh LT 112 (116)
4. 1996 (4) Andh LT 272 (277)
5. 1997 (4) Andh LT 112 (116).

way of usufructuary mortgage or mortgage with possession and possession of property is not delivered to the Bank in lien or interest or otherwise, the Bank would be entitled only to such rights which a simple mortgagee will have in regard to the mortgaged property. In the event of the mortgagor failing to pay the amounts due according to the contract, the mortgagee has a right to cause the mortgaged property to be sold and apply the proceeds towards discharge of the mortgage money. The mortgagee does not have any right over the rents or income from the mortgaged property. The equitable mortgage as such, does not help the Bank to claim a charge or equitable assignment in regard to rents(6). Possession does not go with equitable mortgage(7).

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97. APPLICATION OF PROCEEDS.— [*Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S. 156 and Schedule V.*]

Anomalous Mortgages

98. RIGHTS AND LIABILITIES OF PARTIES TO ANOMALOUS MORTGAGES.— In the case of ^[an anomalous mortgage] the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

[A] Substituted for the words "a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage or a combination of the first and third, or the second and third, of such forms", by the Transfer of Property (Amendment) Act, 1929 (20 of 1929), S 49

Synopsis

1. **Scope of the section.**
2. **Provisions of Section 60 apply to anomalous mortgages.**
2A. **Applicability of Section 68 to anomalous mortgages.** See Section 68, Note 12.
3. **Applicability of other provisions of Act where contract is silent on the point.**
3A. **Applicability of general provisions of law.**
4. **Mortgagee entitled under deed to foreclosure and sale — Discretion of Court to grant decree for sale.** See Note 18 on Section 67 and the AIR Commentaries on the Code of Civil Procedure, 10th (1985) Edn., O 34, R 4, Note 9 in the Appendix.
5. **Combination of a simple mortgage and a usufructuary mortgage.**
6. **Combination of a usufructuary mortgage and a mortgage by conditional sale.**
7. **Kanom.**
8. **Otti.**
9. **Peruarthum.**
10. **Hadarawara.**

1. Scope of the section.

Prior to the amendment in 1929, there was no definition in the Act of an anomalous mortgage, but the old S. 98 dealt with certain classes or types of anomalous mortgages. The amending Act of 1929 introduced in S 58, Cl (g), a definition of "anomalous mortgage" and the present section now deals only with rights and liabilities of the parties to such a mortgage(1).

Under this section the rights and liabilities of the parties under an anomalous mortgage are to be determined by their contract as evidenced in the mortgage deed, and so far as such contract does not extend, by local usage(2). Thus, the question whether a mortgagee under an anomalous mort-

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6. AIR 194 Kant 133 (136) : 1993 (3) Kant LJ 372
7. 2001 (4) ICC 672 (681)

Section 98 — Note 1

1. See the Report of the Special Committee under Cl. 19 and Cl. 48
2. (1901) 26 Bom 252 (258) (FB) ** AIR 1956 Madh-Bha 110 (112) (Anomalous mortgage

gage has a right to claim a decree for sale or for foreclosure or for both, or a personal decree for the mortgage-money, will depend upon the terms of the particular contract of mortgage(3). It has been held that he cannot claim any right expressly or impliedly negatived by the contract(4), and that if those rights, though given, are controlled or limited by the contract to a particular state of circumstances, he will be entitled to claim those rights only subject to such limitations(5).

Insofar as the contract does not extend, the section says that the rights and the liabilities will be governed by the local usage. The instances of anomalous mortgages in which the rights and liabilities are governed by local usage are provided by the various customary mortgages prevalent in different parts of India, such as *Kanom* and *Otti* in Malabar and *Iladurwara* in South Kanara.

It is submitted that the view abovementioned, viz., that an anomalous mortgagee cannot claim any right which is expressly or impliedly negatived by the contract between the parties is not correct. Because such a view is in conflict with the decision and observations of the Privy Council in *Mohammad Sher Khan v. Raja Seth Swami Dayal*(6) which has already been considered in Note 29 on S. 60. It was held by their Lordships in the above case that the parties to an anomalous mortgage cannot contract themselves out of the statutory right of redemption conferred by S. 60 of the Act. It was, therefore, held that notwithstanding an express provision in the mortgage deed for allowing the mortgagee to remain in possession of the mortgaged property for a certain period after the right of redemption had accrued under S. 60, the mortgagor was not debarred from suing for redemption

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— Mortgage with possession — Stipulation for redemption within two years and in default mortgage to have option to sue for recovery of amount by sale of property — Mortgagee held entitled to remain in possession after expiry of redemption and is entitled to sue for possession on dispossession during subsistence of mortgage — and not bound to sue for sale.) ** AIR 1935 Oudh 254 (255) (DB). ** AIR 1928 Mad 8[illegible] (8[illegible]) (DB). ** (1[illegible]) 2 All 203 (205, 206) (DB). (Anomalous mortgage — Mortgagee entitled to possession — Possession not delivered — Mortgagee held entitled to sue for mortgage money.) ** AIR 1915 Oudh 16 (22, 23) : 18 Oudh Cas 10 (DB).

3. AIR 1958 Punj 309 (310) (DB). (Mortgagor undertaking to pay principal with interest — On default two options given to mortgagee namely either to recover principal money with interest at higher rate or to get possession in lieu of principal and interest — Assuming it was an anomalous mortgage, mortgagee was entitled on default to sue for money and to have property sold.) ** AIR 1935 Oudh 254 (255) (DB). (Mortgagee — Provision for interest on principal if mortgagee not put in possession — Possession not given — Mortgagee held entitled to decree for sale.) ** (1910) 6 Ind Cas 795 (796) (DB) (All). (A provision giving the usufructuary mortgagee power to sell by institution of suit takes the mortgage out of the category of usufructuary mortgage in S. 58(d) and the provision is given effect to.) ** AIR 1927 Cal 836 (840). 54 Cal 687 (DB). (Foreclosure.) ** AIR 1937 Pat 261 (262) (DB). (Personal decree.)

[See also (1885) 11 Cal 237 (244) : 12 Ind App 1 (PC).]

4. **AIR 1919 PC 121 (123) : 15 Nag LR 134.** (If the intention appears that sale was not contemplated has no right to a judicial sale.) ** (1905) 6 Oudh Cas 167 (173, 174). (Held on construction that mortgagee had right to obtain possession only and not of sale.) ** AIR 1928 Mad 226 (226) (DB). (Right to be in possession only, not of sale.)

5. AIR 1919 Oudh 418 (419). 21 Oudh Cas 341. (A deed of anomalous mortgage did not contain any independent covenant to pay except the usual stipulation for repayment after the fixed term. There was, however, a personal remedy against the debtor available to the creditor if the whole of the debt could not be satisfied out of the sale proceeds of the mortgaged property. — Held, that the creditor could not get a simple money decree, as that covenant could be availed of only in a certain contingency which had not arisen.) ** AIR 1924 Cal 592 (594) (DB). (Right of sale only on failure to redeem after expiry of 8 years — Held, the right did not arise before 8 years had expired.)

6. **AIR 1922 PC 17 (19) : 49 Ind App 60.**

before the expiry of such period. Referring to the argument that the mortgage in question was an anomalous mortgage, their Lordships observed as follows :

> "But their Lordships do not think it necessary to pursue this enquiry, for in the view they take, the rights and liabilities of the Litigants must depend on the terms of the instrument as controlled by the Transfer of Property Act, for even if it were an anomalous mortgage, its provisions offend against the statutory right of redemption conferred by S. 60, and the provisions of the one section cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. An anomalous mortgagee entering after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This under S. 60 of the Transfer of Property Act is the event on which the mortgagor had a right on payment of the mortgage-money to redeem.
>
> The section is unqualified in its terms, and contains no saving provision as other sections do in favour of contracts to the contrary. Their Lordships therefore see no sufficient reason for withholding from the words of the section their full force and effect."

The above passage clearly shows that the rights and liabilities of the parties to an anomalous mortgage must depend on the terms of the instrument *as controlled by this Act* and where such terms are inconsistent with any provision in the Act which is applicable to anomalous mortgages, it is the latter that will prevail and not the contract between the parties(7). See also S. 68, Note 12.

The rights and liabilities of the parties in an anomalous mortgage have to be determined, as warranted by S. 95, with reference to the terms of the contract between the parties. In instant case certain fixed sum was to be paid every month, which was believed by the parties to be a "fair occupation rent". The document did not provide for payment of interest. The amount was to be paid irrespective of any profit from the property. What was agreed was payment of fixed sum every month irrespective of any profit and not a division of profits between the mortgagor and mortgagee(8).

2. Provisions of section 60 apply to anomalous mortgages.

The provisions of S. 60 apply also to anomalous mortgages and, therefore, stipulations in a deed of anomalous mortgage amounting to a clog on the equity of redemption are invalid. See section 60, Note 29.

2A. Applicability of section 68 to anomalous mortgages.

See section 68, Note 12.

3. Applicability of other provisions of Act where contract is silent on the point.

As has been seen already in Note 1, some decisions hold that if the contract of anomalous mortgage expressly or impliedly negatives any right or remedy given to the parties under other provisions of this Act, such provisions cannot be applied(1). But if the contract of mortgage is *silent* on any particular point and the application of the other provisions of this Act is not inconsistent

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7. AIR 1959 Pat 235 (238) (DB). (Even though there be a contract to the contrary in the mortgage bond in question, if a term of that contract offends against the statutory right to sue for the mortgaged money conferred by S. 68, the statutory right must prevail upon the stipulations in the deed. ** AIR 1957 Andh Pr 51 (5, 2). (In cases of anomalous mortgages, the rights and liabilities depend on the terms of the contract as controlled by the Transfer of Property Act. The terms of the contract cannot offend the terms of S. 60 and clog redemption.)

8. (1988) 1 Ker LT 50 (53)

Section 98 — Note 3

1. AIR 1932 Oudh 178 (179) (DB). (Section 68 not applied as there was a contract to the contrary.) ** (1904) 7 Oudh Cas 11 (12). (Right of sale not intended to be given — Section 68 not applied.) ** (1897) 21 Mad 1 (3) (DB). (Section 68 held not applicable.)

with the contract, there is no reason why such provisions should not be applied(2). In the under-mentioned case of the Lahore High Court(3), where, in an anomalous mortgage there was a *covenant to pay*, but the contract was silent about the mode of enforcing such covenant it was held that it could be enforced under S. 68(1)(a) of the Act. The High Court of Calcutta seems however to be of the opinion that the moment the mortgage in question is found to be an anomalous one, Ss. 67 and 68 cannot be applied at all(4).

As seen in Note 1 of the correct view under the section is that the terms of an anomalous mortgage cannot prevail against the express provisions of the Act insofar as such provisions may apply to anomalous mortgages.

Where the mortgagee in possession was not empowered to create lease which would be binding on the mortgagor after redemption of mortgage, the tenant inducted by the mortgagee could not claim protection under the Rent Control law(5).

3A. Applicability of general provisions of law.

It has been held by the Patna High Court that [illegible] the application of general principles of law, such as the doctrine of subrogation to securities, to anomalous mortgages(1). In that case there was nothing in the contract [illegible] the application of the doctrine. If the contract expressly or impliedly negatives any such [illegible] of subrogation it is clear that the principle cannot be applied in opposition to the contract.

4. Mortgagee entitled under deed to foreclosure and sale — Discretion of Court to grant decree for sale.

See Note 18 on S. 67 and the AIR Commentaries on the Code of Civil Procedure [illegible] Edn., O. 34, R. 4, Note 9 in the Appendix.

5. Combination of a simple mortgage and a usufructuary mortgage

There was a conflict of opinions before the amendment of this section in 1929 as to whether a combination of a simple mortgage and a usufructuary mortgage was an anomalous mortgage. The general view was that it was not an anomalous mortgage(1) though in some cases it was held to be an anomalous mortgage(2).

There was also difference of opinion prior to the amendment of 1929 as regards the rights and *liabilities* of the parties to such a combined mortgage. According to one view which considered it as an anomalous mortgage, the rights and liabilities of the parties were determined by the provisions of the Act itself(3). The other view was that though such mortgages were *not* anomalous ones,

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2. AIR 1968 Pat 222 (230) (DB) (Provisions of Ss. 67 and 98 not conflicting — Provisions of S. 67, applicable.) ** AIR 1950 Pat 13 (15, 16) (DB) (Where a mortgagee is compelled to pay a previous mortgage-debt in order to obtain possession of the mortgaged property, he is entitled to the right of legal subrogation under S. 92(1) where such a right is not curtailed by the terms of the contract.) ** AIR 1943 Sind 59 (61) (DB) (There is no reason, why in a mortgage which technically must be classed as anomalous the mortgagee should have no remedy under S. 68 if the mortgaged property is wholly destroyed, unless express provision for such remedy appears in the deed.)

3. AIR 1935 Lah 103 (104) : 16 Lah 612 (DB).

4. AIR 1924 Cal 592 (594) (DB).

5. AIR 1987 SC 2146 (2155) : (1987) 4 SCC 223.

Section 98 — Note 3A

1. AIR 1937 Pat 345 (347)

Section 98 — Note 5

1. See Note 41 on Section 58.

2. See Note 41 on Section 58

3. AIR 1929 PC 129 (141) : 56 Ind App 299 ** (1904) 27 Mad 526 (528) (FB)

the rights and liabilities of the parties were to be determined by the terms of the mortgage-deed(4) A third view was that such a combination constituted an anomalous mortgage within the meaning of S. 98 and hence the rights and liabilities were governed by the terms of the contract and not by the provisions of the Act(5). See also S. 68, Note 17.

The amendment in 1929 has put an end to the above conflict by including such a mortgage in the definition of an anomalous mortgage It is clear that the rights and liabilities of the parties to such a mortgage would now be governed by the terms of the contract as evidenced by the mortgage-deed and, so far as such contract does not extend, by local usage(6). In the undermentioned cases(7) the amendment has been held not to be retrospective

A mortgagee under such a mortgage has a right of sale(8) and also a right to obtain a decree for the mortgage-money on the basis of the personal covenant in the mortgage(9). The dismissal of a suit for sale of the property, however, only bars an action for sale but does not extinguish the right of the mortgagee to possess the property It, therefore, follows that until the debt is liquidated the security remains unaffected(10).

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4. AIR 1939 Pat 540 (542, 543) (DB)

5. (1903) 27 Bom 600 (603) (DB).

6. **AIR 1958 SC 941 (945).** (Liability of mortgagee to render accounts depends on terms of the mortgage-deed) ** **AIR 1947 Lah 40 (45) : ILR (1946) Lah 805 (FB).** (Mortgage with possession — Personal covenant to pay principal by certain date — Covenant to pay interest not wholly covered by usufruct of property - Mortgage is anomalous — Mortgagee can bring mortgaged property to sale — AIR 1933 Lah 151. **Overruled.**) ** (1978) 19 Guj LR 420 (430) ** AIR 1956 Mad 434 (437) (DB) ** AIR 1953 Madh Bha 9 (12) (Deed transferring possession of land to creditor for a certain period towards discharge of debt — Debtor also contracting for personal liability — Deed held anomalous mortgage, a combination of simple and usufructuary mortgage and not a zurpeshgi lease — Mortgagor's right to redeem held was implied in condition that mortgagee's right to land was to cease after the expiry of stipulated period.) ** AIR 1934 Rang 159 (159)

7. AIR 1934 Oudh 255 (256) 10 Luck 10 (DB) ** AIR 1939 Pat 540 (542) (DB)

8. **AIR 1927 PC 32 (36) : 54 Ind App 68 ** AIR 1947 Lah 40 (45) : ILR (1946) Lah 805 (FB) ** AIR 1973 Raj 173 : 1972 Raj LW 310 (FB).** (Provisions of S 67 and S 98 do not conflict with each other — Anomalous mortgagee is entitled to sale in absence of contract to the contrary) ** AIR 1968 Pat 222 (230) ILR 46 Pat 1202 (DB) (Anomalous mortgage — Absence of covenant for sale — Provisions of S 67 are applicable — Provisions of Ss 67 and 98 are not conflicting — Mortgagee entitled to realise mortgage money by sale of mortgaged property) ** AIR 1964 Madh Pra 305 (306) (DB) ** AIR 1953 Mad 13 (15) (DB) ** AIR 1922 Pat 167 (169) (DB) ** (1913) 16 Oudh Cas 90 (93) ** AIR 1934 Oudh 255 (256) 10 Luck 10 (DB) (Express provision giving power of sale is not necessary for simple mortgage — Personal covenant carries with it power of sale by implication — Mortgagee entitled to take possession on default of mortgagor — This does not take away power of sale) ** (1913) 18 Ind Cas 286 (287) (Oudh) ** AIR 1921 Pat 403 (405) (DB) ** **(1904) 27 Mad 526 (528) (FB).** (The right to cause the mortgaged property to be sold in default of payment being implied within the meaning of S 58(b)) ** AIR 1935 Lah 103 (104) 16 Lah 612 (DB). (A personal covenant to pay is held to have the effect of implying a right of sale.)

[**See also** AIR 1956 Mad 434 (441) (DB) (*Held*, on facts that the deed of mortgage which gave the mortgagee a right to recover only the amount of the principal by sale of the mortgaged property did not create any charge for the interest due thereon)]

Also see S. 67, Note 15 and S. 68, Note 17.

9. **(1904) 27 Mad 526 (528) (FB).** ** AIR 1935 Lah 103 (104) · 16 Lah 612 (DB).

10. 1961 Jab LJ 1207 (1208).

See also Note 41 on S. 58.

Though the document in the present case is styled as a possessory mortgage deed, the mortgagee is given the right to bring the property to sell on the mortgagor failing to pay the mortgaged money after the prescribed period. The document is therefore not a usufructuary mortgage simpliciter whereas it partakes the character of a simple mortgage also, such a mortgage comes under the category of anomalous mortgage(11).

6. Combination of a usufructuary mortgage and a mortgage by conditional sale.

Prior to the amendment of this section in 1929, a combination of a mortgage by coditional sale and a usufructuary mortgage was not regarded as an anomalous mortgage(1). Under the present definition of an anomalous mortgage as contained in S. 58, Cl. (g) however, such a combination will clearly be an anomalous mortgage and the rights and liabilities of the parties thereto will be governed by the terms of the contract or by local usage, as the case may be.

A mortgagee under this class of mortgages has a right of foreclosure(2). Such a mortgage does not generally contain a covenant to pay and therefore the mortgagee is not entitled to a personal decree.

7. Kanom.

A kanom is a customary mortgage prevalent in Malabar. It is a combination of a usufructuary mortgage and a lease(1), and has been recognised as an anomalous mortgage(2). The mortgagor who is known as a *jenami* makes a lease in favour of the mortgagee, known as kanom-holder or *kanomdar*, a fixed rent out of which mortgagee is entitled to retain the interest due on the mortgage debt, the balance only being paid to the mortgagor. As to the rights and liabilities of the parties under this class of mortgages, see the Malabar Tenancy Act, 1929 (XIV of 1929) and the undermentioned cases(3).

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11. AIR 1994 Ker 141 (144) : 1994 (1) Ker LJ 89

Section 98 — Note 6

1. AIR 1924 Rang 93 (85) : 1 Rang 419 (DB)
2. (1913) 21 Ind Cas 457 (458) (DB) (All)

Section 98 — Note 7

1. AIR 1951 Mad 187 (189) . ILR (1952) Mad 92 (FB) ** (1954) 1 Mad LJ 439 (442) ** AIR 1919 Mad 320 (320) (DB) (Kanom is an anomalous mortgage.) ** AIR 1926 Mad 650 (651) (It is a combination of usufructuary mortgage and a lease for twelve years.) ** AIR 1921 Mad 243 (245) : 44 Mad 344 (DB) ** (1903) 26 Mad 727 (728) (FB). (A kanom caures for twelve years.)
2. AIR 1951 Mad 187 (189) : ILR (1952) Mad 92 (FB) ** (1954) 1 Mad LJ 439 (442) ** AIR 1926 Mad 650 (651) ** AIR 1921 Mad 243 (245) : 44 Mad 344 (DB) ** AIR 1914 Mad 317 (318) ** (1907) 30 Mad 300 (302, 303) (DB) ** AIR 1933 Mad 876 (879)
3. (1954) 1 Mad LJ 439 (441, 442) (*Held*, on facts that the kanartham exceeded 40 percent of the jenmi's rights and therefore the kanom was a mortgage in regard to which the kanomdar could not claim fixity of tenure.) ** AIR 1951 Mad 187 (190) : ILR (1952) Mad 92 (FB). (Though a jenmi could have instituted a suit for recovery of the rent from the kanomdar as and when it fell due during the subsistence of the kanom, still the rent in arrear becomes a matter of account to be taken between the janmi and the kanomdar in a suit for redemption for the kanom. The fact that the kanomdar had to pay porappad or michawaram every year does not exempt him from liability to pay it at the time of redemption if he failed to pay it at the stipulated time.) ** (1898) 21 Mad 411 (4, 3) (DB) (In a suit to redeem a kanom of land on which timber has grown, the jenmi is not entitled to be credited with half the value of the timber under the Malabar Compensation for Tenants' Improvements Act 1 of 1887 but the jenmi must pay the full costs of the improvements which consist of timber trees.) ** (1898) 21 Mad 138 (139) (DB) (As regards the value of improvements, there is no distinction between a tenant under a kanom and under a verumpattam.) ** (1884) 7 Mad

As a *kanom* partakes the nature of a usufructuary mortgage, the *kanomdar* has no right to bring the property to sale(4). His only right is to remain in possession for the period of twelve years and thereafter until he is paid the *kanom* amount together with the value of improvements, if any, effected by him(5). He does not forfeit his right to hold for twelve years by allowing the rent to fall into arrears(6).

An *ubhayapattam* is equivalent to a *kanom* mortgage(7).

8. Otti.

An otti is another form of anomalous mortgage prevalent in Malabar, the incidents of which are governed by local usage. As to the rights and liabilities of the parties under the local usage applicable in this class of mortgages, see the undermentioned cases(1).

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545 (547) (DB) (A jenmi can set off arrears of rent, not only against the kanom amount, but also against the improvements made by the kanomdar, even where such improvements have been hypothecated to a creditor of the kanomdar.) ** **(1881) 3 Mad 382 (383) (FB)** ** (1907) 30 Mad 300 (302, 303) (DB) ** (1880) 2 Mad 193 (193) (DB) (Kanom expressly providing for the surrender of the property demised on demand — Grantor held could redeem without waiting for any fixed number of years.) ** (1887) 10 Mad 192 (193) (DB) (The primary intention that a kanom is to be redeemed only after twelve years can be negatived either expressly or by implication by a special clause.) ** (1880) 2 Mad 45 (46) (DB) (In the case of Kanom it is not competent to mortgagors to redeem before the arrival of the appointed time.) ** (1882) 5 Mad 310 (313) (DB). (Kanom containing stipulations as to compensation for improvements — "Clause also to the effect that land was to be surrendered "whenever the amount advanced is ready" — **Held,** mortgagor not entitled to redeem before expiry of 12 years — Words construed as referring to period subsequent to 12 years.) ** (1890) 14 Mad 76 (77) (DB) ** (1863) 1 Mad HCR 445 (446) (DB) (A Kanom-holder who denies his jenmi's title forfeits his right to hold for twelve years.) ** (1864) 2 Mad HCR 109 (110) (DB). (Do.) ** (1864) 2 Mad HCR 161 (161) (DB) (Do.) ** (1902) 27 Mad 26 (27, 28) (DB).

4. (1899) 22 Mad 350 (351) (DB) (Kanom is not a simple mortgage.) ** AIR 1926 Mad 650 (651) ** AIR 1914 Mad 317 (318) (DB).

Also see Section 58, Note 37.

[But see (1892) 15 Mad 366 (370) (DB) (Kanom is a combination of a simple mortgage and a usufructuary mortgage — Kanomdar therefore has a right of sale.)]

5. AIR 1926 Mad 650 (651).

[See also (1882) 6 Mad 140 (145) (DB).]

6. AIR 1951 Mad 187 (189) : ILR (1952) Mad 92 (FB) ** (1862) 1 Mad HCR 112 (112) (DB) ** (1862) 1 Mad HCR 113n (113n) (DB).

7. (1907) 30 Mad 61 (65) (DB).

Section 98 — Note 8

1. AIR 1973 Ker 270 (272, 273) : 1973 Ker LT 608 ("Otti" is a customary form of mortgage prevalent in Kerala. A person borrowing money under it is under personal obligation to repay the amount. It is not necessary that an express provision should be made for the same.) ** AIR 1955 Trav-Co 207 (207) (The customary law of Travancore is that a person who borrows money on otti is personally liable for the amounts as in the case of a hypothecation bond.) ** (1863) 1 Mad HCR 261 (262) (DB). (Cannot be redeemed before lapse of 12 years.) ** (1863) 1 Mad HCR 122 (123) (DB). (Do.) ** (1880) 2 Mad 45 (45) (DB) (Do.) ** (1882) 4 Mad 113 (118) (DB). (Do.) ** (1864) 2 Mad HCR 161 (161) (DB) (Ottidar forfeits right by denying jenmi's title.) ** (1881) 3 Mad 74 (75, 76) (DB) (Do.) ** (1882) 5 Mad 198 (199) (DB) (Ottidar can claim pre-emption.) ** (1890) 13 Mad 490 (491) (DB) (Do.) ** (1911) 12 Ind Cas 626 (627) (DB) (Mad) (In South Kanara Ottidar cannot claim pre-emption.) ** (1891) 1 Mad LJ 485 (487) (DB) (Ottidar has a prior right to make further advances to mortgagor.) ** (1881) 3 Mad 246 (247) (DB).

9. Peruarthum.

A peruarthum is also a customary anomalous mortgage prevailing in certain parts of Malabar Under the local usage governing it such a mortgage is redeemable on payment, not of the amount for which the land is mortgaged, but of its market-value(1)

10. Iladarawara.

An iladarawara mortgage is a customary anomalous mortgage in vogue in South Kanara It is usually for a long term of years It is also a lease of the property for the term agreed upon Repayment of the loan is not permissible under the custom before the expiry of the term(1)

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99. ATTACHMENT OF MORTGAGED PROPERTY.— [*Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S 156 and Schedule V*]

Charges

100. CHARGES.— Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained [A][which apply to a simple mortgage shall, so far as may be, apply to such charge]

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, [B][and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge]

[A] *Substituted* for the words "as to a mortgagor shall so far as may be apply to the owner of such property, and the provisions of sections 81 and 82 shall, so far as may be apply to the person having such charge", by the Transfer of Property (Amendment) Act, 1929 (20 of 1929) S 50

[B] *Added, ibid.*

Synopsis

1. **Scope of the section.**
2. **Liens and charges under the English law.**
3. **Charge on movables.**
4. **Charge on future property.**
5. **"Made security".**
6. **Property must be specified.**
7. **"By act of parties".**
8. **Security bond charging immovable property.**
9. **Contingent charge.**
10. **Floating charge.**
11. **"By operation of law".**
12. **Charge under Rent Acts.**
13. **"And the transaction does not amount to a mortgage".**
14. **Transfer invalid as a mortgage whether operates as a charge.**
15. **Mortgageor charge.**
16. **Creation of charge — Writing and registration, whether necessary.**

(Do.) ** (1883) 6 Mad 140 (144, 145) (DB) ** (1883) 1 Mad HCR 356 (357) (DB) ** (1886) 9 Mad 371 (373) (DB) ** (1884) 7 Mad 442 (452) (DB)

Section 98 — Note 9

1. (1878) 1 Mad 57 (59) (DB).

Section 98 — Note 10

1. (1882) 4 Mad 113 (118) (DB).

17. Rights and liabilities of a charge-holder.
18. Priority as amongst several charges.
19. Assignment of charge.
20. Section does not apply to a charge of a trustee.
21. "Save as otherwise expressly provided by any law for the time being in force".
22. Transferee for consideration without notice.
23. Subsequent transferee from a transferee, if protected.
24. Charge, whether binds auction-purchaser.
25. Enforcement of charge.
26. Personal liability.
27. Sale in execution of a charge decree — Whether extinguishes the charge.
28. Charge created by a decree.
(A) Whether such a charge is within this section.
(B) Enforceability against transferee for consideration without notice.
(C) Enforcement of the charge.
29. Payments in the nature of salvage.
30. Hindu widow's rights of maintenance.
31. Debts of a deceased Muhammadan.
32. Nankar and dahyak rights.

1. Scope of the section.

This section defines "a charge" and states what provisions of the Act apply thereto and against whom it is enforceable.

A person, according to this section, is said to have a charge on the immovable property belonging to another when—

(1) such property is *made security for the payment of money* due by the latter, and

(2) such transaction *does not amount to a mortgage.*

A mortgage, as defined in S. 58, is a transfer of an interest in specific immovable property for the purpose of *securing the payment of loan*. Thus, in the case of a mortgage as well as in a charge, the property of another person is made security for a loan or debt; but whereas a mortgage is a *transfer of an interest* in property, a charge, as defined above, does not involve the transfer of any interest in property(1).

According to Sir John Salmond a charge is the best type of security He observes :

"The best type of security is that which combines the most efficient protection of the creditor with the least interference with the rights of the debtor, and in this latter respect the mortgage falls far short of the ideal. The true form of security is a lien, leaving the full legal and equitable ownership in the debtor, but vesting in the creditor such rights and powers (as of sale, possession, and so forth) as are required, according to the nature of the subject-matter, to give the creditor sufficient protection, and lapsing *ipso jure* with the discharge of the debt secured"(2).

A charge is a device to create enforceable security(3)

Hypothecation creates a charge in favour of hypothecatee(4).

Where a decree for payment of money against an industrial unit stipulated that judgment-debtor should not create charge on machinery of unit but did not stipulate that charge is created in

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Section 100 — Note 1

1. AIR 1951 All 141 (145, 150) : ILR (1953) 1 All 284 (FB) ** AIR 1937 Oudh 217 (219) : 13 Luck 101 (FB) ** AIR 1966 Pat 75 (79) (DB) ** 1965 All LJ 1104 (1106) ** AIR 1965 Ker 27 (27) ** AIR 1964 Bom 1 (3) ILR (1963) Bom 509 (DB) ** AIR 1962 Cal 12 (16) (DB) ** (1956) 60 Cal WN 988 (991) ** AIR 1951 Cal 398 (399) (DB) ** AIR 1951 Pat 254 (255) ILR 30 Pat 613 ** AIR 1950 Nag 117 (123) ILR (1949) Nag 802 ** ILR (1949) 1 Cal 392 (397) (DB) (That is so whether charge is created by decree or by contract.)

   See Note 4 on S. 58

2. Sir John Salmond, "Jurisprudence", 7th Edn., 1924, Page 464.

3. AIR 1985 Kant 185 (189)

4. AIR 1995 Kant 195 (192)

favour of judgment, creditor, decree cannot be said to have created charge on machinery of industrial unit(5).

A charge under the section may be created either by *act of parties* or by *operation of law*. It is stated in the Preamble that this Act is one "to define and amend certain parts of the law relating to the transfer of property by *act of parties*" and in view of that statement, it is not easy to understand why charges created by operation of law have been included in this section. "But for the fact that there are some sections in the Act which refer to such charges", observes Lord Williams, J., of the Calcutta High Court, "one would have thought that they had been included by inadvertence."(6)

Charge can be created in respect of both immovable and movable properties. A charge is nothing but a device to create security which is enforceable in a Court of law. In order to create a charge in respect of immovable property, it is necessary that the same is required to be embodied in a document. However in order to create a charge relating to movables it need not be in writing. Further in order to create a chrge, it is not necessary to employ any technical or any particular form of expression. All that is required is that there should be a clear intention to make a particular property as a security for the payment of money. Creation of enforceable security is the essence of charge either in respect of immovable property or in respect of moveables(7).

There is a difference of opinion on the question whether this section is exhaustive of all kinds of charges. One view is that it is exhaustive of all charges and that a Court is not justified in introducing new conceptions of charges not supported by the statutes in India(8). The other view is that the section is not exhaustive and that there are certain kinds of charges which are not included within the purview of this section(9). There are charges created by a decree of Court(10), or by an award(11) and charges created on the grounds of equity(12). As to whether these are charges,

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5. AIR 1995 Kant 185 (189).

6. AIR 1934 Cal 862 (863, 864) : 61 Cal 1047 (DB).

7. AIR 1995 Kant 185 (189).

8. AIR 1926 Mad 55 (56, 57) : 48 Mad 821 (DB). (The Act is intended to be exhaustive and the Courts are not at liberty to follow English common law rules.)

9. **AIR 1959 Andh Pra 622 (625) : ILR (1959) Andh Pra 511 (FB)** ** AIR 1940 Nag 163 (166) : ILR (1941) Nag 513 (DB). (This section does not apply to charge created by a decree of Court.) ** (1937) 169 Ind Cas 169 (171) (Nag). (Do.) ** AIR 1959 All 579 (580) (DB). (Do.)

   [See also AIR 1926 Mad 141 (142). (The mere fact that the charge does not come within the meaning of S. 100 of the Transfer of Property Act does not necessarily imply that it is not a charge within the meaning of Art. 132 of the Limitation Act.)

10. **AIR 1929 PC 174 (176) : 56 Ind App 254** ** (1911) 10 Ind Cas 481 (486) (SB) (All). (*Held* on construction that the decree in question was not a decree for sale of mortgaged property but merely operated to create a charge on it.) ** **AIR 1959 Andh Pra 622 (625), ILR (1959) Andh Pra 511 (FB)** ** (1983) 2 Andh WR 211 (215). (The charge in specific performance decrees is a statutory charge whereas the charge created in the maintenance is by act of Court.) ** (1975) Rev I R 514 : ILR (1976) 2 Pun 768. (The recital in the decree that the house would remain under attachment till the payment of the decretal amount does not create any charge for payment of the same.) ** AIR 1920 Mad 722 (723) : 43 Mad 800 (DB). (Decree for maintenance of a Hindu widow creating charge on family estate.) ** AIR 1925 Mad 1101 (1103) (DB). (Creation of a charge by a compromise decree in a money suit does not convert the suit into a mortgage suit.) ** (1907) 30 Mad 478 (481) (DB). (Compromise in a suit for money charging the amount on property is lawful and the relief by way of charge relates to the suit.)

11. AIR 1926 All 527 (528, 529) (DB) ** AIR 1928 Lah 440 (441) (DB). (*Held* no charge was created by the award.) ** AIR 1922 All 410 (411) (DB).

12. AIR 1943 Mad 373 (376) : ILR (1943) Mad 794 (DB). (*A* constructing building on *B*'s land

falling under this section, see the Notes that follow.

Hypothecation is a specie of pledge. Hypothecation though not necessarily accompanied by possession of the property and though it may not create a title as such would indeed provide a security. Hypothecation does create a charge(13).

The principle of lis pendens applies where a pre-existing charge is enforced and transfer pendente lite is not protected(14).

When assuming that the charge was created voluntarily by the assessee, it was not created on

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— *B*'s encouraging construction — *A* is entitled to a charge on building for money expended by him) ** **(1893) 15 All 304 (310) : 20 Ind App 108 (PC)** ** (1903) 13 Mad LJ 228 (230) (DB) (Payment by benamidar of a mortgage executed by him with the consent of the real owner and binding on him — Payment is not voluntary and benamidar is entitled to a charge for it 15 All 304 (PC), Foll.) ** (1894) 18 Bom 86 (91) (DB). (*A* mortgaged property to *B* *C* purchased equity of redemption in execution of a money-decree against *A*. Subsequently *A* mortgaged the property usufructuarily to *D* who had no knowledge of *C*'s purchase *A* paid off the mortgage in favour of *B* with the money of *D* It was held that at the date of the mortgage in favour of *D*, *A* had no right to mortgage the property as *C* had already purchased the equity of redemption; but as the money advanced by *D* had been utilized to pay off the mortgage in favour of *B*, which would have been a burden on (as purchaser of the equity of redemption, *D* had an equitable charge on the property for the amount paid) ** (1892) 19 Cal 401 (410, 411) (DB). (*A* *B* and *C* were undivided coparceners. *A* and *B* executed a mortgage in favour of *D* in respect of the joint property without the consent of *C* in order to raise money for the benefit of themselves Subsequently, all of them executed a mortgage in favour of *E* *D* obtained an *ex parte* decree against *A*, *B* and *C* and *F* purchased the property in execution *E* also obtained an *ex parte* decree and *G* purchased the property in execution of his decree *G* sued for a declaration that the mortgage in favour of *D* was invalid It was held that though *A* and *B* had no authority, without the consent of *C*, to mortgage their undivided shares yet *G* who derived his title from *A*, *B* and *C* was not entitled to recover the shares without paying to *F* who had by his auction purchase acquired the rights of *D* the money advanced on *D*'s mortgage which should be considered an equitable charge on the share) ** (1912) 16 Ind Cas 405 (406) (DB) (Mad) (Mortgage by karnavan — Only a portion of consideration utilised for the benefit of tarwad Mortgage declared not binding on other members but mortgagee held entitled to a charge in equity for the portion of consideration used for the benefit of tarwad) ** AIR 1914 Mad 698 (700) (DB) (Transfer by Ejnan of an alias anthanam family of family property — Only a portion used for benefit of family — Transfer declared not binding on the family, but charge was given in equity for the portion of consideration.) ** (1912) 14 Ind Cas 14 (15) (Oudh). (A mortgagee advancing money to a guardian on the security of a minor's property but not acting under the authority of the Court cannot prove necessity for raising the whole money — The contract of mortgage is voidable and is liable to be set aside at the option of the minor but the mortgagee will be entitled to a charge on the property for the necessary amount where a portion of the money has been spent for the minor's benefit) ** (1884) Pun Re No 52 p 128 (130) (Where part of the consideration money was required for necessary purposes held that the vendee was entitled to a charge on the estate for such amount.) ** AIR 1918 Cal 804 (805, 806) (DB) (A mokarari maurasi lease of wakf property by a mutwalli is void if there is no urgent necessity for granting it but the lessee is entitled to a refund of the amount of salami paid by him which would be a charge upon the wakf property, but he has no personal claim against the mutwali.)

[See also AIR 1939 Nag 132 (134). (Agreement providing that in default of a certain payment for maintenance by one party to the other the latter will be at liberty to cultivate a field and maintain herself — Equitable lien is created — But such a charge cannot be enforced by sale of the land.)]

13. AIR 1995 Kant 185 (192).

14. AIR 1983 Andh Pra 49 (56) : (1982) 2 Andh LT 280

threat of the transferor, by operation of law or decree of a Court etc , the charge was created voluntarily by the assessee and therefore the interest payable on such charge is not deductible under S 24(1)(iv) of the I.-T. Act(15).

2. Liens and charges under the English law.

In England a "lien", in its *primary* sense is a right in one man to *retain that which is in his possession* but which belongs to another until certain demands of the person in possession are satisfied(1). In this sense it is given by law and not by contract, and subject to some exceptions does not arise until possession of the property is obtained(2) It is only a right of defence, not a right of action and, consequently, can be claimed in respect of a statute barred debt It does not, except in special circumstances, give any right to sell the thing retained, and is not capable of being assigned(3).

A lien, in its *secondary* sense, where the person claiming the lien has not got possession of the thing in respect of which the lien is claimed, is either judicial, equitable or statutory Judicial liens are obligations established by judgments or orders of Courts of justice binding the property, but giving no right of possession. Equitable liens are founded on the consideration of a duty or implied intention on the part of the owner to make property answerable for a specific claim(4) An equitable lien has been defined as an equitable right conferred by law upon one man, to a charge upon the real or personal property of another until certain specific claims have been satisfied(5)

An equitable charge is a security which does not create a legal estate in land but only gives a right to payment out of the property It entitles the holder to have the property comprised therein sold to raise the money charged thereon, but it does not, in the absence of any express provision to that effect, amount to an agreement to give a legal mortgage, and the mode of enforcing it is by sale and not by foreclosure(6).

An equitable lien differs from an equitable charge in that the latter is a right founded on contract while the equitable lien is founded on the principle of equity But in so far as their effect is concerned, there is no distinction between an equitable lien and equitable charge and both are liable to be defeated under the statutes of limitation(7). An equitable lien differs also from the common law lien in that the latter is founded on possession and, except as modified by statute, merely confers a right to detain the property until payment whereas the former which exists irrespective of possession confers on the holder the right to judicial sale(8)

3. Charge on movables.

This section deals with charges on immovable property It does not apply to a charge created on movable property(1). The creation of a charge on movables need not be in writing(2) It has

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15. 1998 (149) Cur Tax Rep 444 (448) (Mad)

Section 100 — Note 2

1. Halsbury, Laws of England, (Hailsham Edition), Vol 20 para 695 ** AIR 1955 Bom 419 (428) ** (1917) 1 Ch 99 (103, 104) 86 LJ Ch 204 115 LT 700 1917 HBR 97 61 SJ 131, Dyson v. Peat.
2. Halsbury Laws of England (Hailsham Edition), Vol 20, Para 695
3. Halsbury, Laws of England (Hailsham Edition), Vol 20, Para 696
4. Halsbury, Laws of England (Hailsham Edition), Vol. 20, Para 698
5. Halsbury, Laws of England (Hailsham Edition), Vol 20 Para 714
6. Halsbury, Laws of England (Hailsham Edition) Vol. 23, Para 352
7. Halsbury, Laws of England (Hailsham Edition), Vol. 20, Para 714.
8. Halsbury, Laws of England (Hailsham Edition), Vol 20, Para 714

Section 100 — Note 3

1. AIR 1929 Lah 274 (275) (DB). (Charge created on timber.)
2. (1969) 1 ITJ 14 · 71 ITR 713 (DB) (Bom) (Whenever a particular property of fund is

been held that for creating a charge on movables the property must be specifically indicated(3). A charge on movable property which might come into existence at a future date is valid as an agreement to charge such property(4). The charge created by a lease on shares for debts owed by the shareholders to the Company is not merely an equitable charge(5).

See also Note 4.

4. Charge on future property.

In order to create a present charge it is, of course, necessary that the property charged must be in existence. A document creating a charge on property which may come into existence in the future does not create any charge *in praesenti*. It may, however, operate as an *agreement* to create a charge when the property comes into existence in the future. As has been seen in Note 2 on S. 43, when it does come into existence, equity, treating that as done which ought to be done, fastens upon the property and the agreement to create a charge will become a completed charge(1).

Where a mortgagor mortgaged certain properties to a portion of which he had no present title but acquired it later on, and on the death of the mortgagor his heir sold such portion to third person, the question was whether the mortgagor was entitled to a decree charged on such portion. It was held that a charge on future properties operates upon such property as soon as it comes into existence and hence even though Sec. 43 was not applicable, the transferee would obtain the benefit of the subseqeunt acquisition of title by the transferor(2).

Assignment of future debt by way of security. There can be a valid and legal assignment of moneys which are to fall due hereafter, by way of security for the loans borrowed by the assignor. In such a case, the creditor in whose favour the security is created will be entitled to priority over

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earmarked or made a security for payment of a debt a charge would arise on that property.)

[See AIR 1916 Lah 54 (55) : 1916 Pun Re No. 32 (DB). (If made orally, it is as effectual (except in cases provided by S. 48 of the Registration Act) as if it were effected by an instrument in writing.)]

3. AIR 1955 Sau 86 (88) : 9 Sau LR 43 (DB). (Where a decree refers to the cash annuity payable by the Government to the defendant and makes it available for the obligation arising under the decree, it creates a charge on the said amount.) ** AIR 1924 Nag 360 (361) *(Obiter.)*

4. AIR 1923 All 199 (200). (Claim was enforceable against the transferee of the produce with notice of the equitable interest.) ** (1886) 13 Cal 262 (264) (DB). (Mortgage of future indigo crop.) ** AIR 1929 Lah 274 (275) (DB) ** AIR 1933 Cal 154 (159) : 59 Cal 1372 (DB).

5. AIR 1971 Cal 18 : (1970) 2 Com LJ 64.

Section 100 — Note 4

1. AIR 1914 Bom 267 (268) (DB). (Lease providing that on lessee-company's delay in payment of rent landlord would recover arrears from buildings erected on land — *Held*, charge was created on buildings when they came into existence.) ** AIR 1953 Bom 101 (103). (The rule of English Law as stated in Holroyd v. Marshall, (1861-62) 10 HLC 191 : 11 ER 999 and Collyer v. Isaacs, (1881) 19 Ch D 342 : 51 LJ Ch 14 applies to India. Hence a charge on future property operates upon such property as soon as it comes into existence.) ** AIR 1951 Assam 56 (58) : ILR (1951) 3 Assam 1 (DB) ** AIR 1938 All 22 (25) : ILR (1938) All 63 (DB). (Mortgage of a share in immovable property for which mortgagor had sued for pre-emption — Mortgagee also aware that property did not belong to mortgagor at that time but would be mortgagor's in future — *Held*: transaction did not amount to a mortgage but created a charge on the share to be subsequently acquired by the mortgagor.)

[See also (1855) 69 ER 462 (463) : 1 K & J 277 (279) : 1 Jur (NS) 750 : 103 RR 79, Riccard v. Prichard.]

2. AIR 1972 Ker 176 (178, 179) : 1972 Ker LT 94

the other creditors of the person giving the security(3).

See also Note 3.

5. "Made security".

In order to create a charge it is not necessary to employ any technical or any particular form of words. All that is required is that there must be a clear intention to make a particular property, a security for the payment of money(1). As observed in *Nathan Lal v. Durga Das*(2),

> "A charge does not involve the transfer of the interest in the property subject thereto and arises from the circumstance that certain property, movable or immovable, or any interest in such property, is indicated with certainty as the fund out of which a certain claim is to be met or satisfied, the fund so indicated being the security for the claim."

Where the property is not intended to serve as security, there can be neither a mortgage nor a charge(3).

In cases where the transaction is reduced to writing the cardinal rule of construction is that the intention of the parties should be gathered from the language used by the parties in such deeds(4).

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3. AIR 1965 All 474 (475, 476) ILR (1965) 1 All 23 (DB) ** (1945) 49 Cal WN 494 (496) (DB) (Contractor doing work for Municipality borrowing from Bank on the security of the moneys that may become due to him from the Municipality for work done by him.)

Section 100 — Note 5

1. **AIR 1970 SC 504 (507) : (1970) 1 SCJ 347.** (Family arrangement providing for discharge of personal debts of the donor out of share of another does not create charge.) ** 1979 Tax LR (NOC) 169 (177) 123 ITR 118 (DB) (All) (It is true that the creditor will enforce his charge on default, but that by itself does not postpone creation of an immediate charge.) ** AIR 1967 Raj 258 (263) ** AIR 1958 Mad 23 (25) ** (1956 Andh WR 509 (The words that "O S No 670 of 1944 do stand decreed in respect of a life interest in one acre of the schedule attached to plaint, therein, free from claims of Vulugundam Radhabayamma etc" are of sufficient amplitude creating a charge over acre 1-0 out of the properties mentioned in the schedule.) ** 1956 Ker LT 313 (320) (DB) ** AIR 1955 Bom 419 (425) ** AIR 1955 Sau 86 (88) 9 Sau LR 43 (DB) ** AIR 1952 Trav-Co 62 (64) ** AIR 1950 Cal 323 (324) (DB). (Recitals in jamanama making it clear that defendant's vatni interest was made security for payment of money due to plaintiff in respect of derpatni rent — Document creates a charge within S. 100.) ** AIR 1950 Pat 478 (480) (Even if document fails as a lease it could be treated as creating a charge on leasehold property where in clear terms it creates a charge.) ** AIR 1949 All 539 (541) (DB) ** AIR 1940 Cal 93 (95) (DB) ** (1894) 70 LT 718 (718) 1894 WN 88 Craddock v. Scottish Provident Institution (Affirming (1893) 69 LT 380 on appeal.) ** AIR 1939 Nag 118 (119) ILR (1941) Nag 356 ** AIR 1929 Oudh 539 (540) (DB) ** AIR 1915 Mad 664 (672) (DB) ** AIR 1931 All 62 (64) : 52 All 985 (DB).

   [See also AIR 1951 Pat 254 (255) ILR 30 Pat 613 (DB) (Compromise in terms of which decree is passed embodying agreement that certain property shall remain under attachment till satisfaction of decree and be liable to be sold — It was held that no charge was created as it did not show intention to make the property security.) ** AIR 1914 All 279 (280) ILR 36 All 507 (509) (Equitable assignment by way of charge — Intention to assign or make a charge must be clear — Form is of no importance.) ** (1913) 19 Ind Cas 478 (479) (DB) (Mad.).]

2. AIR 1931 All 62 (64) : 52 All 985 (DB)

3. **(1892) 19 Cal 584 (593) : 19 Ind App 95 (PC).** (Taking into consideration all the deeds, granting maintenance, which were purported to create charge, held parties had no intention to create any.) ** AIR 1918 Cal 557 (566) (DB) ** 1936 RD 365 (365) (*Held* that the documents were bonds and not mortgages.) ** AIR 1936 Mad 709 (712, 713) (DB)

   [See also (1869) 12 Suth WR 491 (492) (DB).]

4. See Note 20 on S. 8, and also the undermentioned cases :

Where the intention of parties which could be gathered from the document in question, namely, the power of attorney, indicated that the property in dispute was not made security for payment of expenses incurred for managing, imposing etc the land in favour of attorney holder, as no restriction or embargo was put on owner for transfer of land and only the right created in favour of attorney holder was to claim expenses incurred as aforesaid, if his power of attorney was revoked or cancelled, no charge could be held to have been created by the document in question on the land in dispute(5) Where, however, the language of the deed is not itself precise or is ambiguous, the surrounding circumstances may be looked to, for the purpose of ascertaining such intention(6) In considering whether a particular deed or document does or does not create a charge, cases as regards other deeds are not always a good guide(7).

Ordinarily, when the parties refer in a document to particular properties as the source from which a debt is to be paid or by the sale of which a debt is to be realized, there is some indication of an intention to make the property more directly liable than on a mere enforcement of a personal liability(8) For instance in maintenance cases, where in the absence of a specific agreement the maintenance will only be a kind of indefinite charge upon the family property, even a slight indication to convert it into a definite charge may suffice(9). This will be *a fortiori* so in a case where the party claims to be entitled to succeed to or to share in a certain property and that claim is settled by a provision for maintenance payable out of that property(10) Again, where a property is already subject to a mortgage, and a later document between the same parties relating to a fresh advance provides that the previous mortgage shall not be redeemed before the later debt is paid or that the later debt shall be paid at the time of redeeming the prior mortgage, it has been held that the parties must have intended that the security under the first mortgage should be available for the fresh advance as well(11) But the stipulation in a subsequent mortgage of a different property to the

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AIR 1967 Raj 258 (263) ** 1965 All LJ 1104 (1107) ** AIR 1952 Trav-Co 62 (64) ** AIR 1949 All 539 (539) ILR (1949) All 790 (DB) ** (1911) 12 Ind Cas 146 (146) (DB) (Mad) (There being no ambiguity in the language of the document evidence of the conduct of the parties was held inadmissible to prove an intention different from that appearing from the deed) ** AIR 1925 Oudh 550 (552) ** AIR 1929 Oudh 539 (540) (DB)

5. AIR 2002 Him Pra 99 (102).

6. See Note 20 on S. 8, and also the undermentioned cases :

AIR 1915 Mad 664 (672) (DB) (Per Seshagiri Aiyer, J — View upheld in AIR 1918 PC 156) ** AIR 1931 Mad 140 (145, 146) 54 Mad 163 (DB) ** AIR 1929 Oudh 80 (82) · 3 Luck 446 (DB).

7. AIR 1967 Raj 258 (263) ** 1965 All LJ 1104 (1107) ** AIR 1955 Bom 419 (428) ** AIR 1926 All 171 (171) (DB) ** AIR 1941 Nag 102 (103) · ILR (1942) Nag 263 (DB).

8. AIR 1935 Mad 17 (19) ** 1885 All WN 19 (21) (DB) (Charge however was held inoperative for want of registration.)

9. AIR 1935 Mad 17 (19) ** AIR 1940 Cal 93 (95) (DB) (Where a certain allowance was to be paid out of the estate left by the testator it was held that a charge was created) ** AIR 1932 Oudh 168 (170) (DB) (Certain maintenance allowance was to be paid from "riyasat taluka" It was held that the deed created no personal liability on the holder of the estate for it, but only a charge for the allowance on the estate) ** AIR 1936 Sind 16 (18) (DB) ** AIR 1923 Cal 27 (30) 50 Cal 266 (DB) ** AIR 1920 Cal 986 (987) (DB) (Provision in a deed granting an annuity that it is to be paid out of the estate of the grantor creates a charge.)

10. AIR 1918 Cal 557 (565) (DB) **** (1883) 9 Cal 945 (950, 951) : 10 Ind App 45 (PC) ** AIR 1918 PC 156 (157) : 46 Ind App 64** AIR 1935 Mad 17 (19).

11. **AIR 1930 PC 176 (177) : 57 Ind App 173 ** AIR 1933 All 257 (258) : ILR 55 All 359 (FB)** AIR 1935 Mad 17 (19) ** (1908) 32 Bom 386 (390) (DB) ** AIR 1926 All 171 (172) (DB) ** (1909) 31 All 482 (485) (DB) ** (1909) 1 Ind Cas 345 (346) (DB) (All) (Mortgagor taking further advances from mortgagee under the bond, covenanting that when-

same mortgagee to redeem it before the earlier mortgage does not create a charge in respect of the property comprised in the first mortgage(12). So also, where the parties entering into a partition arrangement say that if the parties thereto do not carry out their respective obligations, any loss incurred by one of them shall be recovered out of the properties of the others, no other connection between the properties and the enforcement of the liability can be thought of except that the properties are intended to be security(13). A direction in a partition decree asking one to pay owlety to the other sharer in order to equalize the share creates a charge over his share even where such a charge has not been created in express terms by the decree(14).

Provision for payment of money for equalising excessive allotment on partition of properties in a decree is a charge on the property(15).

A document under which a sum of money is payable out of the profits of a particular property constitutes a charge upon that property(16).

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ever he would redeem the first mortgage he would also pay money borrowed under the bond — Bond held created a charge) ** (1872) 4 NWPHCR 161 (164) (DB) ** (1919) 6 Ind Cas 165 (166) (DB) (All) ** AIR 1927 Oudh 510 (511) 3 Luck 1 (3) (DB) ** AIR 1925 Oudh 506 (507) ** AIR 1916 Oudh 329 (331) (The mere fact that mortgaged property was not described in the deed of further charge does not detract from the validity of the charge)

[See also (1912) 15 Ind Cas 851 (852) (All) ** (1965) 8 Oudh Cas 227 (230) (DB)]

Also see Section 62, Note 12

[See however (1912) 16 Ind Cas 222 (223) (DB) (All) (A executed a usufructuary mortgage in favour of B in 1864 and four days later he executed another document in favour of the mortgagee in which he promised to pay Rs 500 with interest before he redeemed the mortgage — The document was described as a tamasuk — Held that the document was neither a mortgage nor a charge — It was merely a money bond and the suit on it in 1910 was either barred by time or was premature) ** AIR 1923 Oudh 24 (25) (An undertaking by a mortgagor who takes a fresh advance that he will not redeem the mortgage until he has repaid the advance is legal and enforceable against himself but it is not a charge on the land and is not enforceable against a purchaser of the land) ** AIR 1925 Oudh 593 (594) (A deed with a similar provision but styled as tamasuk zar mazid and giving no details of the property but a mere reference to the original mortgage held could not be regarded as a deed of further charge — It created only a personal covenant against the mortgagor) ** AIR 1934 Lah 938 (940) (DB) (A subsequent bond merely stating that the bond has been executed separately and the amount of the bond will be paid before mortgage deed held did not create a charge) ** (1904) 26 All 559 (564) (DB) (Provision in a later bond that the mortgaged property should not be redeemed until the principal money and interest under the bond had been paid held created no charge on the mortgaged property) ** (1905) 27 All 178 (181) (DB). (Do.)]

12. (1911) ILR 33 All 393 (395).

13. AIR 1935 Mad 17 (19) ** AIR 1933 Mad 715 (716) (DB) ** AIR 1926 All 527 (529) (DB)

14. AIR 1957 SC 577 (583). (AIR 1926 Oudh 230 (231) cannot be held to be good law in view of the Supreme Court decision.)

15. AIR 1973 Cal 304 (305, 306).

16. AIR 1943 Bom 414 (415) (Co sharers in estate — Agreement by one to pay other lump sum annually out of income in lieu of share — Charge is created) ** AIR 1937 Oudh 420 (421) 13 Luck 35 (DB) ** AIR 1932 Oudh 336 (338) 8 Luck 168 (DB) ** (1882) 5 All 11 (14) (DB) ** AIR 1935 Oudh 309 (313) ** (1904) 7 Oudh Cas 108 (110) (Decree awarding out of annual profits of village a sum equal to 10 per cent on the Government revenue — Decree held created a charge on that village) ** AIR 1936 Oudh 52 (54) 11 Luck 575 (DB) (Under a will, part of the income assigned to the expenses of religious rites and ceremonies — Charge held was created on the property) ** (1883) 7 Mad 23 (24, 26) (DB) ** (1835) 58 ER 738 (742) 4 LJ Ch 119 7 Sim 3 40 RR 57, Revenshaw v Hollier

A mere covenant by a party not to alienate the property was held not by itself sufficient to create a charge(17). An agreement between *A* and *B* that *A* should give a regular mortgage of his immovable property for money advanced by *B* does not constitute a mortgage or charge upon such property(18). So also, an agreement to sell does not create any interest or charge on the property(19) Immovable property security cannot be furnished by submitting a certified copy of Xerox copy of the title deeds(20).

Illustrations

(1) By an agreement between *A* and *B* who were brothers, it was agreed that *B* should waive his claims to succeed to his father's estate and should withdraw a suit instituted by him against *A* for maintenance, that *A* should pay a certain monthly allowance to *B* in perpetuity, and further, if *A* for is own necessity mortgaged or hypothecated the *muafi* villages, so that the property left might be insufficient to meet the monthly allowance fixed, *A* would pay the allowance out of his other property. It was held by the Judicial Committee that the deed created a charge for the allowance on the property(21).

(2) In a particular dispute, the arbitrator awarded to the defendant property of greater value than that awarded to the plaintiff In order to equalize the division, the arbitrator awarded a certain sum to be

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[See also AIR 1929 Oudh 80 (82) . 3 Luck 446 (DB) ** AIR 1916 Oudh 129 (131) . 19 Oudh Cas 49, (Decretal charge.)]

17. (1913) 19 Ind Cas 478 (479) (DB) (Mad) ** AIR 1934 Mad 713 (714) (DB) ** (1881) 7 Cal 196 (198) (DB) ** AIR 1928 Lah 440 (441) (DB) ** (1880) 2 All 449 (451) (DB)

[See also AIR 1934 Pat 495 (495, 496) 13 Pat 620 (DB) (In an agreement for sale of land the vendor after reciting that he has received a portion of the consideration stated that "I the declarant mortgaged, hypothecated, and pledged the land entered in this deed of contract, so that should I execute any deed of any kind whatsoever, deed of sale, rehan, etc , in respect of the land entered in the deed of contract, the same shall be treated as null and void and inoperative — Held that the intention of the vendor was only to enter into covenant, usually found in such deeds, against encumbering or selling the property to another, and that the clause did not create either a charge or a mortgage)]

[See however AIR 1960 Pat 305 (305) ILR 38 Pat 1235 (DB). (Security bond — Undertaking not to alienate property till ordered by Court creates charge.) ** AIR 1929 Oudh 539 (540) (DB) (Stipulation in a decree that defendant must not dispose of this share in the factory until the satisfaction of the decretal amount held created a charge.) ** AIR 1914 All 187 (188) . 36 All 201 (DB) (Deed reciting that executant had borrowed certain sum and then referring to certain property — Covenant to repay sum with interest in certain period — Clause under which executant undertaking that until repayment of sum, he would not transfer property — Deed not using the word "hypothecate" or anything equivalent to it — Held per Richards, C J , and Bannerji, J , that deed amounted to charge, although according to Bannerji, J , it amounted to a mortgage.) ** AIR 1939 Nag 118 (119) ILR (1941) Nag 356 (Decree providing payment by instalment and directing defendant not to alienate particular property till satisfaction of decree — Decree held created charge on property.)]

18. AIR 1930 PC 76 (78) ** ILR (1963) 2 Ker 60 (64) (DB) ** AIR 1932 Oudh 54 (56) · 7 Luck 237 (DB). (The agreement merely creates a right in B to obtain a regular deed of mortgage to be executed by A) ** (1789) 30 ER 73 (74) 2 Cox Eq Cas 160, Williams v. Lucas

[See also AIR 1938 Mad 889 (892) : ILR (1939) Mad 7 (FB) ** (1913) 36 Mad 426 (434) (DB).]

Also see Section 58, Note 6

19. See Note 23 on Section 54

20. 2000 (1) Mad LW 760 (764)

21. (1883) 9 Cal 945 (951) : 10 Ind App 45 (PC).

paid to the plaintiff by the defendant and further added that the property awarded to the defendant should be treated as *makphul* for the sum. It was held that a valid charge for the sum was created on the defendant's property(22).

(3) A stipulation in a lease deed that the lessee should deduct a certain portion of the annual rent in repayment of a sum of money already borrowed by the lessor from him, creates a charge on the property leased and not merely a personal obligation(23).

(4) *A* sold certain property to *B*. The sale deed contained the following provision: "The said vendee is to pay Rs. 25 ... to me annually (as *malikana*) which he has agreed to pay." It was held that the words "as *malikana*" could not be rejected as mere surplusage. They showed an intention that the payment of Rs. 25 should be an annual charge upon the property(24).

(5) By a deed, *J* admitted liability. In respect of that liability, he undertook to execute a charge bond over specified share and rights in a village together with *sir* land. *J* undertook to get the sanction of the Court for transfer of *sir*, and not to assign the property until he carried out the above undertaking. It was held that the property was made security for the liability and that a charge was created(25).

See also the undermentoned cases(26).

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22. AIR 1926 All 527 (529) (DB).

23. AIR 1931 All 62 (64) : 52 All 985 (DB).

24. (1887) 9 All 591 (600) (FB).

25. AIR 1941 Nag 102 (105) : ILR (1942) Nag 263 (DB).

26. In the following cases a charge was held created :

AIR 1947 PC 8 (15) : 73 Ind App 208 : ILR (1946) All 756 : ILR (1947) Kar (PC) 25. (Partition between Hindu father N and his sons — Partition award allotting property to N subject to charge for his wife's maintenance — If wife ceased to live with N charge for maintenance to be at Rs. 75 a month — Award held created valid charge from date of award.) ** **AIR 1924 PC 162 (172) : 52 Ind App 1.** (Creditor advancing money to debtor for prosecuting a just claim — Debtor agreeing to give specified share out of the fruits of litigation to creditor — Creditor has charge on the fruits of litigation for the money lent.) ** **AIR 1918 PC 156 (157) : ILR 42 Mad 581.** (Dispute between A and B about right to impartible estate — Compromise — A taking one village and annuity and B the rest of the property — Held, on construction that the annuity was charged on the property taken by B.) ** **AIR 1948 Mad 1 (6) : ILR (1948) Mad 454 (FB).** (Mortgage of specific item of joint property by one co-sharer — Partition — Right of mortgagee to proceed against substituted items in hands of mortgagor is charge within S. 100 and not mortgage.) ** AIR 1967 Mad 175 (179) : ILR (1964) 2 Mad 832. (Dedication in favour of charity — Benefit meant essentially for charity — Directions to pay certain amounts to settler's relatives from income of dedicated property — Deed remains deed of dedication to charity and not merely a charge on the property in favour of it.) ** AIR 1965 All 474 (475) : ILR (1965) 1 All 23 (DB). (Power of attorney executed by customer in favour of bank purporting to assign future debts payable to customer — Held, on construction of deed that clear words of hypothecation indeed indicated that charge was created.) ** **AIR 1962 Ker 58 (60) : ILR (1961) 2 Ker 493 (FB).** (Lease for a year — Rent fixed payable at stated time — Lessee creating charge on another property by way of security for payment of rent — Expiry of term — Lessee continuing in possession by virtue of statutory tenancy created under S. 4, Cochin Verumpattomdars Act — Charge held operative so long as statutory tenancy lasted because it is attendant on the liability to pay the rent which is continued.) ** AIR 1958 Mad 319 (320) : ILR (1958) Mad 234 (DB). (Inam grant — Grant specifying land from which Melwaram is to come by extent — Held, a charge on the estate was constituted.) ** AIR 1955 Bom 419 (429). (Held, that under the transaction the creditor got no charge on any of the assets but there was only a personal covenant by the company whereby it bound itself to keep all its assets unincumbered till the loan was discharged.) ** AIR 1955 Sau 86 (88) : 9 Sau LR 43 (DB). (Decree referring to cash annuity payable by Government and making it available for obligation arising under the decree.) ** AIR 1954 Ajmer 77 (77, 78). (Where Cl. (5) of the agreement arrived at between the parties provided

" . . . . . the properties movable or immovable, partitioned or unpartitioned, self-acquired or joint, left by the late Rai Bahadur which shall be the absolute property of party No 2 to be utilized by him in the manner he may think fit subject to his discharging the obligations mentioned above . " and Cl (3) contained the obligation to pay a certain maintenance allowance It was held that all the properties allotted to party No 2 under the agreement became subject to the charge for payment of the maintenance) ** AIR 1947 Mad 424 (425) (Charge for rent — Possession after term fixed — Charge extended also to the rent due after the period of the lease) ** AIR 1945 Pat 434 (435) 24 Pat 345 (DB) (Property to remain attached and liable until satisfaction of entire decree — Charge is created) ** AIR 1940 Pat 283 (284, 285) (DB) (A person who was appointed as a manager of a Bank agreed that he would furnish security to the value of Rs 4 000 for the due and proper discharge of his duties — In pursuance of this agreement he executed a document in the body of which he conveyed and transferred to the Bank a certain house which the Bank was to have and to hold as security for the said post of manager — The concluding portion of the document provided that in the event of his removal from his post by resignation, dismissal, death or otherwise, the Bank should reconvey the house to him — Held, that the last provision must be read in the light of the earlier provisions and that the document read as a whole created a charge on the house in favour of the Bank for any amount up to Rs 4,000 which might become due from the manager to the Bank by reason of his misconduct or failure to discharge his duty) ** AIR 1938 Lah 509 (510) (DB) (Compromise in execution proceedings — Attachment of property continued — Stipulation that judgment-debtor should not transfer attached property till payment of entire decretal amount — Charge on property held created) ** AIR 1937 All 705 (706) (Obiter — Will making elgatee owner in possession of property enjoining him to spend its income on virtuous, charitable purposes and for parjapath of idol — Will held made gift of suit property to legatee with charge in favour of idol to cover worship expenses.) ** AIR 1929 All 737 (739). (Fund indicated in deed for payment of allowance — Allowance must be deemed to be a charge on the fund.) ** AIR 1927 All 132 (134) ILR 48 All 821. (Held, on a construction of the document of sale that the charge created by it for the unpaid purchase money affected only the movable and immovable property in existence at the time the sale deed was executed and not the property subsequently acquired by the purchaser) ** (1913) 19 Cal LJ 19 (28) (A condition in babuana grant of properties that the grantee should pay his share of the Government revenue to the grantor is not enough to create a charge in favour of grantor on the property, in case he pays the revenue) ** (1910) 5 Mad LT 78 (79) (A covenant in a sale deed by which the vendee was to pay third person, a certain quantity of rice annually cannot be enforced by the maintenance holder as giving a charge on the property sold) ** (1901) 4 Oudh Cas 61 (63) (Annuity granted to a person to defray expenses of worship of a certain temple — Annuity to be recovered out of the profits of certain villages — Held, it was a charge on the profits of those villages) ** **(1888) 15 Cal 66 (69) : 14 Ind App 137 (PC).** (A direction in a will devising immovables to repay a debt due by the testator to the devisee's father with interest was construed to be a charge on the immovables) ** (1878) 8 Ch D 411 (415) 47 LJ Ch 660 26 WR (Eng) 734, Mason v Robinson (A testator granted some annuities to various persons and subject to them made a trust in favour of his sons and daughters — It was held that the annuities were made a charge on the property) * AIR 1926 Bom 495 (496) (DB). (Where by a written agreement the borrower agreed to pay the lender a commission on the gross income of a factory and it was also agreed that in certain circumstances the lender might recover the amount out of the machinery and properties of the factory belonging to the lender, held that the document created a charge) ** **(1880) 5 Cal 438 (443) : 6 Ind App 182 (PC)** ** AIR 1926 Oudh 349 (350) : 1 Luck 176. (Held, the nankar was a charge on the mortgaged property even after foreclosure) ** AIR 1917 All 346 (347) 39 All 311 (DB) (Direction in a will that certain idols should be maintained out of the income of the property and balance should be appropriated by heirs — Held, the will created a charge on the property for expenses of idols and did not create an endowment) ** **(1912) 36 Bom** 564 (598) ** (1867) 2 Ch App 644 (648, 649) 36 LJ Ch 925 17 LT 153 · 16 WR (Eng)

30. Birch v. Sherrat ** AIR 1933 Bom 298 (299, 300) (DB). (Charge created by a compromise decree.) ** (1880) 5 App Cas 588 (594, 595) : 49 LJ Ch 829 , 43 LT 227 , 29 WR (Eng) 293. Carmichael v. Gee.

In the following cases no charge was held to be created :

** AIR 1996 Andh Pra 123 (127) (Religious endowment — Donors neither reserving rights in the property nor a portion of the income in the hands of the manager of worshippers for thier own use — *Held* doners intention was to make an outright dedication and not to create a mere charge on the income.) ** AIR 1949 All 539 (541) (LR 1 Ch 790 (Suit for arrears of rent compromised — Arrears made payable in instalments — Defendant agreeing not to remove or dispose of stock-in-trade remaining in the premises before entire decretal amount was paid — Any attempt on part of defendant to remove entitles plaintiff to take out execution for entire decretal amount — Compromise also providing that defendant was not to quit premises before payment of decretal amount and that if he did so without providing adequate security execution for entire amount could be taken — Absence of clear expression of intention to create charge on stock-in-trade — It was held that no charge was created.) ** AIR 1953 Trav Co 193 (195) (LR (1952) Trav Co 241 (DB). (Where it is expressly stated in the judgment that the amount decreed would not be a charge on the plaint properties the direction that the decree amount could be realised from the properties of the defendant's family cannot amount to creating a charge on those properties.) ** AIR 1952 Trav-Co 62 (64) (Partition deed — Direction to sell part of property and utilize cash towards payment of debts — Charge on items of property directed to be sold was not intended to be created.) ** AIR 1946 Madh 99 (101) (21 Luck 185 (DB) (Partition suit — After partition certain amounts payable by plaintiff to defendant — Judge directing plaintiff not to transfer property allotted to plaintiff so long as money due to defendant had not been paid — Order was in the nature of injunction and not a charge.) ** AIR 1946 Pat 216 (217) (Decree for future maintenance providing that maintenance will be first charge on certain properties — Claim does not arise under any charge but under decree itself — Charge is provided by decree as additional safeguard.) ** (1911) 12 Ind Cas 146 (146) (DB) (Mad). (Where all that the document says is that the plaintiff and his children are to receive certain allowances as the charge and not that any of the endowed properties which are not even mentioned in the document were to be charged with such payments held it does not create any charge.) ** **AIR 1920 PC 16 (21) : 47 Ind App 149.** (If A has two villages X and Y and he keeps X and hands over Y to B to enjoy on terms that B has the usufruct and A pays the Government revenue B has no charge over X to secure the payment of Government revenue payable by A in respect of Y.) ** AIR 1925 Rang 55 (57) 2 Rang 429 (DB) (Before the suit was decreed a temporary injunction was passed restraining the defendant from alienating his property — After passing of decree the appellate Court issued an ad interim order of execution — Upon receipt of that order the lower Court issued notice to the parties and ordered the defendant to give list of securities — Then, on a certain day, the parties appeared in Court and exactly what happened was not known, but the Judge's diary order stated that judgment-debtor's property was already attached and therefore no further security was necessary and that decree-holder agreed — The appellate Court then made plenary the ad interim stay order and when its order was received by the lower Court, the clerk wrote on the reverse thereof "Execution already stayed" When the case was called again the plaintiff applied for order directing judgment-debtor to furnish adequate security whereupon the judgment-debtor was ordered to furnish sufficient security — This was never done as the appeal was dismissed and the plaintiff proceeded with execution of the decree — *Held* that in these circumstances it cannot be held that the property in question was ever actually made security for the due performance of the decree.) ** (1895) 18 Mad 368 (371, 372) (DB) ** (1912) 14 Ind Cas 189 (189) (DB) (Mad) ** AIR 1928 Lah 440 (441) (DB). (Under an award partitioning property between J and S, S to pay to J certain amount in instalments — On failure to pay two instalments J to realize the whole amount by suit — S not to alienate property till such amount paid — No charge on S's share for the amount.) ** (1875) 8 Mad HCR 189 (191) (DB). (Debts undertaken by the holder of an ancestral and impartable

6. Property must be specified.

The section uses the expression "immovable property" and not "specific" immovable property as has been used in S. 58 It is, therefore, not necessary that the properties charged should be described with that amount of definiteness as is necessary in the case of a mortgage(1). But there should be some expression to signify what properties exactly are to be charged(2). A general de-

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pollhaput in respect of decrees obtained against his mother cannot by such undertaking become a charge upon villages forming part of the estate.) ** (1904) 1 All LJ 327 (328) (DB). (Provision in a Will that the guardian of some legatees shall pay certain maintenance allowance to a certain woman does not create a charge.) ** (1910) 8 Ind Cas 864 (866) (DB) (All). (Some property which had previously been mortgaged devolved upon certain persons by inheritance — They agreed to divide the property amongst themselves and to pay the mortgage debt proportionately to their shares — The agreement contained a stipulation that "if for any reason, any of the co-sharers fails to pay the debt, then, the co sharer who was to pay any amount of the debt in excess of his share shall be entitled to get the same from the person and the property of the defaulting co-sharer" — *Held* that the stipulation in the agreement did not create any charge upon the property of any of the co-sharers in respect of any sum paid by any other co-sharer in excess of his rateable share of the debt.) ** AIR 1925 Oudh 550 (552) ** (1905) 2 Cal LJ 138 (141) (DB) (A direction in the Will for the payment of the testator's debts is only a general direction to pay up all his debts out of the estate, and does not create any charge thereupon) ** AIR 1923 Lah 652 (654). (At the foot of a hundi a note was added in the following words,"Haman Delhi wa Ludhiana ki jaidad is qarze ki zimmewor hogi", held these words did not create a charge) **AIR 1914 Cal 263 (268) (DB). (A condition in babuana grant of properties that the granteee should pay his share of the Government revenue to the grantor is not enough to create a charge in favour of grantor on the property.) ** (1890) Bom PJ 164 (164) (DB). (Sale-deed contained the following words : "This is my Stridhan — I have sold it to you — You should protect me by giving me food and raiment as long as I live" — *Held* that these words imported only a personal obligation on the brother they did not impose a charge on the land.) ** (1906) 33 Cal 1133 (1153) (DB) (By a bond, being on the face of it an ordinary bond, the obligor agreed to repay the debt, and admitted that if he failed to do so, the obligee would be entitled to recover the debt by sale of a certain factory belonging to him and from his person and other properties and that the property referred to in the bond will be held painbandhi for the debt — Deed registered in Book 1 — Property held not intended to serve as security.) ** AIR 1936 Lah 508 (510). (Attachment before judgment — Suit compromised and compromise decree passed — Compromise providing that property should remain under attachment till payment — *Held* that it would be straining the language used by the parties to hold that by providing that the property should remain under attachment they intended that the decree-holder should have a lien or a charge on the property Affirmed in AIR 1936 Lah 610.) ** (1936) 164 Ind Cas 477 (479) (DB) (Cal) ** AIR 1926 Mad 1167 (1167). (A clause in a Will directing testator's son to pay maintenance at a certain rate to a person does not create a charge in favour of the person.) ** 1935 Oudh WN 288 (290) (DB) ** (1879) 3 Cal LR 417 (420) (DB). (Maintenance grant — Order by the grantor to his agent to pay the allowance out of revenues of the zamindari — The order does not create any charge.)

Section 100 — Note 6

1. **AIR 1937 Oudh 217 (219) : 13 Luck 101 (FB)** ** AIR 1919 Mad 528 (530) (DB) **(1890) 13 All 28 (44) (DB) ** AIR 1940 All 456 (457) : ILR (1940) All 669 (DB). (**Overruled** on another point in AIR 1943 All 453 (FB).)

2. ILR (1966) 1 Mad 114 (118) ** AIR 1957 Orissa 32 (33) · ILR (1956) Cut 713 (DB) ** AIR 1932 Cal 451 (453) (DB) ** AIR 1924 Nag 360 (361) (Covenant that obligee should recover from "person and property of debtor is too wide to fasten a charge.) **AIR 1926 Oudh 230 (231). (Property concerned must be reasonably certain.) *AIR 1918 Cal 557 (565, 566) (DB) ** AIR 1941 Mad 794 (794) (DB). (Charge created by a decree over all

scription of the property would be sufficient if, from the facts and circumstances, the property can be ascertained(3), the principle being *"certum est quod certum reddi potest"* that is certain which can be made certain(4). Where, however, the description given is too vague and indefinite, the charge will be void for uncertainty(5). In *Montagu v. Earl of Sandwich*(6), Cotton, L.J. observed :

> "I think it is an established rule, that where the covenant is to charge real estate which can be ascertained by existing facts and circumstances, for example, if there is a covenant to charge all the real estate which a man has at a particular time, that covenant will itself make a charge. But where the covenant is to charge, not all or any definite portion of a man's estate, but only that which is worth £ 1000 a year, or which would be sufficient to secure £ 1000 a year, then from the indefiniteness of the matter referred to there will be no charge unless an instrument is afterwards execued to give effect to the covenant, and it remains simply a covenant to be enforced as against the assets of the covenantor."

Thus, a valid charge can be created upon what could be defined to be *the whole of a man's property* at the date of the charge (7). A charge on *villages granted to a person by Government in*

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the property of the judgment-debtor both movable and immovable is not void for uncertainty.)

[**See also** 1904 App Cas 355 (358) : 73 LJ Ch 739 : 91 LT 602 : 55 WR (Eng) 113 : 20 TLR 633 : 12 Mans 141, *Illingworth v. Houldsworth* ** (1718) 24 ER 458 (458) : 1 P Wms 429, ***Fremoult v. Dedire.***]

3. AIR 1918 Cal 557 (565, 566) (DB) ** AIR 1941 Mad 794 (794) (DB) ** (1887) 9 All 158 (164) (DB) ** (1882) 5 All 111 (114) (DB) ** AIR 1916 Oudh 327 (330) (Deed of further charge providing that properties mortgaged by the previous deeds would not be redeemed till the further loans were paid — Properties not specifically described — *Held* valid charge was created.) **(1911) 34 Mad 47 (49, 50) (DB) (Wideness of language must be distinguished from indefiniteness of language.) ** AIR 1938 Mad 767 (769) (Decree ordering payment out of 'share of S's branch of the family property' and the share specified in a schedule attached to the decree — Charge held created over the properties.) ** (1901) 24 Mad 689 (692) (DB) (Where a decree indicates that a charge is created and the property can be identified, it is immaterial that the decree does not specify it.) ** (1899) 2 Ch D 530 (533) : 81 LT 354 : 48 WR (Eng) 59 *Tyson v. Acloco.* (If it is possible to discover the meaning of the contract by construction and to ascertain when the time for enforcement comes and to what property the charge attaches, it cannot be said that it ought not to be enforced because it is too vague or even because there might have been a difficulty in ascertaining the property at the time of the creation of the charge.)

[**See also** AIR 1941 Cal 117 (118) (Charge for allowances granted under Will may attach to general estate although testator had not provided for allowances to be paid out of specified properties.) ** AIR 1940 Cal 93 (95) (DB) (A Will provided that monthly allowances should be paid to his grand daughter out of the estate left by the testator — The testator gave two successive life estates and gave the remainder to his grandson — It was held that the charge would attach to the corpus of the estate.)]

4. (1887) 9 All 158 (162) (DB) ** AIR 1918 Cal 557 (565, 566) (DB) ** (1882) 5 All 111 (114) (DB).

5. AIR 1957 Orissa 32 (33, 34) : ILR (1956) Cut 713 (DB) ** AIR 1932 Cal 451 (453) (DB) (General description will not do.) ** (1888) 13 Mad 35 (36, 37) (DB) (A promise to pay out of the debtor's property indefinitely or in indefinite order for satisfaction of a decree out of the assets of a deceased person in whose hands soever they may be found does not create any charge on specific property.) ** AIR 1929 Oudh 539 (540) (DB) ** AIR 1924 Nag 360 (361) ** (1905) 2 All LJ 754 (757) ('Burden of liability ... shall remain on the materials of the house' — These words are insufficient to create a charge on the property.) ** AIR 1933 All 934 (93) (DB) (Charge created by Mahomedan on unknown share of one of his heirs.)

6. (1886) 32 Ch D 525 (538, 539) : 54 LT 502 : 55 LJ Ch 925

7. AIR 1941 PC 16 (19) : 68 Ind App 34. (While it would not be unusual to create a charge

lieu of loyal services rendered by him is on a specified property.(8) So also property is specified where *'my share in the Premier Aerated Company at Hazaratganj* is charged (9) Where, on the other hand, in a partition suit a decree was passed by which one A was allotted *something more* than an exact one-third of a house and was directed to pay a certain amount to B and C on account of this excess and there was no amin's map or report on the record to show the excess area, it was held that the excess area being uncertain and undefined there was nothing on what the charge for the amount would rest.(10)

7. "By act of parties."

In the undermentioned cases,(1) a charge created by Will was held to be a charge by act of parties and within the meaning of this section. See also the undermentioned case.(2) A mere agreement to execute a mortgage cannot create a mortgage or a charge (3)

As to whether a charge created by decree incorporating a compromise is a charge created by act of parties, see Note 28.

Credit facility was given by a financial institution to a company against its agreeing to mortgage immovable property Resolution was also passed accordingly in the Board's meeting of the company. However, the company neither mortgaged the property nor register the charge with the Registrar of companies, though it availed of credit facility the company went into liquidation. Held that the undertakings given by the company did not amount to mortgage or charge attracting S. 125 of the Companies Act and became void against the liquidator (4)

8. Security bond charging immovable proeprty.

Where, by a security bond, a person besides making himself personally liable under S. 145 of the Civil Procedure Code, gives his immovable property as security, the question whether the transaction amounts to a morgage or a charge will depend on the terms of the document and the intention of the parties It is therefore a question of construction of the particular document (1)

This section shows that, for the creation of a charge, there must be some *person* in whose favour the charge is created. Where a security bond purporting to charge immovable property is given to the *Court* and not to any named person there is no charge, as the Court is not a juridical

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on particular lands it would seem improbable that a vast estate should be charged as a whole with the payment of a small amount) ** (1887) 9 All 158 (162 164) (DB) ("All my wealth and property") **AIR 1941 Mad 794 (794) (DB) ("All the property of the judgment-debtor both movable and immovable".)

[But see (1913) 19 Ind Cas 221 (221) (DB) (Mad) (Words "all my property movable and immovable, as 'thanakha' shall be liable" are not enough to create a charge)]

8. (1882) 5 All 11 (14) (DB).
9. AIR 1929 Oudh 539 (540, 541) (DB).
10. AIR 1926 Oudh 230 (231).

Section 100 — Note 7

1. AIR 1914 Oudh 349 (350) (Assumed) **AIR 1932 Oudh 336 (338, 340) : 8 Luck 168 (DB)
2. AIR 1962 Mad 111 (120) : ILR (1962) Mad 1 (FB). (Suit on pronotes on original side of High Court — Defendant given leave to defend on furnishing security — Security bond in favour of Registrar securing immovable properties is a charge created by voluntary act of parties.)
3. (1968) 38 Com Cas 701 : (1968) 2 Com LJ 225 (Bom).
4. 2000 CLC 704 (711) (LBC).

Section 100 — Note 8

1. AIR 1934 Mad 1 (3) 57 Mad 218 (DB). (Charge.) * AIR 1917 All 104 (105) : 39 All 225 (DB). (Mortgage.)

person and can neither sue nor take property, nor assign it (2) In the undermentioned case(3) no person was named in the security bond as mortgagee It was held that the security bond did not create a morgage but created a charge It is submitted that the decision is wrong as it proceeds on the reasoning that a document invalid as a mortgage creates a valid charge

As to the enforcement of security bonds, see Notes on S 145 of the A I R Commentaries on the Code of Civil Procedure, 10th (1985) Edn and O 34, R 14 Note 4 in the Appendix

9. Contingent charge.

A contingent charge, that is to say, a present charge as security for discharging a contingent liability can be validly created (1) Section 5 and S 21 of the Transfer of Property Act recognise the principle of such a transaction (2) In such a case as soon as the contract is entered into the promisee is entitled to look to the specified property as security for the due performance of the contract (3) No doubt there is a difference between a present charge to discharge a contingent liability and the mere possibility of a charge or a promise to create a charge in future But it cannot be said that whenever there is a charge to secure a liability which will arise only if at all, in the future, there is no present charge within the meaning of the section (4) Thus, where in a document there was a

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2. **AIR 1919 PC 55 (57, 59) : 42 All 158 : 22 Oudh Cas 212 : 46 Ind App 228** ** AIR 1929 All 834 (835, 836) (DB) The beneficiary though not a necessary party to the transaction must be specifically named as being the person in whose favour the charge exists ** AIR 1936 Rang 303 (304) (Security bond for producing the attached cattle before the execution Court when required and failing therein to forfeit Rs 90)

3. **AIR 1930 Sind 159 (161)**

Section 100 — Note 9

1. AIR 1953 Trav Co 344 (348) ILR (1953) Trav Co 298 (DB) ((1911) 11 Ind Cas 629 (Mad), AIR 1918 Mad 674 and (1933) 23 Trav LJ 466 (FB) Foll (1887) 14 Cal 687 and AIR 1932 Cal 451, **Not foll.**) ** AIR 1952 Madh B 16 (17) (DB) ** AIR 1918 Mad 674 (675) (DB) ** AIR 1928 Pat 587 (588) 7 Pat 584 (DB) ** AIR 1931 Mad 120 (121) (Where a decree with reference to future maintenance stated that the plaintiff was to recover the value thereof at a particular rate by executing the decree and selling the plaint-mentioned property it was held that the words were sufficient to create a charge in respect of future maintenance) ** AIR 1934 Lah 765 (767, 768) 16 Lah 137 (DB) (Running account between debtor and creditor Debtor's shop made collateral security for all advances subject to maximum of Rs 4 000 — Charge is not limited to first advance of Rs 4000 but includes all advances) ** AIR 1925 Pat 288 (290) (DB) ** (1911) 11 Ind Cas 629 (632) (DB) (Mad) ** AIR 1937 Pesh 76 (78) (DB) ** (1906) 28 All 655 (658) ** AIR 1938 Rang 145 (148)

   [**See also** AIR 1933 Pat 257 (258) (By the terms of a lease deed the landlord's claim for rent was made the first charge on the property *Held* present charge was created to meet a future contingency) ** AIR 1921 Mad 459 (460, 461) (DB) (Partition deed among members of Hindu family providing that each sharer's properties should be liable if he fails to discharge the debts allotted to him — A charge is created ** (1889) 12 Mad 69 (71) (DB) (**Followed** in 11 Ind Cas 629) ** AIR 1941 Pat 95 (96, 97) 20 Pat 86 (DB) (Compromise decree creating charge for future maintenance) ** AIR 1927 Mad 1069 (1069) (DB) (A registered bond furnishing security for the payment of future subscriptions of a kuri held created a present charge, though the executant undertook to execute a mortgage in future when required.)]

2. AIR 1952 Madh B 16 (17) (DB) ** (1911) 11 Ind Cas 629 (632) (DB) (Mad) (A charge may be created on the happening of a condition where the condition itself is first stipulated and the condition happens afterwards.) ** AIR 1937 Pesh 76 (78) (DB)

3. **AIR 1934 Lah 765 (767) : 16 Lah 137 (DB).**

4. AIR 1953 Trav-Co 344 (347, 348) ILR (1953) Trav-Co 298 (DB) ((1911) 11 Ind Cas 629

clause to the following effect : "In the case aforesaid creditor being dispossessed of the holding in any way, in that case he shall realize his dues from my one anna share in Mauza Dharwali and Gasainpur," it was held that a present charge on existing property was created though it could only be enforced on the happening of the contingency, i.e., dispossession of the creditor.(5) A contrary view taken in the undermentioned cases(6) that such a charge is not a charge within the meaning of this section is, it is submitted, not correct. In *Madho Misser v. Sidh Binaik Upadhya*(7) which is a leading case for the contrary view A borrowed money from B and agreed to repay the amount within a certain period with interest; he also agreed that if he did not repay the money according to the stipulation, B should take possession of certain land and then A would not be liable to pay interest. It was contended that the document created a charge on the property In negativing the contention their Lordship of the Calcutta High Court observed :

> "When the Legislature speaks of a charge under S 100, it speaks of something which operates as a charge upon land immediately as it is executed. This document seems to us, not to create a charge at the time of its execution, but to operate only as a charge upon the land in question upon the non-payment of the principal money in 1289 All that it does is to create the *possibility* of a charge ultimately arising on the land That is set a charge under S 100 of the Transfer of Property Act."

Similar observations were made in *Harjas Rai v. Naurang*(8) a case decided by the Allahabad High Court, Speaking about these cases Coutts-Trotter, J., in *Imbichi v. Achampat Avukoya Haji*(9) observed as follows :

> "Now the learned Judge has held that their deed of partition, Ex D, did not create a 'charge' under S. 100, Transfer of Property Ac, and in coming to that decision, he bases himself upon a decision in *Madho Misser v Sidh Binaik Upadhya* (10) Now that decision as well as the decision in *Harjas Rai v Naurang*(11) is capable of two constructions It is capable of being construed as deciding that the instrument in that case was, in fact not a present charge to secure against a future contingent liability, but a mere contingent charge arising on the happening of a possible future event. If the two cases mean that, there is no particular harm in that, though whether one would agree with the view they take of the construction of the particular instruments is another question But if they are supposed to enunciate the proposition which is contended for here and nothing short of that proposition will avail the respondent — namely, wherever you have a charge to secure a liability which is not a liability existent *in praesenti*, but will arise, if at all, in the future, that cannot be a present charge within the meaning of the Transfer of Property Act, then I think this Court is bound to say that those

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(Mad) : AIR 1918 Mad 674 and (1933) 23 Trav LJ 466 (FB) **Foll.**, (1887) 14 Cal 687 and AIR 1932 Cal 451, **Not foll.**) ** AIR 1952 Madh B 16 (17) (DB) (Direction in decree that amount shall be realisable from a certain property if mortgaged property was found insufficient creates a valid contingent charge) ** AIR 1925 Pat 288 (290) (DB) ** AIR 1928 Pat 587 (588) : 7 Pat 584 (DB) ** AIR 1918 Mad 674 (675) (DB).

5. AIR 1928 Pat 587 (588) : 7 Pat 584 (DB).

6. (1906) 3 All LJ 198 (200) ** (1887) 14 Cal 687 (690) (DB) ** (1906) 3 All LJ 221 (223) (DB) (A sale-deed contained the following covenant - "If in future any person appears as a claimant of the property sold and makes a claim in consequence of which there is an injury to the property sold, or we do not give possession, then the purchaser may recover the money from our persons or the sold property" — **Held**, that the covenant did not create a charge in favour of the purchaser.) ** (1922) 67 Ind Cas 939 (940) (DB) (Lah). (**Dissented from** in AIR 1934 Lah 765) ** AIR 1926 Oudh 209 (210) (Contingent charge is not a charge within S 100 14 Cal 687, **Rel. on.**) ** AIR 1932 Cal 451 (453) (DB) (An *ekrarnama* which says that if the allowance of maintenance remains in arrears in future, the properties may be sold for realisation of the same, cannot be said to create a charge.)

7. (1887) 14 Cal 687 (691) (DB)

8. (1906) 3 All LJ 221 (223) (DB).

9. AIR 1913 Mad 674 (674, 675) (DB).

10. (1887) 14 Cal 687 (691) (DB)

11. (1906) 3 All LJ 221 (223) (DB).

decisions, if they mean that, are bad law and should not be followed. The most forcible illustration, I think, is the one given by my learned brother of a Government servant who gives security by the deposit of a fidelity bond or other security for the faithful discharge of his duties. Is the charge bad, because he has not been dishonest at the time the deposit is made? Another equally good illustration is the case of a man who, while his account is in credit at the bank, deposits his title deeds to secure any future overdraft there may be. It is idle to contend that those are not perfectly good charges on the property over which they purport to operate, notwithstanding the fact that the indebtedness in both cases is future and is contingent. As I say, if those cases in Calcutta and Allahabad are to be supposed to decide the proposition contended for, we decline to follow them."

10. Floating charge.

The term "floating charge" and its synonym "floating security"(1) are commonly used in financial and mercantile circles(2) as a charge which affects all the assets of a going concern expressed to be included in it, but not *specifically* affecting any item until some event occurs which causes it to crystallize into a fixed security. "The term has received judicial recognition and is found used in legislative enactment (3) The whole basis of this kind of charge is that even after the creation of the charge, the business goes on and the person who creates the charge can dispose of the assets in the ordinary course of business till the charge becomes a fixed charge (4)

A specific charge is one which without more fastens on the ascertained and definite property while a floating charge is ambulatory or shifting in nature hovering over and floating with property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp. When a charge is fixed it affects the title to the property as a transfer of interest takes place immediately and the property can be dealt with subject to the charge. But if the charge is a floating charge Company may on ordinary course of business deal with the property by mortgage, selling, disposing or using it up at any time before the charge attaches.(5)

In *Evans v. Rival Granite Quarries, Ltd* (6) Buckley, L.J., described a "floating security" as follows :

"A floating security is not a future security, it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security, the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged

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Section 100 — Note 10

1. 1904 App Cas 355 (357) : 91 LT 602 : 73 LJ Ch 739 : 53 WR (Eng) 113. Illingworth v. Houldsworth
2. See AIR 1927 Cal 682 (684) : 54 Cal 513 (DB). (The term 'floating charge' is not term of art. The term has to be regarded as applying to a commercial document.)
3. (1903) 2 Ch D 284 (294, 296), Houldsworth v. Yorkshire Woolcombers Association Ltd

   See the Companies Act (1 of 1956), S. 125.

   See the English Companies Act, 1948, S. 95
4. AIR 1963 Ker 301 (304) : ILR (1963) 2 Ker 209 (DB) ** AIR 1961 Cal 308 (309) 3 cit ** (1903) 2 Ch D 284 (292), Houldsworth v. Yorkshire Woolcombers Association Ltd ** (1885) 29 Ch D 736 (743) : 54 LJ Ch 919 : 53 LJ 562, In re Horne & Hellard ** AIR 1933 Cal 154 (157) : 59 Cal 1372 (DB).

   [See also (1878) 10 Ch D 530 (541) : 27 WR (Eng) 236 : 48 LJ Ch 137 : 39 LT 589, In re Florence Land & Public Works Co (Per Jessel, M.R.)]
5. AIR 1970 Andh Pra 225.
6. (1910) 2 KB 979 (999) : 79 LJKB 970.

   [See also AIR 1931 Cal 223 (231, 232) : 58 Cal 136 : 131 Ind Cas 689 (DB) ((1910) 2 KB 979, Followed.) ** AIR 1927 Cal 682 (685) : 54 Cal 513 (DB) ((1910) 2 KB 979, Followed.)]

in such a way that the mortgagor can deal with them without the concurrence of the mortgagee A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security"

According to Lord Macnaghten, in *Illigworth v Houldsworth*(7) :

"There was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge A specific charge, I think is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined, a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp"

Romer, L.J , in In *re Yorkshire Woolcombers Association, Ltd* (8) lays down three characteristics of a floating charge. He observes :

"I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge (1) If it is a charge on a class of assets of a company present and future, (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time and (3) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way."

Thus, it will be seen from he above observations that, in a floating charge the property is constantly changing from time to time, the charge does not of itself fasten even on the property existing at the moment of the creation of the charge (9) The charge becomes a fixed charge or specific charge on the inervention of the charge-holder or the undertaking charged ceasing to be a going concern(10) and till then the charge remains dormant (11)

Illustrations

(1) Where leasehold property and the machinery, engine boilers, etc., were charged it was held that

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7. 1904 App Cas 355 (358) · 91 LT 602 · 53 WR (Eng) 113 73 LJ Ch 739

[See also AIR 1931 Cal 223 (230 231) 58 Cal 136 (DB) (1904 AC 355, **Followed.**) ** AIR 1926 Bom 427 (429, 430) . 50 Bom 547 (DB) (1904 AC 355, **Followed.**)]

8. (1903) 2 Ch D 284 (295).

[See also AIR 1942 All 119 (120) : ILR (1942) All 242 (FB). (Affirming AIR 1938 All 574.) ** AIR 1939 Sind 100 (103).

9. AIR 196 Ker 301 (304) ILR (1963) 2 Ker 209 (DB) ** AIR 1962 All 101 (103) (DB) ** AIR 1961 Cal 308 (309) (DB) ** (110) 2 KB 979 (994) 79 LJ KB 970, Evans v Rival Granite Quarries Ltd ** AIR 1926 Bom 427 (430) · 50 Bom 547 (DB).

10. **AIR 1931 PC 245 (247) : 58 Ind App 323 : 59 Cal 377** ** AIR 1963 Ker 301 (304) ILR (1963) 2 Ker 209 (DB) ** AIR 1962 All 101 (103) (DB) ** AIR 1961 Cal 308 (310) (DB) (Floating charge in favour of B — Subsequent attachment by C a secured creditor — Charge becomes crystallised.) ** AIR 1955 Bom 419 (429) (1897 App Cas 81 66 LJ Ch 102, Governments Stock and other Securities Investment Co v Manila Rly Co , **Rel. on.**) ** AIR 1955 Mad 331 (339) (DB) (Where the debenture holders appoint a receiver and such receiver takes possession of the assets of the mortgagor company comprised in the floating charge, it becomes crystallised and fixed on those assets 1941 Ch 129 110 LJ Ch 51, Tetley & Son Ltd v Griffin Hotel Co. Ltd., **Rel. on.**) ** AIR 1933 Cal 154 (157) 59 Cal 1372 (DB) ** 1897 App Cas 81 (86) 66 LJ Ch 102 · 75 LT 533 45 WR (Eng) 353, Governments Stock & other Securities Investment Co , Ltd v Manila Rly Co Ltd.

11. AIR 1962 All 101 (103) (DB) ** (1888) 13 App Cas 523 (541) · 88 LJ QB 75 60 LT 162 37 WR (Eng) 513, Tailby v Official Receiver (Per Lord Macnaughten) ** 1897 App Cas 81 (86) 66 LJ Ch 102 75 LT 553 45 WR (Eng) 353, Governments Stock & other Securities Investment Co , Ltd v Manila, Rly Co Ltd ** (1914) 1 Ch 954 (963, 964) , 83 LJ Ch 666 : 110 LT 759, In re Crompton & Co. Ltd.

there was no floating charge but a fixed charge because the element of *fluctuation* which was necessary for a floating charge was wanting, and the element of fluctuation due to wear and tear was widely different from what would be consequent on the power of disposal in the ordinary course of business (12) Similarly where assets were given in the possession of the lender company it was held for the same reason that there was no floating charge (13)

(2) Where the borrower company handed over the keys of the godowns to the lender company and further agreed to keep in the godowns stock fetching a certain fixed price and it was also agreed that whenever the borrower company wanted to take out any stock from the godowns it must do so only with the consent of the lender company, it was held that the document did not create a floating charge but a specific charge.(14)

(3) The mere element of uncertainty as to what the amount of the charge, or what the object charged would be was, however, held not sufficient to satisfy the requirements of a floating charge (15) Where it was agreed that the borrower company could dispose of the stock *with the permission* of the lender company and thus carry on its business it was held that the nature of the fixed charge could not be altered so as to become a floating charge merely because in spite of the charge, the business of the borrower company continued to be carried on (16)

Debentures of companies afford the most ordinary example of a floating charge but they are not the only instances of it, a floating charge may be created even by an individual and by means other than the issue of debentures (17) So also floating charge need not be on the whole undertaking nor the whole property of the company (18)

What is the difference between a floating charge and a contingent charge described in Note 9? In the case of a contingent charge, as soon as the contingency happens a specific property which has already been marked out become liable to satisfy the claim of the charge holder But in the case of a floating charge the happening of the contingency which converts the floating charge into a fixed charge does not necessarily fasten the liability to all or any of the properties which constituted the debtor's assets when the floating charge was created but to such properties as constitute the assets of the debtor at the time that the floating charge becomes a fixed charge (19)

In the absence of a stipulation to the contrary a floating charge leaves the person or the company creating the charge at liberty to create specific charges in priority to itself (20)

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12. AIR 1933 Cal 154 (157) : 59 Cal 1372 (DB)
13. AIR 1927 Cal 682 (685, 686) : 54 Cal 513 (DB).
14. AIR 1926 Bom 427 (430) : 50 Bom 547 (DB)
15. AIR 1933 Cal 154 (158) : 59 Cal 1372 (DB).
16. AIR 1926 Bom 427 (430) : 50 Bom 547 (DB).
17. AIR 1933 Cal 154 (157) 59 Cal 1372 (DB) (Mortgages by tradesmen of their stock in trade and effects belong to the class of a floating security in so far as the security is attached to the subject charged by them in the varying condition in which it happens to be from time to time.)
18. (1903) 2 Ch D 284 (298), Houldsworth v Yorkshire Woolcombers Association Ltd
19. See AIR 1943 Oudh 338 (353) : 18 Luck 683 (FB). (In the case of both a fixed charge and a floating charge, there is an agreement to transfer an interest in property when a certain contingency arises The only difference is that where the charge is fixed it is secured on specific property and where it is floating it is secured on such asset as may be available when the contingency arises.)
20. AIR 1931 Cal 223 (232) 58 Cal 136 (DB) (But it is not uncommon to insert in a debenture words to the effect that the company would not be authorised to create any mortgage or charge ranking in priority to the debenture) ** (1878) 10 Ch D 530 (540, 546) 27 WR (Eng) 236 48 LJ Ch 137 39 LT 589, In re Florence Land & Public Works Co ** (1880) 15 Ch D 465 (472), In re Colonial Trust Corporation.

See also the undermentioned cases.(21)

A floating charge on the undertaking or property of a company, requires registration under S. 109 of the Indian Companies Act, VII of 1913 Otherwise it is void under that section.(22) (See now S 125 of the Companies Act, 1956) A document creating a floating charge will also require registration under S 17 of the Registration Act if it concerns immovable property of the value of Rs. 100 and upwards and will not affect the immovable property if not so registered.(23) As to the effect of non-registration upon the secured debts due to the borrower from third persons which are charged, see Notes on Section 8

11. "By operation of law."

A charge created by "operation of law" is a charge that comes into existence on certain state of facts happening simply because of a rule of law coming into operation, without the intervention of any agency (1) It has been held that the words "by operation of law" in this section are more extensive than the words "by law" and that a charge created "by operation of law" includes a charge directly created by the provisions of an Act as well as other charges created indirectly as a legal consequence of certain conditions (2) It has also been held that the expression "operation of law" only means working of the law and is not restricted in its application to such cases as fall under S. 55 or S. 73 of the Act.(3)

A statutory charge differs from a contractual charge and is based upon the principle of justice, equity and good conscience.(4)

In order to create a charge by operation of law no docuemnt is necessary to be executed or signed or attested by the party and charge may be created without any writing and the instrument creating a charge is not required to be attested (5)

The following are instances of charges by operation of law created directly by the provisions of Acts :

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21. **AIR 1941 All 345 (348) : ILR (1941) All 691 (FB).** (Distinction between a fixed and floating charge explained) ** (1899) 2 Ch 130 (135, 136) 68 LJ Ch 410 · 80 LT 461, Foster v Borax Co (Contract of sale of business to a company of similar kind — Action amounts to putting an end to the business of the company and debenture-holders are entitled to take action by way of injunction to part with its assets before paying them.) ** (1900) 2 Ch 654 (658, 659) 69 LJ Ch 659 82 LT 674 48 WR (Eng) 636. In re H H. Vivian & Co Ltd **(Held,** debenture holders could not restrain the sale of one of the three branches of the company) ** (1893) 69 LT (NS) 169 (170, 171) · 1 QB 744 63 LJ QB 12 41 WR (Eng) 483 Driver v Board (A contract to purchase debentures creating a floating charge on real estate is one in respect of an interest in or concerning land within S. 4, Statute of Frauds) ** (1916) 1 Ch 132 (138) 114 LT 276 85 LJ Ch 106. National Provincial Bank of England v United Electric Theatres **(Nature of floating charge discussed — Held, floating charge on chattels was created.)**
22. AIR 1952 Mad 136 (144) (DB) ** AIR 1926 Bom 28 (30) (DB) ** AIR 1939 Sind 100 (106) ** AIR 1927 Cal 682 (684) 54 Cal 513 (DB) ** **AIR 1942 All 119 (120) : ILR (1942) All 242 (FB). (Affirming** AIR 1938 All 574.)
23. **AIR 1931 PC 245 (247) : 58 IA 323 : 59 Cal 377** ** AIR 1962 All 101 (104, 105) (DB) ** AIR 1930 Cal 536 (537) 57 Cal 328 ** AIR 1931 Cal 223 (231) 58 Cal 136 (DB).

Section 100 — Note 11

1. **AIR 1959 Andh Pra 622 (625) (FB) ** AIR 1951 All 141 (149) : ILR (1953) 1 All 284 (FB).**
2. **(1903) 26 Mad 686 (726) (FB).** (Per Benson, J) ** AIR 1945 Pat 192 (196) · 23 Pat 953 (DB) (Co-mortgagor redeeming simple mortgage may rely on a charge for his right of contribution from the other mortgagors.)
3. **AIR 1943 Oudh 354 (359) : 19 Luck 1 (FB). (Held,** Charge created by decree comes under section -- Note There is a conflict of decisions on the point -- See Note 28.)
4. AIR 1968 Mad 142 (151, 152) : (1966) 2 Mad LJ 298.
5. **AIR 1969 SC 1147 (1152) : (1969) 2 SCJ 784.**

1. Under the provisions of this Act.

(a) Seller's charge for unpaid purchase-money under S 55(4)(b).

(b) Buyer's charge under S. 55(6)(b).

(c) Charge for contribution under S 82 of the Act (see Note 13 of S 82)

2. Under the provisions of other Acts.

(a) Charge in favour of Government in respect of the amount due under a certificate issued by Collector by virtue of S 8, Bihar and Orissa Public Demands Recovery Act (4 of 1914) (6)

(b) Charge in favour of Municipal Boards in United Provinces for the amount of taxes due to them under S. 177 of the U P. Municipalities Act of 1916(7) and in favour of Calcutta Corporation for consolidated rates under Calcutta Municipal Act of 1923 (8) Charge under S 87 of the Bombay District Municipal Act (3 of 1901) in favour of Municipal Boards in respect of house tax and sanitary cess imposed under that Act (9) Charge under S 85, Madras District Municipalities Act (5 of 1920).(10) Charge under S. 121A of the Bihar and Orissa Municipal Act or the Patna Municipal Corporation Act for the tax on holdings.(11)

(c) Charge in favour of Government for a loan advanced under the Land Improvement Loans Act, XIX of 1883, by S. 7(c) of the Act.(12)

(d) Charge for the arrears of property tax under S. 212 of the Bombay City Municipal Act (Bombay Act 3 of 1888).(13) Charge for arrears of property tax under S 141, Bombay Provincial Municipal Corporation Act (59 of 1949).(14)

(e) Charge in favour of the Government for court-fee in a pauper suit under O 33, R 10 of the Civil Procedure Code.(15)

(f) Charge in favour of mortgagee paying arrears of revenue to release the mortgaged property from attachment for arrears of revenue under S. 35, Madras Revenue Recovery Act (2 of 1864).(16)

(g) A charge under Section 60, Chota Nagpur Tenancy Act is different in nature from the charge under Section 100, T.P. Act.(17)

(h) the word "charge" in Rule 94-A of the Defence of India Rule, 1939 is not to be construed

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6 AIR 1934 Pat 648 (649, 650) : 13 Pat 364 (DB).

7. AIR 1940 All 456 (456) ILR (1940) All 669 (DB) (**Overruled** on another point in AIR 1943 All 115 (FB)) ** AIR 1937 OUdh 31 (31) . 12 Luck 333 (**Reversed** on another point in AIR 1941 Oudh 305 (DB).)

8. (1956) 60 Cal WN 988 (990) (Section 205 of that Act makes the consolidated rate due to the corporation first charge on the premises subject to payment of revenue) ** AIR 1934 Cal 862 (863, 864) 61 Cal 1047 (DB) (**Reversing** AIR 1934 Cal 325 : 60 Cal 1470) ** AIR 1915 Cal 478 (480, 481) 42 Cal 625 (DB) (Section 228 of Act 3 of 1899.) ** AIR 1925 Cal 1067 (DB) (Do.)

9. AIR 1943 Bom 21 (22).

10. AIR 1948 Mad 412 (415)

11. 1955 BLJR 229 (230).

12. AIR 1939 Bom 183 (187) ** AIR 1919 Mad 590 (593) 41 Mad 691 (DB)

13. AIR 1935 Bom 347 (350) : 59 Bom 681 (DB).

14. (1967) 8 Guj LR 65 (68)

15. See Notes on O 33, R 10 of the AIR Commentaries on the Code of Civil Procedure, 1908, 10th (1985) Edn.

16. AIR 1955 Andh Pra 274 (277).

17. AIR 1969 Pat 1 : ILR 46 Pat 98 (FB).

in the restrictive sense as charge under Sec. 100, T. P Act (18)

(i) Section 65-A will not apply to statutory charges like the one created by Section 39 of Malabar Tenancy Act of 1930.(19)

Charge created by consent decree is in the nature of charge contemptated by S 100.(20)

An attachment before judgment, or in execution of a decree has merely the effect of preventing all private alienations of the property to the prejudice of the claims enforceable under the attachment It does not create any title, charge, lien or priority in the property in favour of the attaching creditor (21) So also the appointment of a Receiver does not amount to a charge on the property for which the Receiver is appointed (22) There is no provision of law under which a creditor who advances money become entitled to a charge over the property acquired with the money advanced by him.(23)

Similarly there is no provision of law under which a charge can be said to have been created by operation of law in favour of Builders over the buildings constructed by them on the land of the Company regarding payment due to the builders from the Company (24)

Any alienation of property made on or after the assessment of sales tax would not be valid unless and until the sales tax amount due and payable is cleared as provided by S. 24 of T.N. General Sales Tax Act, 1959 under which statutory charge has been created on the disputed property.(25)

As to charges created by decree, see Note 28.

12. Charge under Rent Acts.

A charge for the payment of rent under the Bengal Tenancy Act(1) or the Madras Estates Land Act,(2) is not such a charge as is defined by this section So also a charge under S. 74, Orissa

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18. AIR 1969 Cal 578 : (1969) 1 Com LJ 55.
19. AIR 1971 Ker 61 : 1970 Ker LT 756 (FB).
20. AIR 1985 Cal 47 : (1984) 88 Cal WN 877
21. See cases under Note 5 on S 64 in the AIR Commentaries on the Code of Civil Procedure, 1908, 10th (1985) Edn. and the undermentioned cases :

    ** (1910) 6 Ind Cas 113 (114) (DB) (All) (A creditor, who before judgment attaches the property of the judgment debtor, does not acquire any lien or charge on the property)

    [See however (1880) 5 Cal 148 (174) : 6 Ind App 88 (PC). (An order of sale in addition to an attachment under a mortgage decree held to create a valid charge) ** (1910) 23 All 467 (470) (DB) (Every attaching creditor who has obtained an order for sale thereby acquires a charge on the property attached) ** (1900) 2 Bom LR 32 (35, 40) (DB).
22. AIR 1935 Mad 146 (149).
23. AIR 1926 All 397 (397)
24. (1967) 1 Mys LJ 567.
25. 2001 (3) Mad LW 720 (724, 725)

Section 100 — Note 12

1. (1888) 15 Cal 492 (496) (DB) ** (1906) 33 Cal 985 (995) (DB) ** AIR 1918 Cal 265 (270) (DB). (Per Chatterjea, J.)

   [See also AIR 1934 Pat 70 (72, 73) (Rights given under S 65, Bengal Tenancy Act, are peculiar to the landlord There is no right of subrogation in the subsequent mortgagee advancing money to the mortgagor to pay off the rents.)]
2. AIR 1919 Mad 733 (734) 42 Mad 114 (DB) (The Estates Land Act treats the charge as being of the same nature in all cases, and creates no distinction between the charge where rent is payable in kind and the charge where rent is payable in money) ** AIR 1932 Mad 189 (192) 55 Mad 468 (DB) ** AIR 1932 Mad 716 (719)

Tenancy Act(3) and under S 65, Bihar Tenancy Act(4) are not charges within the meaning of this section The charge created by the tenancy law in the Central Provinces, however, has been held to be a charge arising by operation of law within the meaning of this section (5) See also he undermentioned cases.(6)

13. "And the transaction does not amount to a mortgage."

In its ordinary sense the word "charge" means an obligation imposed on property or a claim on property In this sense every mortgage would create a charge, but every charge would not be a mortgage.(1)

This Act, however, draws a clear distinction between a mortgage and a charge(2) and restricts the latter to cases where the security *does not amount to a mortgage* as defined in S 58. In the undermentioned case(3) it was observed by Sadasiva Aiyar, J., that *"every mortgage creates a charge* but conversely every charge does not amount to a mortgage" It is submitted that the said observations are not correct in so far as they imply that a mortgage will include a charge, within the meaning of this Act In some cases(4) the word "charge" has been loosely used for the word "mortgage". Such use of the word is not correct.

The main distinction between a "charge" under this section and a mortgage is that a mortgage involves a *transfer* of an interest in specific immovable property, while in a charge there is no such transfer of interest (5) The following further differences between a mortgage and a charge may be noted :

[But see AIR 1920 Mad 183 (185, 186) 43 Mad 786 (DB) (Per Sadasiva Aiyar J — Charge for rent where it is payable in money is a charge within the meaning of S 100 and therefore O. 34, R. 14, Civil P.C. apples)]

3. AIR 1951 Orissa 41 (45) : ILR (1950) Cut 195 (DB)

4. AIR 1952 Pat 9 (11) : ILR 30 Pat 317.

5. AIR 1940 Nag 156 (158) ILR (1941) Nag 607 (DB) (The charge given by S 9 C P Tenancy Act, is a special statutory right i e a charge within S 100 T P Act which arises by operation of law That being so its scope and limitations are those which the law creating it gives) ** (1890) 14 CPLR 17 (19, 20) (Section 99 T P Act (now repealed) held applicable) ** (1907) 3 Nag LR 164 (168) (Landlord cannot bring the holding of his tenant to sale in execution of a decree for arrears of rent except in the manner provided by S 99, T. P Act) ** (1903) 16 CPLR 52 (53)

[But see (1897) 10 C PLR 48 (49, 51) (Charge under old S 40 of the C P Tenancy Act was held to be not such a charge as was defined by S 100, T P. Act)]

6. 1963 Ker LT 884 (885) (Malabar Tenancy Act (14 of 1930) S 41 — Assignee from jenmi — Is not entitled to charge for arrears of michavarum) ** 1956 Ker LT 313 (320) (DB) (In respect of jenmom lands there is charge on the kanom holding for michavarum and other dues payable under kanapattom.)

Section 100 — Note 13

1. AIR 1934 Bom 189 (190) (DB).

2. AIR 1919 Cal 634 (635) 46 Cal 111 (DB) ** AIR 1941 Lah 274 (275) (DB)

[See also (1887) 14 Cal 730 (738) (FB).]

3. AIR 1919 Mad 528 (530) (DB)

4. (1905) 1 Cal LJ 531 (536) (DB) ** (1893) 6 CPLR 60 (63) ** AIR 1916 Cal 801 (802, 803) : 43 Cal 69 (DB).

[See also (1913) 40 Cal 514 (516, 517) (DB)]

5. AIR 1951 All 141 (145, 150) : ILR (1953) 1 All 284 (FB) ** AIR 1966 Pat 75 (79) (DB) ** 1965 All LJ 1104 (1106) ** AIR 1965 Ker 27 (27) ** AIR 1964 Bom 1 (3) ILR (1963) Bom 509 (DB) ** AIR 1962 Cal 12 (16) (DB) ** (1956) 60 Cal WN 988 (991) * AIR 1951 Cal 398 (399) (DB) ** AIR 1951 Pat 254 (255) ILR 30 Pat 613 ** AIR 1950 Lah 54 (56,

(1) A charge can be created by act of parties or by operation of law A mortgage, however, can only be created by act of parties.(6)

(2) In a simple mortgage there is always a personal covenant to pay, while there may or may not be a personal covenant in a charge.(7)

(3) A mortgage secures the payment of a *loan* or a *debt*. A charge need not necessarily secure any *debt* or *loan* Thus, a charge for maintenance is not a charge to secure a debt which is to be advanced by the charge-holder In other words, charge may be a mere grant and may not be a loan or debt or liability arising out of an engagement.(8)

(4) A mortgage can be enforced against a transferee with or without notice of it. A charge

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57) Pak LR (1949) Lah 595 ** AIR 1950 Nag 117 (123) · ILR (1949) Nag 802 ** ILR (1949) I Cal 392 (397) (DB) ** ILR (1948) I Cal 492 (498) ** AIR 1931 All 338 (339) ** **AIR 1943 Oudh 354 (356) : 19 Luck 1 (FB) (AIR 1943 Oudh 338 (FB), Foll.) ** AIR 1943 Oudh 338 (352, 353) : 18 Luck 683 (FB) ** AIR 1932 Lah 465 (466) : 13 Lah 660 (FB)** AIR 1932 Oudh 336 (340) 8 Luck 168 (DB) ** AIR 1934 Bom 189 (19) (DB) ** (1902) 25 Mad 220 (237) (FB)** AIR 1926 Mad 903 (904) ** (1906) 33 Cal 985 (992) (DB) ** AIR 1929 All 281 (285) 51 All 612 (DB) ** AIR 1929 Oudh 539 (540, 541) (DB) ** AIR 1924 Oudh 209 (215) (DB) ** AIR 1936 Lah 482 (484) (DB) ** AIR 1937 Oudh 35 (42) (FB)** AIR 1936 Oudh 196 (200) (DB) ** AIR 1922 Pat 529 (532) · 1 Pat 387 (DB) (A document ran as follows "This settled coal land, mines, ec., as well as all other movables shall ever be regarded as a security for he payment of the rent and cesses due togeher with interest thereon due to you I shall not be competent to transfer the said property by sale, gift or remove the same, so long as he rent, etc., due to you will remain unpaid" — **Held**, it created a mortgage and not merely a charge) ** AIR 1914 Oudh 349 (351) ** AIR 1931 All 62 (64) 52 All 985 (DB) ** AIR 1941 Lah 274 (275) (DB) ** AIR 1937 Oudh 217 (219) : 13 Luck 101 (FB)** (1890) 13 All 28 (44) (DB) ** AIR 1915 Cal 478 (480) 42 Cal 625 (DB) ** AIR 1931 Cal 223 (228) 58 Cal 316 (DB) (A charge is a right in immovable property within S 17(1)(b) of Registration Act) ** AIR 1932 Cal 451 (454) (DB) ** AIR 1939 Nag 118 (119) ILR (1941) Nag 356 ** AIR 1936 Nag 125 (127) ILR (1936) Nag 22 (DB) ** AIR 1916 Low Bur 67 (67) ** (1908) 35 Cal 837 (843, 844) (DB) ** AIR 1941 Nag 102 (103, 104) ILR (1942) Nag 263 (DB) ** (1884) 12 QBD 347 (350) 32 WR (Eng) 492 53 LJ QB 222 50 LT 723 Burlinson v. Hall ** (1889) 23 QBD 239 (242) 38 WR (Eng) 15 58 LJ QB 459 61 LT 229, Tancred v Delagoa Bay Rly Co ** AIR 1940 All 456 (457) : ILR (1940) All 669 (DB) (Overruled on another point in AIR 1943 All 115 (FB).)

Also see Note 1 and S. 58, Note 4.

[See however AIR 1941 All 345 (347) : ILR (1941) All 691 (FB). (Obiter) ** AIR 1914 Nag 32 (34) : 10 Nag LR 81.]

6. AIR 1950 East Punj 64 (66) ** AIR 1950 Nag 117 (123) ILR (1949) Nag 802 ** (1911) 11 Ind Cas 629 (632) (DB) (Mad) ** (1908) 35 Cal 837 (844) (DB)

[See also AIR 1919 Mad 528 (530) (DB)]

[But see AIR 1918 Lah 99 (102) 56 Pun Re 1918 (Page 191) (A mortgage can be created by a decree and it stands practically on the same footing as one created by conract *inter parties*) ** AIR 1915 Cal 478 (480) 42 Cal 625 (DB) (Mortgages can be created by express words of the statute — See S 13, Patna Regulation, or S. 171, Bengal Tenancy Act.)]

7. **AIR 1951 All 141 (150) . ILR (1953) 1 All 284 (FB)** ** AIR 1950 Nag 117 (123) : ILR (1949) Nag 802 ** AIR 1931 All 99 (100) 52 All 901 (DB) ** AIR 1933 All 934 (937) (DB) ** AIR 1935 Oudh 309 (313) ** AIR 1934 Bom 189 (190) (DB) ** AIR 1914 Mad 114 (115) (DB) (Per Sadasiva Iyer, J) ** AIR 1918 Mad 997 (997) (DB) ** AIR 1915 Mad 1172 (1172) (DB) ** AIR 1919 Mad 528 (530) (DB).

8. **AIR 1951 All 141 (150) : ILR (1953) 1 All 284 (FB).**

cannot be enforced against a transferee for consideration without notice (9)

(5) A mortgage can be redeemed but that is not necessarily the case with a mere charge **(10)** In the undermentioned cases(11) the word "redeem" has been used in connection with paying off the amount that was charged on the property In these cases it must be understood as having been used in the sense merely of "paying off a debt" and not in the technical sense in which it is used in connexion with a mortgage (See also Note 43 on Section 91)

(6) A charge may be created in perpetuity, while a mortgage must necessarily be for a limited period.**(12)**

14. Transfer invalid as a mortgage, whether operates as a charge.

A transaction which is intended to be a mortgage but which fails as a mortgage by reason of not fulfilling the requirements of law, such as the provisions of S 59, does not operate as a charge (1)

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9. AIR 1950 Nag 117 (123) ILR (1949) Nag 802 ** ILR (1948) 1 Cal 492 (498)

[See Notes 22 to 24]

10. ILR (1948) 1 Cal 492 (498) (An agreement to pay annuity to a person and to continue to pay to his descendants from generation to generation to generation making a charge over property creates a charge and not a mortgage as the intention of the parties is to create a liability in perpetuity not capable of being redeemed absolutely at any time) ** (1866) 13 LT (NS)) 783 (784) 14 WR (Eng) 298 35 LJ Ch 253 147 RR 129 Earl of Cardigan v Hood.

[See also AIR 1933 All 934 (937 938) (DB) (Charge for maintenance Charge in perpetuity may not be redeemed at all) ** [illegible] (Charge for maintenance — Such a charge may not be redeemed at all)]

11. AIR 1935 Mad 867 (869) 59 Mad [illegible] (DB) ** AIR [illegible] (Possessory charge created by award — Limitation for redemption is 12 years)

12. ILR (1948) 1 Cal 492 (498) ** AIR 1965 Ker [illegible] ** AIR [illegible] (DB) 5 (6 7) ** AIR 1933 All 934 (938) (DB)

Section 100 — Note 14

1. AIR 1916 PC 169 (171). (Mortgage not attested by two witnesses) ** AIR 1973 Raj 123 ** (1906) 33 Cal 985 (993) (DB) (Attested by one witness ** (1905) 32 Cal 729 (732 **(DB). (Not properly attested)** (1899) 26 Cal 78 (81) (DB) (Mortgage bond attested by one witness only) ** (1897) 1 Cal WN 81 (82 83) (DB) (One attesting witness) ** (1908) 35 Cal 837 (DB) (The fact that the necessary formalities of due execution are wanting would not convert the mortgage into a charge) ** (1912) 15 Ind Cas 666 (DB) (Cal) (One attesting witness) ** AIR 1925 Rang 55 58) 2 Rang 429 (Mortgage not reduced to writing or registered) ** AIR 1922 Low Bur 25 (26 11 Low Bur Ru 319 (DB) ** AIR 1916 Low Bur 94 (95) 8 Low Bur Ru 553 (Not registered deed) ** AIR 1914 Nag 32 (36) 10 Nag LR 81 ** (1908) 31 Mad 337 (338) (DB) (Deed not attested) ** AIR 1937 Mad 148 (149) (Want of registration and attestation) ** AIR 1917 Mad 849 (852) (DB) (Attested by one witness) ** AIR 1916 A 163 (164) 38 A L 461 (DB) (Deed not duly attested) **(1913) 35 All 164 (166) (FB).** (Mortgage deed attested by only one witness) ** (1905) 7 Bom LR 934 (935) (DB) (Deed unattested) ** AIR 1927 Sind 66 (75) (Simple mortgage deed neither attested nor registered) ** AIR 1926 Sind 88 (89) 18 Sind LR 282 (DB) (Improper attestation) ** AIR 1934 Bom 24 (25 26) (DB) **(Transaction not executed in legal manner.)**

[See also (1911) 10 Ind Cas 919 (920) (Rang) (Section 100 of the Act is not intended for the protection of those who take conveyances in violation of express provisions of law) ** (1901) 24 Mad 397 (399) (Document invalid as mortgage cannot be held to be a charge as against stranger) ** (1904) 28 Mad 54 (55 56) (DB) ** AIR 1925 Rang 112 3) 2 Rang 313 (DB) (An oral usufructuary mortgagee has no charge on the mortgaged land within the meaning of S 100 of the Transfer of Property Act but he is equitably entitled to retain possession of the land until his debt has been repaid)]

Also see S. 59 Notes 8 and 15.

A contrary view was expressed in the udnermentioned cases(2) that even where an intended security is not completed according to law, a charge may be created The view was rested on the English rule that where parties intend to create a charge and have the power to do so Court will give effect to that intention notwithstanding any mistake which may have occurred in the attempt to effect it, on the principle that equity treats that as done which ought to be done (3) But the Courts in this country are not free to apply the English equitable principles in the face of the statutory provision contained in this section.(4)

Where an instrument embodies the true contract between the parties and is, in terms, an instrument which only creates a charge, then an erroneous belief of the parties that they had created a mortgage would not affect the true nature and validity of the transaction and the failure to effect an attestation in the form required for a mortgage would not obstruct the legal enforcement of the charge.(5)

15. Mortgage or charge.

A charge has a closer resemblance to a simple mortgage than to any other kind of mortgage As the remedy in a simple mortgage and in a charge is the same and the provisions applicable to simple mortgages are made applicable to charges also, the line of demarcation between them is very thin and sometimes hardly distinguishable.(1)

In a charge no right in rem is created but right is something more than a personal obligation for it is a jus ad rem i.e. a right to a thing without possession. Charge is only good against subsequent transferee with notice.(2)

A charge is a burden laid on immovable property of one person as security for the payment of money to another and it is to be contradistinguished from a mortgage. A mortgage, is, in essence, a form of transfer but a charge is not so and while a mortgage is a security for payment of debt, a charge is a security for payment of money which may or may not be a debt. A mortgage may be created only by act of parties but a charge may be created either by (i) act of parties or (ii) by operation of law or (iii) by decree of a competent Court.(3)

As has been seen already in Note 13, the main distinction between a mortgage and a charge is that in a mortgage there is a *transfer of an interest* in property, while in a charge there is no such transfer. Therefore, in order to determine whether a particular transaction is a mortgage or a charge it must be ascertained whether the parties to the transaction *intended* to transfer an interest in the

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2. (1912) 39 Cal 810 (820) (Where a deed of hypothecation did not comply with the terms of the articles of association of a company, held that the document created a valid charge) ** (1903) 17 Mad LJ 39 (39) (DB).

3. (1865) 13 LT (NS) 177 (178) 46 ER 594 35 Beav 153 14 WR (Eng) 6 147 RR 82, *In re Strand Music Hall Co.* ** (1894) 3 Ch 181 (183, 184) · 63 LJ Ch 810 : 71 LT 115 : 42 WR (Eng) 600, *In re Queensland Land and Coal Co* ** (1904) 2 Ch 234 (247, 248) : 73 LJ Ch 617 91 LT 124, *In re Johnston Foreign Patents Co* ** (1886) 34 Ch D 43 (49, 51) : 35 WR (Eng) 40 55 LT 472, *Ross v Army and Navy Hotel Co.* ** (1906) 33 Cal 985 (994) (DB).

4. (1906) 33 Cal 985 (994, 995) (DB).

5. AIR 1914 Nag 32 (36) : 10 Nag LR 81

Section 100 — Note 15

1. AIR 1970 SC 1041 : (1970) 1 SCJ 487. (An agreement to mortgage is not a mortgage) ** 1965 All LJ 1104 (1106) ** AIR 1933 All 934 (937) (DB).

[See also AIR 1916 Nag 78 (79) : 13 Nag LR 19.]

2. AIR 1971 Pat 27 : 1970 BLJR 481.

3. 1969 All LJ 480 : ILR (1969) 1 All 900

property (4) Such intention must be gathered by looking at the substance and essence of the transaction and not merely at the form of the deed (5) If the intention of the parties is to transfer an interest in the property, in order to make it a security, the transaction will amount to a mortgage (6) If, on the other hand, parties intend merely to make the property security without transferring any interest in it the transaction amounts to a charge (7)

In a simple mortgage the mortgagor agrees expressly or impliedly that the mortgagee shall have the right to cause the mortgaged property to be sold for the recovery of his debt The presence of a clause giving the other party a right to sell the property in order to recover his debt indicates a transfer of an interest in the property and is, therefore, a distinguishing factor between a simple mortgage and a charge If an instrument is expressly stated to be a mortgage and gives a power of realization of the mortgage-money by sale of the mortgaged property, it should be held to be a mortgage.(8)

A mortgage by deposit of title deeds effectuates transfer of right to the properties and creation of charge separately on the properties becomes unnecessary (9)

If, on the other hand, the instrument simply creates a lien or directs the realization of money from a particular property without reference to sale, it creates a charge (10) Thus, where a decree based on a compromise provided that "the defendants do pay to the plaintiff the sum of Rs 31,251" and further declared that "the immovable properties specified therein shall be hypothecated for the realization of the said money and that the defendants shall not be able to create any encumbrance on the same," it was held that the decree had no resemblance in form to a simple mortgage that the hypothecation clause created a lien and prohibited further encumbrances and that the parties only intended that the immovable properties mentioned in the schedule to the decree should be reserved intact as security for the payment of money (11) Similarly where under a deed of adjustment filed in execution proceedings the firm *A* was to pay *K* Rs 34,950 on 18 5 1921 and on default to pay Rs. 40,000, and the deed concluded "the first party to be at liberty to recover the amount due to them under this adjustment by sale of the property in execution," it was held that the deed did not give the opponent the power of realization by sale of the property in any of the recognised ways, i e., by sale through Court in execution of a mortgage decree or sale without the intervention of Court under a power given in a mortgage-deed, and was therefore not a mortgage but was merely a

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4. See Note 1.

5. AIR 1936 Lah 482 (484) (DB) ** AIR 1933 All 934 (936) (DB)

6. AIR 1943 Mad 100 (103) ILR (1943) Mad 195 (Mortgage of *X* by conditional sale — Security bond making *Y* security for payment of balance of interest that might be due in respect of mortgage on *X* — Possession of both *X* and *Y* given to mortgagee — **Held**, a mortgage and not merely charge was created in regard to *Y* by the security bond) ** AIR 1934 Pat 217 (219 221) (DB) ** (1905) 9 Cal W N [illegible] (682) (683) ** AIR 1926 Mad 650 (651) (DB) ** AIR 1937 Mad 148 (149) ** [illegible] 11 Ind Cas 662 (662) (DB) Mad ** (1891) 15 Bom 183 (185 186) (DB) ** AIR 1915 A [illegible] 5 15) (DB) ** AIR 1941 Lah 274 (275) (DB) (Person definitely stating that he mortgages his property and would redeem it — **Document is mortgage and not merely charge.**)

7. (1900) 27 Cal 194 (196) (DB) ** AIR 1916 Mad 1219 (1259) (DB) ** AIR 1939 Nag 132 (134) ** **AIR 193 All 136 (147) : 52 All 281 (FB)** ** (1907) 10 Oudh Cas 17 (20)

8. 1965 All LJ 1104 (1108) ** (1908) 35 Cal 837 (843 844) (DB) ** (1890) 13 All 28 (39 41) (DB) (The words *arti* and *mustaghras* imply a power of sale) ** **(1885) 7 All 258 (265, 266) (FB)** ** AIR 1917 All 439 (441) 3 All 361 (DB) ** (1880) 2 All 481 (485) (DB) ** (1911) 9 Ind Cas 828 (829) (DB) (All) ** AIR 1936 Lah 482 (485) (DB) ** (1913) 26 Ind Cas 870 (871) (Oudh) ** AIR 1914 Nag 32 (34) 10 Nag LR 81

9. **AIR 1970 All 644 : 1970 All LJ 864 (SB).**

10. (1908) 35 Cal 837 (843) (DB) ** AIR 1936 Oudh 196 (200) (DB)

11. (1908) 35 Cal 837 (844) (DB).

charge.(12) The power of sale given by the deed in that case was peculiar, limited and outside the provision of the Indian law relating to realization of moneys secured by mortgage by sale of the mortgaged proeprty. On the other hand, where it was stated that the property was *nazar gahan* and the transferee was granted a right to cause the property to be sold through Court, it was held that the document created a mortgage and not a charge.(13) In the case of documents written in the language of the State, the mere name given to the document(14) or the words which imply a power of sale(15) are not by themselves sufficient guides for determining the character of the transaction. The intention of the parties must be ascertained from all the circumstances. Thus, where an *ikrarnama* executed by *A* in favour of his wife *M* securing his immovable property for the payment of her dower-debt used the words "arth" and "mustaghraq" which imply a power of sale and it was argued that the above words showed that the transaction was a mortgage, it was held that there was nothing in the deed except the above words to show that the power of sale was granted, that the parties wishing to create a charge as distinguished from a mortgage could not do so without using the above or some such words, and that what was intended was to provide a property which *M* could always take possession of, in lieu of her dower and therefore the transaction did not amount to a simple mortgage but created a charge only.(16)

However, where under an agreement for sale of property earnest money is paid and the sale is to be held within four months subject to approval of owner's title with condition that if the vendor does not complete the sale the earnest money would be due and payable by him and that it would be a first charge on the property the transaction amounts to a mortgage.(17)

Where an instalment bond provided that the executant would be personally responsible for the payment of the money and in case of default it would be competent to the other party "to institute a suit, obtain a decree and to recover the dues by attachment and sale of the under-tenure," it was held that the clause which entitled the creditor to recover his dues by attachment and sale of the property lent support to the view that a mere charge was to be created, inasmuch as an attachment is wholly unnecessary in a proceeding for the sale of property under a mortgage decree. The document therefore was held to create only a charge and not a mortgage.(18)

According to the High Court of Lahore the presence of a personal liability makes the transaction a mortgage. In *Benares Bank Ltd. v. Harprasad*(19) their Lordships observed :

> "When a charge is created by act of party the specification of the particular fund or property negatives a personal liability and the remedy of the holder of the charge is against the property charged only. When there is in addition a personal covenant, the security will become collateral to that personal covenant and the security would in that case appear to become a transfer of a right of sale to support the personal covenant and as the right of sale is a right in rem the transaction would be a mortgage. For this reason it has been held that the absence of a personal liability is the principal test that distinguishes a charge from a simple mortgage."

A similar view was taken by the Oudh Judicial Commissioner's Court also in the undermentioned case.(20) See also the undermentioned case.(21)

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12. AIR 1927 Sind 66 (75)
13. (1890) 14 Bom 577 (580) (DB).
14. AIR 1914 Nag 32 (35) : 10 Nag LR 81.
15. (1913) 19 Ind Cas 658 (660) (DB) (All)
16. (1913) 19 Ind Cas 658 (660) (DB) (All).
    [See also (1913) 19 Ind Cas 661 (662) (DB) (All).]
17. ILR (1966) 2 Cal 364.
18. (1906) 33 Cal 985 (992) (DB)
19. AIR 1936 Lah 482 (484) (DB).
20. 1935 OWN 1199 (1200)
21. 1965 All LJ 1104 (1106). (Charge of mortgage – Existence of personal liability by itself is

In the Punjab certain classes of agriculturists cannot create a mortgage of their land by virtue of the Punjab Alienation of Land Act (13 of 1900) though it was permissible before. Where A executed a mortgage before the Act and subsequent to the Act took a further advance on the old security on the same conditions as the original mortgage, it was held that the subsequent transaction was not a fresh alienation so as to be hit by the Act,(22) but that it created only a charge (23).

16. Creation of charge — Writing and registration, whether necessary.

Prior to 1929, there was no provision specifying any formalities for the creation of a charge as there was in S. 59 in regard to mortgages, in S. 107 in regard to leases, in S. 118 in regard to exchanges, and in S. 123 in regard to gifts. In some cases it was held, therefore, that it could be created even orally,(1) in accordance with the general principle of law that everything is to be taken as permissible unless there is a prohibition against it. If, however, a document was executed, it had to be registered under S. 17(1)(b), Registration Act, unless the amount secured was less than one hundred rupees (2). No attestation was, however, necessary (3). Nor was it necessary that the deed should also be signed by the person creating the charge. It was sufficient if it was accepted by him.(4)

The first paragraph of Section 100 of T.P. Act consists of two parts. The first part concerns the creation of a charge over immovable property. A charge may be made by act of parties or by operation of law. No restriction is put on the manner in which a charge can be made. Where such a charge has been created the second part comes into play. It provides that all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. The

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not decisive — Absence of such liability may incline the balance against the deed being a simple mortgage.)

[See also AIR 1941 Lah 274 (275) (DB).]

22. AIR 1921 Lah 136 (137) : 2 Lah 202 (DB).

23. AIR 1932 Lah 465 (466) : 13 Lah 660 (FB). (AIR 1921 Lah 136 Approved.)

Section 100 — Note 16

1. AIR 1930 Sind 77 (78, 79) : 24 Sind LR 160 ** (1936) (64 Ind Cas 477, 479) (DB) (Cal) ** AIR 1934 Bom 189 (191) (DB). (Case not governed by the amended Section. Note — In so far as the decision says that oral charge could be created by virtue of S. 9, it is not correct as S. 9 refers only to transfer of property which a charge is not. ** AIR 1936 Mad 865 (867) (DB). (Note — In so far as the decision says that the charge can be created orally by virtue of S. 9, it is incorrect as S. 9 does not apply to charges as it is not a transfer of property, though the principle on which S. 9 is based will apply to a charge also.) ** AIR 1926 Nag 262 (263) ** AIR 1914 Oudh 349 (351).

2. AIR 1929 PC 141 (143) : 7 Rang 234 ** AIR 1926 PC 94 (96) : 53 Ind App 214 ** (1985) 89 Cal WN 1049 (DB) ** AIR 1934 Mad 615 (616) (DB) ** AIR 1933 Cal 154 (160) : 59 Cal 1372 (DB) ** AIR 1934 Mad 713 (714) (DB). (A charge though it may not amount to a transfer creates some interest in immovable property and such a document must be registered.) ** AIR 1931 Cal 223 (228) : 58 Cal 136 (DB) ** (1912) 14 Ind Cas 29 (30) (DB) (Oudh) ** AIR 1926 Bom 495 (496) (DB) ** AIR 1924 Nag 360 (361) ** AIR 1926 Nag 262 (263) ** 1885 A.I.W.N. 19 (21) (DB) ** AIR 1936 Mad 865 (867) (DB) ** (1936) 64 Ind Cas 477 (479) (DB) (Cal) ** AIR 1933 Oudh 76 (78) (DB) ** AIR 1933 Rang 259 (261). (Surety bond which purports to create a charge in favour of Court over a house and site for a sum of Rupees 176-8-0 if not registered is invalid.)

[See also AIR 1923 Bom 287 (287).]

[See however (1933) 15 Nag LJ 141 (146). (A document creating a charge need not be registered and hence its registration by itself cannot create a notice.)]

3. AIR 1921 Mad 514 (515) (DB) ** AIR 1936 Oudh 196 (200) (DB). (A charge is valid without attestation.)

4. AIR 1936 Mad 865 (867, 868) (DB).

second part does not address itself to the question of creation of a charge. It does not attract the provisions of Section 59 of Registration Act relating to the creation of a mortgage. With regard to the applicability of the provisions to a simple mortgage, the second part of the first paragraph makes no distinction between a charge created by act of parties and a charge by operation of law Now a charge by operation of law is not made by a signed, registered and attested instrument. Obviously, the second part has not the effect of attracting the provisions of Section 59 to such a charge.If a charge can be made by a registered instrument only in accordance with Section 59 of Registration Act the subsequent transferee will always have notice of the charge in view of Section 3 of T.P. Act under which registration of the instrument operates as such a notice. But the basic assumption of the doctrine of noice enunciated in the second paragraph is that there may be cases where the subsequent transferee may not have notice of the charge The plain implication of this paragraph is that a charge can be made without any writing If a non-testamentary instrument creates a charge of the value of Rs. 100/- or upwards, the document must be registered under Section 17(1)(b) of the Registration Act. But there is no provision of law which requires that an instrument creating the charge must be attested by witnesses Thus where in a suit on promissory notes, a security bond is executed by defendant in respect of immovable properties for the benefit of decree-holder as a charge for decree amount such a security bond is not required to be attested It is valid and operative if it is duly registered **(5)**

Where the charge is created by a decree, it is exempted from registration under S 17(2)(vi), Registration Act, 1908. The same rule has been held to apply where the decree incorporates a compromise creating a charge **(6)** It has also been held that in such cases the fact that the compromise creating the charge has not been attested would not render the charge or the decree invalid **(7)**

Where the value of the suit property exceeds Rs 100/-, a security bond executed for stay of execution of decree pending appeal requires to be registered **(8)**

See also Note 8 on section 4.

17. Rights and liabilities of a charge-holder.

The old section did not clearly show what exactly the rights and liabilities of a charge-holder were The object of the words "and all the provisions ..... apply to such charge" now introduced in

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5. **AIR 1969 SC 1147 (1152, 1153) : (1969) 2 SCJ 784.** (AIR 1939 Mad 202 and AIR 1940 Mad 140, **Overruled;** O S A Nos 65, 70, 71 of 1956, D/ 28-7-1961 (Mad) **Reversed;** AIR 1950 Nag 117, **Approved.**)

6. AIR 1946 Mad 293 (293) (A charge created as the result of a compromise entered into between the parties in a maintenance suit, which is embodied in the decree, is not invalid for want of registration) ** AIR 1936 All 621 (623) (Different consideration would prevail where a third party, who was not party to the suit comes to enforce the claim under the composition deed — Such person desires to enforce the claim under the composition deed and not under the decree — Agreement must therefore be registered) ** AIR 1933 Bom 298 (299) (DB) ** (1908) 35 Cal 837 (841) (DB) ** AIR 1930 Nag 17 (19) ** AIR 1939 Nag 118 (120) : ILR (1941) Nag 356.

   [See also (1908) 35 Cal 845 (849) (FB). (Deed not registered according to provisions of the law in force and therefore inoperative.)]

   [See however AIR 1955 Raj 17 (18) ILR (1955) 5 Raj 8 (DB) (Compromise decree in money suit — Charge on immovable property attached before judgment created — Not exempted from registration.)]

7. AIR 1952 Mad 163 (164).

8. AIR 1980 Andh Pra 290 (293) (1980, 2 Andh WR 286 (AIR 1928 bom 42, AIR 1934 Lah 138, AIR 1961 MP 2, AIR 1947 Nag 26 AIR 1974 Delhi 136, AIR 1975 Him Pra 25 AIR 1980 Orissa 44, AIR 1960 Punj 517, **Dissented from.**)

the present section is to clarify the position.(1) But even this fails to give a clear idea as the particular rights and liabilities of a charge-holder The words "so far as may be," show that certain provisions which apply to a simple mortgage may *not* be applicable o the case of a charge The section provides that all the provisions preceding this section which apply to a simple mortgage shall apply to a charge, unless any particular provision is incompatible with a charge (2) Thus the provisions contained in S. 56(3), S 67(4), S. 68(5), S 79(6), S 83(7), and S 92(8), have been held to be applicable to charges. On the other hand the provisions of S 67-A have been held applicable to charges created by act of parties but not to charges created by operation of law, on the ground that the clause "in the absence of a contract to the contrary" occurring in that section is an essential part of it and cannot be given effect to in a statutory charge (9) On the same principle, it follows that all the provisions which apply to a simple mortgage only "in the absence of a contract to the contrary will not apply to a charge created by operation of law.

A charge-holder, like a simple mortgagee, has a right to bring the property charged to sale (10)

Section 100 — Note 17

1. See the Report of the Special Committee, clause 49

2. AIR 1939 Mad 202 (203) ILR (1939) Mad 199 (DB) ** 1998 (149) Cur Tax Rep 444 (448) (Mad)

3. See Note 6 on Section 56

4. AIR 1952 All 315 (317 318) (Charge under S 177 U P Monopolies Act — Charge is indivisible and cannot be split up by apportioning the liability for taxes among various persons) ** AIR 1934 Cal 862 (864) 61 Cal 1047 (DB) (Appeal from AIR 1934 Cal 325 But Ss 67 and 67 A will not apply to charges created by operation of law ** AIR 1937 Oudh 420 (423) 13 Luck 35 (DB) (If a purchaser of a portion of the property charged by a will is made to pay the whole amount his remedy will lie in a suit for contribution against the persons in possession of the portion not purchased by him) ** AIR 1936 Oudh 52 (54) 11 Luck 575 (DB) (Charge created by a will) ** AIR 1932 Oudh 336 (339) 8 Luck 16 (DB) (Charge created by will — Charge holder can enforce his charge against whole or any portion of the property charged.)

   See also Note 3 on Section 67.

5. See Note 20 on Section 68

6. See Note 9 on Section 79.

7. AIR 1949 Mad 615 (615).

   See Note 4 on Section 83.

8. AIR 1947 Nag 43 (45) ILR (1946) Nag 469 (DB) (Prior charge paid off by subsequent mortgagee — Mortgagee is subrogated to rights of charge holder)

See Note 6 on Section 92.

9. AIR 1934 Cal 862 (863, 864) 61 Cal 1047 (DB) (Appeal from AIR 1934 Cal 325)

   See also Note 3 on Section 67-A.

10. **AIR 1941 All 345 (351) : ILR (1941) All 691 (FB)** (Obiter — When a charge becomes fixed on specific immovable property it is to all intents and purposes a mortgage if it is created by act of parties Under O 34 R 15 Civil P C it is to be enforced exactly in the same manner as a mortgage) **** AIR 1936 PC 204 (206) : 59 Mad 910 : 63 Ind App 304.** (Charge by operation of law can be enforced by sale under provisions of S 100 T P Act and O 34, R 15, Civil P C) ** AIR 1939 Nag 132 (134) ** AIR 1940 Nag 8 (11) (DB) **(No charge-holder can sue for possession.)**

   [See also (1899) 12 CPLR 26 (27) ** (1862) 31 L J Ch 282 (283) 5 L T (NS) 572 10 W R (Eng) 148 136 RR 379, Mathews v Goodday ** (1894) 3 Ch 226 (227) 43 W R (Eng) 55 **: 63 LJ Ch 749 : 71 LT 181, In re Owen.]**

In *Renukabai v. Bhosan*(11) where a charge for maintenance was created by act of parties and the charge-holder was given a right to take possession of the property instead of a right to ask for sale, it was held that the first part of the section dealt with substantive rights and the second with the manner in which they were to be enforced and if a transaction created a charge within the meaning of the first part of the section it did not become invalid only because a remedy provided for the enforcement of the charge was other than the sale of the property. According to his Lordship "S. 100 contemplates other methods of enforcement, for, the words relating to sale are "so far as may be" and unless some authority is cited to show that the transaction is invalid, effect should be given to the manifest intention of the parties."

A charge-holder, like a simple mortgagee, can enforce his charge against any portion of the property charged.(12)

Where there was a prior charge to secure the arrears of property tax on a building mortgaged to Bank for loan, it was held that the Bank on selling the building was selling as second mortgagee who had to discharge the first charge so as to give an unincumbered estated (13)

Where a charge holder is given *possession of the property as a charge-holder, he can remain in possession of it until the amount due to him is satisfied, but if the possession is not attributable to the charge he cannot insist on retaining possession until his dues are paid (14)* In the undermentioned case (15) decided before the amendment in 1929, where the charge-holder was given possession as such and one of the owners of the charged property sued to recover possession on payment of the charged amount it was held that, by virtue of S 100, the last paragraph of S 60 applied to his case and if he had claimed possession of his share only on, payment of the proportionate amount he would not have been allowed to do so but as he claimed the whole property by paying the whole amount he was entitled to do so.

Where in execution of maintenance decree property charged is sold, auction purchaser can be said to have purchased property subject to charge of maintenance as the judgment debtor's right was already circumscribed by charge of maintenance.(16)

Where while enforcing charge of maintenance, if at a particular point of time a particular property is sold and the sale proceeds were not sufficient to liquidate the arrears of maintenance, then the charge-holder could proceed against other properties in the very execution.(17)

A charge already created in favour of the creditor would continue to subsist so long as the same has not been extinguished or abandoned by express words. Hence where a mortgagor, as a part of the same transaction, took back the mortgaged property on lease, making the rent payable a charge on his equity of redemption, and subsequently surrendered the lease, undertaking to pay the arrears of rent and interest, without delay, and there were no express words in the release deed executed by him extinguishing the charge created by him, it was held, that the mortgagee was entitled to insist on the payment of the arrears of rent as well as the mortgage amount due before allowing redemption.(18)

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11. AIR 1939 Nag 132 (134).
12. AIR 1947 Oudh 122 (126) 22 Luck 37 (Release of part of charged property from charge by owner's action — Charge-holder can recover entire amount of charge from remaining property.)
13. (1983) 1 WLR 472 (476) (Eng case).
14. AIR 1952 Trav Co 539 (539) (DB) ** AIR 1937 Cal 129 (138, 139) ILR (1937) 1 Cal 203 (DB).

    [See also (1906) 33 Cal 1119 (1130) (DB).]
15. (1907) 10 Oudh Cas 17 (20, 21).
16. AIR 1985 (NOC) 127 : ILR (1985) Kant 470.
17. AIR 1985 (NOC) 127 : ILR (1985) Kant 470.
18. AIR 1951 Trav-Co 17 (19, 20) (DB).

Where a decree granted a personal decree for money and charged the plaintiff property for the decretal amount, charge is only ancillary to the money decree and judgment debtor cannot contend that the decree-holder cannot proceed against other property (19)

18. Priority as amongst several charges.

Ordinarily as between several charges created on the same immovable property a charge late, in point of time will be postponed to one earlier in point of time (1) See also section 48

19. Assignment of a charge.

A charge is not a merely *personal* right but is a right as to *property* and as such is transferable.(1) But in some cases, a charge has been said to be an *interest* in property (2) It is submitted that this is not an accurate use of language (See Note 13).

As to whether such an assignment requires registration see Note 17 on S 48 under the sub-heading "debt secured by a charge" and the undermentioned cases (3)

A partition deed between A and N created a charge in favour of A on properties allotted to N's share for expenses of certain religious ceremonies A transferred his share to X who performed such ceremonies and claimed to enforce the charge against N's properties It was held that if X was competent to perform such ceremonies he could enforce the charge against N (4)

20. Section does not apply to a charge of a trustee.

A trustee has a right of indemnity for out of pocket expenses properly incurred by him in the execution of the trust He has a first charge in respect of this right of indemnity on the trust estate,(1) both income and corpus (2) The first half of the second paragraph of this section provides that the provisions of this section will not apply to such a charge Section 32 of the Trusts Act 1882 provides a special mode for the enforcement of the trustee's charge That section provides

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19. (1967) 1 Mys LJ 664.

Section 100 — Note 18

1. AIR 1941 Cal 436 (441) ** AIR 1923 Rang 222 (223) : 1 Rang 261

Section 100 — Note 19

1. AIR 1938 Mad 457 (458) (DB) (Vendor's lien under S 55(4)(b)) ** AIR 1915 Cal 533 (544) : 42 Cal 849 (DB). (Do)

   Also see S 55, Note 12.

2. See AIR 1938 Mad 457 (458) (DB).

3. AIR 1936 Mad 573 (574) (Deed of assignment transferring right to mortgage of junior member of tarwad requires registration) ** AIR 1941 Bom 71 (75) (I L R (1941) Bom 36 (DB) (A charge being a right to or interest in immovable property an assignment of a decree creating charge falls under S. 17(1)(e), Registration Act.)

4. AIR 1942 Mad 711 (712).

Section 100 — Note 20

1. (1910) 37 Cal 229 (234) : 37 Ind App 27 (PC) ** AIR 1916 Mad 57 (59) 38 Mad 260 (DB) ** (1882) 22 Ch D 255 260 262) 52 LJ Ch 228 48 L E S 6 31 WR Eng 95 In re Pumfrey ** (1866) 14 LT 280 (280) : 35 Beav 449 , 55 ER 970 147 RR 255 12 Jur (NS) 757 14 WR (Eng) 599, Re Exhall Coal Co Ltd ** (1887) 20 QBD 43 46 57 LJ QB 47 58 LT 118 36 WR (Eng) 189 In re Holden Ex parte Offer R v Ter Trust originally valid subsequently becoming void) ** (1885) 29 Ch D 2 2 (217 54 L Ch 838 52 LT 344 33 WR (Eng) 452, James v Couchman ** (1910) 1 KB 22 (276 79 LJ KB 488 101 LT 771 St Thomas's Hospital v Richardson ** (1884) 25 Ch D 612 (614) 32 WR (Eng) 424 : 53 LJ Ch 598 : 50 LT 320, Dodds v. Tuke

2. AIR 1916 Mad 57 (62) 38 Mad 260 (DB) ** (1884) 25 Ch D 710 (715) 50 LT 742 Stott v Milne ** (1892) 66 LT 718 (719), Re Owen, Frisby Dyke and Co v Owen Executor of a will is in the position of a trustee.)

"Every trustee may reimburse himself, or pay or discharge out of the trust property, all expenses properly incurred in or about the execution of the trust or the realization, preservation or benefit of the trust property or the protection or support of the beneficiary.

If he pays such expenses out of his own pocket, he has a first charge upon the trust property for such expenses and interest thereon, but such charge (unless the expenses have been incurred with the sanction of a principal civil Court of original jurisdiction) shall be enforced only by prohibiting any disposition of the trust-property without previous payment of such expenses and interest.

If the trust property fails the trustee is entitled to recover from the beneficiary personally on whose behalf he acted, and at whose request, express or implied, he made the payment, the amount of such expenses

Where a trustee has by mistake made an over-payment to the beneficiary, he may reimburse the trust-property out of the beneficiary's interest If such interest fails, the trustee is entitled to recover from the beneficiary personally the amount of such over-payment."

The reason why the trustee is given the right to enforce his charge only by prohibiting any disposition of the trust property without previous payment of such expenses is that he cannot be allowed to put an end to the trust itself by bringing the *corpus* of the property to sale (3) In *Darke v Williamson*(4) the re-building of a chapel was entrusted to three of the trustees in whom the estate was vested There being a deficiency of money, they borrowed, on a deposit of the title deeds of the chapel, £500 which they personally engaged to pay. The representatives of the trustees were compelled to pay the money The legal estate was vested in new trustees It was held that representatives of the persons who had paid the £500 were not entitled to a decree for foreclosure or sale, as by granting such relief the trust would have been altogether destroyed, and that the proper course for realising the money was to deliver the title deeds into their custody and to prohibit disposition of the property without previous discharge of their lien.

The trustee is, however, entitled to have his costs and expenses of executing the trust which is existing and valid Where the trust is void there is no trust which he can execute and therefore he cannot claim costs and expenses incurred in the execution of what is merely an invalid and inoperative nominal trust.(5)

Where a donor settled under a Trust Deed all properties in favour of the school and the deed further provided that she was entitled to manage and run the school and reserved a right to receive maintenance from the school and a right to reside in the residential cottage during her lifetime, the maintenance was a charge on the properties.(6)

21. "Save as otherwise expressly provided by any law for the time being in force."

This expression in the second paragraph has the effect of excluding the charges which are expressly provided for in any other law in force from the operation of the provisions as regards notice in this section Thus, in case of a charge for a loan under the Land Improvement Loans Act (19 of 1883), S 7(1) of that Act read with its proviso operates as a saving clause and excludes it from the provision as to notice (1) Similarly, a charge for rent under the Central Provinces Tenancy

3. AIR 1916 Mad 57 (62) : 38 Mad 260 (DB).

4. (1858) 53 ER 774 (775) : 4 Jur (NS) 1009 : 6 WR (Eng) 824 : 119 RR 571.

5. (1866) LR 1 Eq 651 (655) 14 WR (Eng) 469 14 LT 120 35 LJ Ch 385 : 147 RR 227, Smith v Dresser ** (1887) 20 QBD 43 (46, 47) 57 LJQB 47 58 LT 118 . 36 WR (Eng) 189, In re Holden Ex parte Official Receiver (Trust originally valid, subsequently becoming void — Trustee entitled to charge on thrust property for expenses incurred in the performance of his duty as trustee.)

6. 1975 UPTC 75 (DB) (All)

Section 100 — Note 21

1. AIR 1939 Bom 183 (187) (Transferee for consideration without notice — Charge held binding)

Act (1 of 1920) is saved from the operation of the provision as regards notice in this section by reason of the express provision in S 9 of that Act **(2)** But the saving clause is not limited to those cases in which the law *expressly* states in so many words that the charge is to take effect against transferees for consideration without notice. It also applies to those cases in which the law provides *in effect* that the charge is to take effect against transferees without notice thus, a first charge created under S 177 of the United Provinces Municipalities Act (2 of 1916) in respect of Municipal tax comes within the saving clause and excludes it from the operation of the provision as to notice **(3)** But a contrary view has been taken in the undermentioned decision of the Gujarat High Court **(4)** The provision as to notice under this section was also applied to charges created under the Calcutta Municipal Act of 1899, for sums due on account of a tax imposed upon buildings or lands **and consolidated rates.(5)**

Auction purchaser of property sold in enforcement of statutory charge of municipal taxes having no notice is not bound by the claim This section in unambiguous language laid down that no charge is enforceable against any property in the hand of the transferee for consideration without notice of charge where it is otherwise provided by law A saving provision must expressly provide for enforcement of charge against the property in the hands of the transferee for value without notice of charge and not merely create a charge which Section 141 of the Bombay Provin **cial Municipal Corporation Act does not do (6)**

Where there is a specific provision like Section 74(1) Estate Duty Act that all private transfers of property which are subject to statutory charges of estate duty are void no one deriving title from such a transfer subsequently would get title free from the statutory charge (7)

In *Mama v Ashan Hussain*(8) A obtained a decree for her maintenance against *B* her husband, creating a charge on B's property Subsequently *B* mortgaged the property to C who sued on the mortgage and obtained possession by foreclosure On A's execution of the decree against C for enforcing the charge *C* sued for declaration that the property in his hands was free from the charge as he was a *bona fide* transferee for value without notice Assuming that *C* had no notice and that the charge created by the decree was a charge by operation of law within the meaning of this section, it was held that *C*, as a person claiming through *B* was *B*'s privy and the decree passed against *B* bound *C* also under the general rule of law *C* therefore was held to fall under the saving clause of the proviso as stated above and could not claim the benefit of the proviso

If the husband's transferee of property has notice of the charge in respect of the claim of **wife's maintenance, the charge can be enforced.(9)**

22. Transferee for consideration without notice.

Under the section as it stood before 1929 there was a difference of opinion on the question whether a charge was enforceable against a transferee for value without notice The general trend of

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2. AIR 1940 Nag 156 (158) ILR (1941) Nag 607 (DB) (The departure from the ordinary law, however, cannot be carried further by implication.)

3. **AIR 1943 All 115 (119, 120) , ILR (1943) All 453 (DB) (Overruling** AIR 1940 All 456)

   [**See** AIR 1941 Oudh 305 (308) , 16 Luck 607 (DB) (**Doctrine of constructive notice** applies to a person who buys a house liable for arrears of tax which forms First charge under S 177 U P Municipalities Act **Reversing** AIR 1937 Oudh 31)]

4. (1967) 8 Guj LR 65 (71) (DB) (AIR 1943 All 115 (FB), **Dissented from** — First charge declared under S 141 Bombay Provincial Municipal Corporation Act (4 of 1882))

5. AIR 1915 Cal 478 (480, 481) : 42 Cal 625) (DB)

6. **AIR 1971 SC 1201 : (1971) 2 Civ APJ 263 (SC).**

7. (1975) 2 Cal LJ 87 : (1978) 114 ITR 487

8. (1937) 169 Ind Cas 169 (171) (Nag).

9. AIR 1967 Mad 457 : ILR (1966) 2 Mad 164.

decisions was that it could not be so enforced.(1) A contrary view that it could be enforced even against a transferee for value without notice was held in some cases on the ground that a charge was a transfer of some interest in the property charged and that the transferee could not take a larger interest than the transferor himself had.(2)

As has been seen already in Note 1, the creation of a charge does *not* transfer any interest in the property charged, as in the case of a mortgage While, therefore, in the case of a mortgage a transferee of the mortgaged property can acquire only the remaining interest of the mortgagor, a transferee of the charged property takes the *whole property* unless there is any equity against him If he is a *bona fide* transferee for value there is no equity against him and therefore the charge cannot be enforceable against him.

The present section as amended in 1929 makes this position quite clear. A charge is not enforceable against a *bona fide* transferee for value (3) According to one view the amended section was introduced merely to clarify the position and does not effect any change in the law as it stood before the commencement (4) According to another view the amendment has effected a change in

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Section 100 — Note 22

1. AIR 1916 All 264 (265) 38 All 254 (DB) (Vendor's charge under S 55(4), T P Act) ** AIR 1916 Oudh 290 (291) (Do) ** AIR 1914 Oudh 349 (351) (Charge created by a will — Assumed to be a charge within S 100) ** AIR 1932 Oudh 336 (340) 8 Luck 168 (DB) (Charge created by a will) ** (1881) 8 Cal LR 210n (211n) (DB) (Purchaser with notice — Charge could be enforced against him) ** (1876) 25 Suth WR 243 (245) (DB) (Mortgage with notice of a charge — **Held**, charge had priority over the mortgage) ** AIR 1932 Cal 453 (454) (DB) (The case of decree of Court is different as it binds the property) ** AIR 1926 Nag 262 (263) ** AIR 1934 Nag 149 (150) 30 Nag LR 303 ** (1933) 142 Ind Cas 376 (377) (Nag) ** (1891) All WN 9 (10) (DB) ** (1890) 13 All 28 (44) (DB) ** (1906) 33 Cal 985 (993) (DB).

   [See AIR 1923 Rang 222 (223) : 1 Rang 261.]

2. (1869) 12 Mad 69 (71) (DB) ** AIR 1925 Mad 95 (105) (DB) ** (1870) 5 Mad HCR 457 (461) (DB) ** (1869) 4 Mad HCR 434 (440 442) (DB) ** AIR 1937 Mad 92 (94) (Statutory charge under S 55(4) is an interest in immovable property) ** (1879) 2 All 162 (164) (DB) ** (1906) 28 All 655 (659).

   Also see Note 28

3. **AIR 1947 PC 8 (13) : 73 Ind App 208 : ILR (1946) All 756.** (Joint Hindu family — Partition by arbitrators between father N and his sons — Award allotting villages to N subject to charge of maintenance for his wife — Mortgage and sale of villages by N to D — D held had notice of charge — Clause in mortgage deed that property was conveyed free of all liabilities held could not affect position) ** **AIR 1937 Oudh 217 (219) : 13 Luck 101 (FB)** ** (1984) 1 APLJ 256 ** AIR 1984 (NOC) 85 (Gauhati) ** (1967) 8 Guj LR 65 (70) ** AIR 1963 Bom 1 (4) ILR (1963) Bom 509 (DB) (Subsequent mortgage for consideration and without notice of prior charge prevails over the prior charge in favour of the creditor of mortgagor) ** AIR 1960 Punj 296 (297) ** (1956) 60 Cal WN 988 (991) ** AIR 1951 Cal 398 (399) (DB) ** ILR (1949) 1 Cal 392 (398) (DB) ** (1932) 15 Nag LJ 141 (145) ** **AIR 1948 Mad 1 (6) : ILR (1948) Mad 454 (FB)** ** AIR 1943 Bom 414 (416) (There is no difference in principle between a charge created by decree and one created by contract) ** AIR 1937 Oudh 301 (309) (DB) (Charge for maintenance created by a registered deed of family settlement — Purchaser held to have constructive notice of the charge) ** AIR 1937 Oudh 420 (422) 13 Luck 35 (DB) ** AIR 1936 Sind 16 (19) (DB) ** AIR 1939 Nag 132 (136) ** AIR 1940 Nag 163 (171) ILR (1941) Nag 513 (DB) (The legal estate prevails over a mere equity except when the legal owner takes with notice.) ** **AIR 1937 Oudh 35 (42) (FB)** ** **AIR 1937 Oudh 217 (219) : 13 Luck 101 (FB)** ** AIR 1936 Lah 482 (484) (DB)

   [See also AIR 1932 Mad 189 (192) : 55 Mad 468 (DB).]

4. AIR 1950 Nag 117 (124) ILR (1949) Nag 802 ** AIR 1945 Mad 350 (351) ** AIR 1914

the law, but there is a difference of opinion as to whether it is retrospective (5)

The question whether the transferee is a *bona fide* purchaser for value and without notice is a question of fact **(6)** The onus is on the transferee to prove that he is a transferee for consideration without notice.**(7)** The defence is a *single* defence that he is a *purchaser for value without notice* and does not consist of first, a defence that the defendant is a purchaser for value and then a reply from the plaintiff that he had notice**(8)** and hence ought to be specifically alleged and proved by the transferee.**(9)**

By virtue of provisions of S 100 T P Act, the land in the hands of the transferee can be pursued for realisation of the decretal dues unless the transferee can prove that he purchased the property without notice of the charge and for consideration **(10)**

It was held in the undermentioned case**(11)** that where a subsequent transferee of two items of property burdened with charge transfers one of them to a person for consideration who has no notice of the charge, the charge-holder can recover the entire charge from the remaining property

In order to claim the benefit of the protection under the proviso the subsequent transferee need not be the transferee of the entirety of the property The protection can be claimed even by the transferee of a portion of that property such as a subsequent purchaser for value or a transferee of an interest in the property such as a mortgagee.**(12)**

In the case of *Dattatraya Shankar More*(13) the Supreme Court held that the expression "in the hands of" appear to be a figurative expression intended to convey that a person has sufficient control over the subject matter to which in the context the phrase is applied so as to enable that person, to do whatever he can do with it as the nature of the subject-matter should permit Actual control as compared to possibility of obtaining control seems to be implied in the term In the context of the saving clause the inappropriateness of its applicability to a simple mortgage or in setting of the entire phraseology its application to mortgage seems to us to be clear and evident In the context in which the phrase, "in the hands of" has been used There is no doubt that it was intended to convey and it is conveyed that the buyer as a transferee for consideration without notice

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Nag 1 (6) ILR (1943) Nag 713 (DB) ** AIR 1943 Bom 414 [illegible] ** AIR [illegible] All 456 (456) ILR (1940) All 669 (DB) (**Overruled** on another point [illegible] AIR 1943 All 115 FB)

[See also AIR 1934 Mad 353 (354) (DB). (Obiter)]

5 AIR 1945 Pat 426 (427) 24 Pat 260 (DB) (Section 100 of Transfer of Property Act as amended in 1929 is retrospective) ** AIR 1945 Pat 434 (443) 24 Pat 345 (DB) (Section 100 (as amended in 1920), is retrospective (Per Manohar Lall J)) ** AIR 1934 Bom 189 (192) (DB) (Is not retrospective) ** AIR 1933 Mad 92 (94) (Dis) ** AIR 1933 All 687 (688) ILR (1939) All 885 (DB) (Is retrospective) (**Overruled** on another point in AIR 1943 All 115 (FB))

6. AIR 1966 Madh Pra 318 (321)

7. (1956) 60 Cal WN 988 (991) ** ILR (1949) 1 Cal 392 (397) (DB) ** AIR (1939) Nag 142 (135) ** AIR 1940 Nag 163 (171) ILR (1941) Nag 513 (Db) ** AIR 1935 Cal 475 (481) : 42 Cal 625 (DB) ** AIR 1928 Pat 587 (589) : 7 Pat 584 (DB)

8. AIR 1915 Cal 478 (481) : 42 Cal 625 (DB)

9. (1956) 60 Cal WN 988 (991) ** AIR (1931) All 348 (349) (Question of notice is a question of fact.) ** AIR 1928 Pat 587 (589) : 7 Pat 584 (DB) ** (1911) 2 KB 473 (486) : 80 LJ KB 1107 : 104 LT 911, Wilkes v. Spooner ** (1879) 11 Ch D 327 (337) : 27 WR (Eng) 621 40 LT 201 49 LJ Ch 68, Attorney General v. Biphosphated Guano Co

10. AIR 1984 (NOC) 85 (Gauhati)

11. AIR 1943 Oudh 147 (150) : 23 Luck 13 (DB).

12. AIR 1964 Bom 1 (3) ILR (1963) Bom 509 (DB) (AIR 1940 Mad 701 **Diss. from.**)

13. **(1974) 2 SCC 799.**

of charge was in possession including constructive possession through a tenant who has attorned to him and with all intents and purposes as far as transfer is concerned has conveyed to him all the rights, title and interest which the vendor had in the property including possession. Under the S. 100 transfer of property means the transfer of the whole property and not merely an interest in and over the property as a mortgage or lease. The declaration that all provisions hereinbefore contained which applied to simple mortgage shall so far as can be applied to such charge does not have the effect of changing the nature of the charge into one of interest in property. From these observations it would appear that in a competition between in charge created by a decree which is registered and a subsequent mortgage without notice of prior charge the former charge should prevail.

Charge created under Section 55(6)(b) cannot be enforced against bona fide purchaser for value without notice.(14)

But a contrary view is taken in the Bombay High Court observing that on account of deletion of the words "with notice of payment" which occurred after the words "claiming under him" by an amendment the result is that the charge of the buyer on the price pre-paid is effective not only against the seller but against all persons claiming under him irrespective of notice (15).

It was held however in the undermentioned case(16) that where a subsequent transferee is a simple mortgagee, he cannot be considered "to have the property in his hands" within the meaning of this section, so as to be able to plead the defence under the proviso.

As to the enforcement of seller's charge and a buyer's charge against a transferee for consideration without notice, see Notes 12 and 20 respectively on Section 55.

See also Note 28.

23. Subsequent transferee from a transferee, if protected.

Where *A* is a transferee of the charge property for consideration with notice of the charge and he transfers it to *B* who takes it for consideration without notice of the charge, on the plain meaning of the section *B* being a transferee without notice, the property in his hands will not be subject to the charge (1). Where A a transferee for consideration *without* notice of a charge, transfers it to *B* who has notice of it, can *B* take it free from charge? Yes. The reason is that a purchaser for valuable consideration without notice can give a good title to a purchaser from him with or without notice (2). A being a purchaser without notice takes the property free of the charge and he is perfectly entitled to transfer his rights to any person whether the latter had notice of the charge or not. B can thus shelter himself under the title of A, his transferor.(3)

In *Harnam Singh* v. *Abkar Khan*(4) where the facts were that a property subject to charge was

14. 1979 All LJ 1309 : (1979) 5 All LR 498
15. (1969) 71 Bom LR 769
16. AIR 1940 Mad 701 (703).

Section 100 — Note 23

1. See AIR 1915 Cal 478 (481) : 42 Cal 625 (DB).
2. (1911) 2 KB 473 (483) : 80 LJ KB 1107 : 104 LT 911 : Wilkes v. Spooner (The only exception is that a trustee who has sold property in breach of trust or a person who has acquired property by fraud cannot protect himself by purchasing it from a *bona fide* purchaser for value without notice.) ** (1880) 14 Ch D 432 (445) : 28 WR (Eng) 270 : 41 LT 755 : 49 LJ Ch 498, In re Stemple Ford Colliery Co. (Barrow's case) ** (1879) 11 Ch D 327 (334) : 27 WR (Eng) 621 : 40 LT 201 : 49 LJ Ch 68 Attorney General v. Biphosphated Guano Co. (Per Fry, J.) - The reason for the law is evident. If it were not so, the right of the person who purchased without notice would be limited, for his market would be limited.)
3. AIR 1915 Cal 478 (481) : 41 Cal 625 (DB) (Held both A and B had constructive notice of the charge and hence B was bound.)
4. AIR 1937 Pesh 76 (78) (DB)

purchased by *H* without notice who transferred it to *K* who had notice of the charge, it was held that *K* could not avail himself of a defence under this proviso that the mere fact that H intervened could not change the situation and that *K* took subject to the charge. It is submitted that the decision is not correct.

Compare Note 21 on section 53.

24. Charge, whether binds auction-purchaser.

Section 2, Cl. (d) provides that the Act does not apply to transfers in execution of decrees or orders save as provided by S. 57 and Chap. IV. The saving provision in S. 2, Cl. (d) is perfectly general in its terms and this section being contained in Chap. IV, the provision as to notice applies to transfers by auction sales in execution and an auction-purchaser takes the property which he buys for a price, free of the charge if he has no notice thereof (1). (See also notes on section 2.)

According to the undermentioned cases (2) however, this provision did not apply to auction purchasers. Relying upon the preamble and the definition of "transfer of property" in S. 5, they held that the words "transferred for consideration" in this proviso must be taken to mean only a transfer by act of parties and not a transfer by court sale. Further, following the English law on the subject, these cases held that the auction-purchaser was in no better position than the judgment debtor himself and he was, therefore, subject to the same equities as the judgment debtor was, with or without notice of the charge. No doubt, the language of S. 100 itself seems to be more appropriate for a transaction based on a contract. But in view of the fact that by virtue of S. 2(d), the provisions of S. 100 directly apply to the transfers by operation of law or by or in execution of a decree or order of a Court, the words, "transferred for consideration", which are wide enough to include these transfers also, must be taken to include auction sales and this proviso must, therefore, be taken to apply to auction-purchasers (3). Recently this question was considered by the Supreme Court in *Laxmi Devi v. Mukund Kanwar*(4) and there it was held by that Court, overruling the first view, that the latter view states the correct law and the proviso applies to auction-purchasers. See also the undermentioned case(5) which, following the Supreme Court decision, has applied the proviso to the auction-purchasers.

However, where the property was purchased by the petitioner in a public auction in execution of mortgage decree obtained by State Financial Corporation against the owner mortgagor and he had notice of property tax due in respect of property purchased by him, the first charge of Corporation in respect of the property could be enforced even against him by initiating recovery proceedings permissible under law. When a charge was first created by operation of law over any property, that charge would have precedence over an existing mortgage (6).

See also the undermentioned cases(7) in which this provision as to notice is applied to auction-purchasers.

Section 100 — Note 24

1. **AIR 1943 All 115 (122) : ILR (1943) All 453 (FB) (Overruling** AIR 1939 All 687) ** AIR 1960 Punj 296 (297) ** AIR 1953 Pat 58 (60) : ILR 31 Pat 722 (DB) ** AIR 1940 All 456 (457) : ILR (1940) All 669 (DB) (**Overruled** on another point in AIR 1943 All 115 (FB))
2. AIR 1940 Mad 701 (702) ** AIR 1938 Oudh 84 (86) : 13 Luck 746 (DB) ** AIR 1937 Cal 129 (138) : ILR (1937) 1 Cal 203 (DB) ** AIR 1925 All 60 (61) : 47 All 60 (DB).
3. **AIR 1943 All 115 (121, 122) : ILR (1943) All 453 (FB)** ** AIR 1960 Punj 296 (297) ** AIR 1953 Pat 58 (60) : ILR 31 Pat 722 (DB).
4. **AIR 1965 SC 834 (838) : (1965) 1 SCR 726.** (AIR 1940 Mad 701 and AIR 1937 Cal 129. **Overruled.**)
5. **(1967) 8 Guj LR 65 (70).**
6. **AIR 2002 Guj 221 (228) : 2002 (2) Guj LR 1109.**
7. **AIR 1937 Oudh 217 (219) : 13 Luck 353 (FB). (Overruling** AIR 1929 Oudh 316) ** AIR

25. Enforcement of charge.

By virtue of the last clause of the first paragraph of this section, S. 67 is applicable to a charge-holder and he is entitled, like a simple mortgagee, to sue for sale of the charged property. Order 34, R 15 of the Code of Civil Procedure provides that the provisions contained in that Order and which apply to a simple mortgage should, so far as may be, be applied to charges also. The procedure for the enforcement of a charge by a suit for sale of the property will, therefore, be governed by rules contained in that Order There must, therefore, be a preliminary decree under O 34, R 4 of the Code of Civil Procedure in all such cases.(1) Further by virtue of O. 34, R 14 of the Code of Civil Procedure, he cannot obtain a money decree in respect of the amount charged and sell the property He must file a *suit for sale* of the property charged.(2)

In a case from Malasia it was held that on an application for sale of the land charged, the court has not only to apply the law, but also to invoke the aid of equity in order to be satisfied whether a cause to the contrary has been shown or not in accordance with S 256(3) of the National Land Code (corresponding to S. 100 of T. P. Act).

The charge must not only come to the court with proof that the charger has defaulted but also with the proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of innocent thrid parties to be affected by the order.(3)

The effect of a decree on a charge is the same as that of a decree on a mortgage (4)

Where in pursuance of a decree for sale, the property is sold but the sale proceeds are found insufficient, the charge-holder will be entitled to apply for a personal decree against the judgment debtor under O 34, R 6 if the judgment-debtor is also under a personal obligation to pay the money.(5) It has been observed, however, in the undermentioned case,(6) that even if the judgment-debtor is not under a personal obligation to pay, the charge-holder will be entitled to a personal decree under O 34, R 6 by virtue of the provisions of O. 34, R 15 The relevant remarks are based on the authority of an Allahabad case(7) and on the assumption that in that case the decree was

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1961 Pat 291 (292) (Fact that proprietary rights are sold in execution of nankar rent decree puts the auction purchaser on notice of the charge and he purchases the rights subject to the charge) ** AIR 1937 Oudh 31 (32) 12 Luck 353 (**Reversed** on another point in AIR 1941 Oudh 305) ** AIR 1932 Oudh 336 (340, 341) 8 Luck 168 (DB) ** AIR 1937 Nag 36 (36, 37) ILR (1938) Nag 183 ** AIR 1941 Pat 95 (97, 98) 20 Pat 86 (DB)

Section 100 — Note 25

1 AIR 1942 Sind 83 (84) ILR (1942) Kar 168 (Order 34, R 15 however does not apply where there is no decree for sale but a money decree with a declaration of charge for the amount decreed) ** AIR 1940 Cal 60 (62, 64) (Suit for enforcement of charge - Charged property sold without passing preliminary decree for sale — This can be regarded as a mere irregularity.)

[See also AIR 1933 PC 143 (144) : 11 Rang 186 : 60 Ind App 183.]

2. 1955 BLJR 229 (230) ** AIR 1920 Pat 521 (522) 5 Pat LJ 248 ** AIR 1940 Pat 283 (285) (DB) ** (1905) 1 Nag LR 117 (119, 120) (The charge created by S 65 of the C P Land Revenue Act is one within the purview of S 100, T P Act, and cannot be enforced without bringing a suit for sale of the charged property) ** AIR 1918 Cal 705 (707) 45 Cal 530 (DB) ** **(1967) 11 Moo Ind App 241 (266) : 8 Suth WR 17 (21) (PC).** (Suit seeking personal remedy only — Property cannot be sold.)

3. **(1983) 2 Malayan LJ 384 (389).**

4. AIR 1953 Mad 32 (38) (DB) ** AIR 1937 Cal 129 (138) ILR (1937) 1 Cal 203 (DB)

5. (1905) 2 All LJ 379 (DB) (Per Banerji J — View approved in Letters Patent Appeal reported in 28 All 365) * AIR 1935 All 411 (415, 416) 57 All 797 (DB)

6. **AIR 1932 Cal 775 (780, 781) : 59 Cal 1314 (DB).**

7. **(1905) 2 All LJ 379 (383) (DB).**

granted under O. 34, R. 6 only on the authority of O. 34, R. 15. It is submitted that the view ignores the words, "so far as may be" in R. 15. A personal decree under O. 34, R. 6 cannot be passed unless the judgment-debtor is also under a personal obligation. In the Allahabad case above referred to there was such a personal obligation and it was not decided merely on the strength of the provision in O. 34, R. 15 as it stood before the amenment.

A decree creating a charge for future maintenance to be paid at a particular time stands exactly on the same footing as a decree ordering the payment of a sum of money by instalments and the charge-holder may apply for execution of the decree as the amount of maintenance becomes due (8). In such a case though the charged property may be sold for arrears already accrued, the liability for future payments will remain after the sale and the property in the hands of the auction-purchaser will be subject to the charge in respect of such payments (9).

The amount of court-fee that is recoverable in a pauper suit and for which the Government has a charge on the subject-matter of the suit can be recovered by the Government in execution of the decree and a separate suit for the purpose is not necessary (10).

A person having a charge on the property of a company can claim priority over the unsecured creditors of the company without bringing a suit for that purpose if the company has gone into liquidation.(11)

Where a charge-holder is entitled to claim possession of the property instead of a sale thereof the decree in a suit for possession will have to approximate as close as may be to a decree for foreclosure (12). A charge-holder not entitled to possession of the property cannot enforce the charge by suing for possession.(13)

As to the enforcement of the charge under S. 7 of the Land Improvement Loans Act, 19 of 1883, see the undermentioned case.(14)

Debts owned to the Corporation in the form of consolidated rates can be enforced against the property charged therefor in absolute right.(15)

26. Personal liability.

Where a charge is created by act of parties and there is a personal covenant to pay, the charge holder is, of course, entitled to a personal decree against the person bound to pay.

Where there is no personal *covenant to pay* the charge holder will not on principle be entitled to a personal decree.(1) It has, however, been held in the undermentioned cases (2) that he will be

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8. AIR 1968 Pat 238 (243) (DB) ** AIR 1957 All 575 (585) (DB) ** (1870) 15 Suth WR 128 (129) (DB) ** (1880) 9 All 33 (34) (DB) ** AIR 1939 All 579 (580) (DB) (Holder of a charge under a decree need not file a separate suit — Order 34, R. 14 is no bar to execution.) ** (1898) 2 Cal WN 33 (33, 34) (As the charge holder had come to an arrangement with the judgment debtor after the decree, she was referred to a separate suit for claiming the arrears.)
9. See the Code of Civil Procedure, O. 34, R. 15, Note 12 in the Appendix ** AIR 1957 All 575 (585) (DB).
10. (1896) 18 All 419 (421) (DB).
11. AIR 1914 Bom 267 (268) (DB).
12. AIR 1939 Nag 132 (136).
13. AIR 1940 Nag 8 (11) (DB).
14. AIR 1915 Cal 813 (815) (DB).
15. AIR 1976 Cal 242 (253) ; (1976) 2 Cal LJ 57 (AIR 1942 Cal 226 Overruled.)

Section 100 — Note 26

1. See AIR 1932 Oudh (168) (160) (DB).
2. AIR 1932 Oudh 168 (170) ** AIR 1936 Oudh 52 (55) : 11 Luck 575 (DB).

given a personal decree where the charge is on the income of the property and the defendant has been in receipt and enjoyment of the income. Where the plaintiff had a seller's charge under S. 55(4)(b) and sued to enforce his charge and also claimed a personal decree against the defendant, he was granted such a decree inasmuch as the buyer was also under a personal obligation to pay the purchase-money under S. 55(5)(b).(3)

Neither Section 49B of the Electricity (Supply) Act, 1948 (as amended in W. B.) nor Cl. 6 of Schedule of Electricity Act, 1910 (as amended in W. B.) do nowhere make the outstanding dues of the licensee for the energy supplied to person, a charge on the premises or the property to which the electricity was supplied. These are personal obligations. The auction purchaser of premises is not liable to make payment of outstanding dues for consumption of electricity supplied to that premises prior to such auction sale.(4)

27. Sale in execution of a charge decree — Whether extinguishes the charge.

Where in a suit to enforce a charge a decree for sale is obtained and the property is sold in execution of the decree, a question arises whether such a sale extinguishes the charge on the property and the auction-purchaser gets it free from it. The general principle applicable to the mortgage is that at a mortgage sale the auction-purchaser takes the security free from the mortgage. Order 34, Rule 15 of the Civil Procedure Code also provides that all provisions which apply to a simple mortgage shall, so far as may be, apply to charges. In applying those provisions, it must, however, be borne in mind that a charge is not exactly identical with a mortgage, and although a similar remedy is available, a suit for the enforcement of a charge is not necessarily the same as a suit for sale on a mortgage(1) and hence different results may follow. Thus, the general principle stated above regarding mortgage sale, might apply in the case of a single charge because by reason of sale, all dues on the charge may be liquidated either by the sale proceeds or by a personal remedy where available and thus the charge may be extinguished. But where a charge is of a recurring nature, as in the case of maintenance allowance, if the property is sold in execution of a decree for arrears, the liability in respect of future payments remains after the sale and is not extinguished by it. The effect of the sale is to satisfy the claim for the arrears only. The charge for future maintenance still remains attached to the property and the auction-purchaser gets the property subject to the charge.(2) Second part of Section 100 is subject to Section 52, T. P. Act.(3) See also the undermentioned case.(4)

28. Charge created by a decree.

(A) Whether such a charge is within this section.

As seen in Note 1 a charge may be created by a decree of Court. The judicial decisions are not unanimous on the question whether such a charge is "a charge" within the meaning of this section

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3. AIR 1933 PC 143 (145) : 60 Ind App 183 ** AIR 1931 All 99 (100) : 51 All 901 (DB).

4. AIR 2002 Cal 242 (246) : 2002 (2) Cal LT 196.

Section 100 — Note 27

1. AIR 1940 Cal 60 (62, 63) ** AIR 1933 All 934 (938) (DB)

2. AIR 1967 Mad 126 (127) ** AIR 1964 Mys 40 (41) ** AIR 1940 Cal 60 (62) ** AIR 1933 All 934 (938) (DB) (There is no question of redeeming a perpetual charge such as one for maintenance but only paying up the arrears of maintenance due and preventing the sale of property in execution of decree.)

3. AIR 1969 Orissa 114 (116) : 34 Cut LT 1296.

4. AIR 1956 Mad 67 (70) : II R (1956) Mad 697 (DB) (When there existed two charges created by a Court decree, one of which alone was sought to be enforced and the properties brought to sale in enforcement of the charge, even granting S. 100 applies the other charge does not get extinguished where the party entitled to that charge has not sought to enforce it, not any property brought to sale in execution of that charge.)

One view is that where a decree incorporates a compromise creating a charge upon specific immovable property of the judgment-debtor it is a charge within the meaning of this section (1) According to some cases it is nothing but a charge by act of parties (2) the reason being the well-settled principle that a contract is nonetheless a contract because it is embodied in a decree (3) It has been held by the undermentioned case(4) that a decree creating a charge passed on the basis of an award also amounts to an "act of parties" According to the undermentioned case(5) a charge created by a decree based upon an award is nonetheless a charge created by operation of law as the expression "operation of law" only means working of the law Another view is that a charge created by a decree is not a charge within the meaning of this section According to this view the section is limited to charges created by act of parties or by operation of law and is not exhaustive of all charges A charge created by a decree is neither a charge created by act of parties nor a charge by operation of law It is, therefore, not included in this section (6) According to this view decrees stand on some

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Section 100 — Note 28

1. **AIR1937 Oudh 217 (219) : 15 Luck 101 (FB) ** AIR 1944 Nag 1 (7) ILR (1943) Nag 713 (DB) ** AIR 1943 Oudh 354 (359) : 19 Luck 1 (FB).** (A [illegible] by a decree of Court based upon an award made upon a [illegible] agreement [illegible] a charge created by operation of law and comes within this section) ** [illegible] ** AIR 1941 Pat 95 (98) : 20 Pat 86 (DB) ** AIR 1941 Cal 436 (438) ** AIR 1925 All 60 (61) : 47 All 90 (DB).

2. AIR 1957 All 575 (582) (DB) (Decree after contest neither amounts to an act of parties nor operation of law.) ** AIR 1950 Nag 117 (127) ILR (1949) Nag 802 ** AIR 1944 Nag 1 (7) ILR (1943) Nag 713 (DB) (This is especially so where the properties are not the subject-matter of the suit.) ** AIR 1941 Pat 95 (98) : 20 Pat 86 (DB)

   [See also AIR 1968 Pat 238 (241) (DB) (Charge decree for maintenance not based on compromise — Section 100 does not apply.) ** AIR 1918 Cal 705 (707) : 45 Cal 530 (DB). (Money decree on a security bond declaring charge — *Held* charge was already there — Decree merely declared it — It is, therefore, a charge by act of parties.)]

3. AIR 1941 Pat 95 (98) : 20 Pat 86 (DB) ** AIR 1916 Cal 816 (817) : 43 Cal 217 (DB) ** AIR 1924 Pat 231 (232) : 2 Pat 749 (DB)

4. AIR 1957 All 575 (582) (DB)

5. **AIR 1943 Oudh 354 (359) : 19 Luck 1 (FB).** In such a case the charge [illegible] operation of law consequent on the act of the parties in [illegible] tion and upon the application to make the award a rule of the Court — AIR 1920 Oudh 316, **Overruled.**)

6. 1980 TNLJ 402 (403) (Mad) (However, if the decree has the backing of a compromise or an agreement between the parties creating [illegible] the charge is one created by act of parties.) ** AIR 1969 Cal 406 (A charge created under an Award is neither by act of parties nor by operation of law.) ** AIR [illegible] Pat 102 (Where a person gets a decree for maintenance payable from the income of certain property and decree creates a charge against the property the Decree Holder has the same rights as a simple mortgage.) ** AIR 1908 Cal 336 (338) ** AIR 1963 Tripura 46 (47) ** AIR [illegible] Mad 23 (25) ** AIR 1957 Punj 92 (95) ILR (1958) Pat 908 ** AIR 1956 Mad [illegible] ILR (1956) Mad 697 (DB) ** [illegible] 9 Nag LJ 254 [illegible] ** AIR [illegible] Pat [illegible] (DB) ** AIR 1945 Pat 278 (280) : 24 Pat 245 (DB) ** AIR 1940 Nag 163 (166) : ILR (1941) Nag 513 (DB) **.(1937) 169 Ind Cas 169 (171) (Nag)

   [See AIR 1957 Cal 204 (208) (A charge created by a decree would be one by operation of law only where the decree merely embodies a charge which exists in law independently of the decree itself. If a decree embodies a charge which has no existence in law independently of the decree itself, this would be outside the definition of S 100. A charge for the payment of maintenance of a Hindu widow out of the [illegible] stands [illegible] by a decree may from one point of view be said to be one by operation of law and from another point of view one not by operation of law but by a decree only.)]

   [See also AIR 1939 All 579 (580) (DB).]

what different footing and are governed by rules of their own, so it may well be that the intention of the Legislature was to leave decrees out of this section "(7) This view does not distinguish between decrees incorporating a compromise and ordinary decrees

No doubt, this section specifically deals with charges created only by act of parties and by operation of law It is also true that in view of the distinction made by S 2, Cl (d) between a transfer "by operation of law" and that "by or in execution of a decree of a competent Court," a charge created by operation of law must be distinguished from that created by a decree so as to not to include the latter within the former class The Special Committee in 1927, however, have referred to the charges created by a decree in their report and have purported to amend the section in order to protect the transferees for consideration without notice "as charges created by operation of law or by a decree will not necessarily be registered "(8) This according to the undermentioned cases,(9) seems to suggest that they intended to include the charge created by decree within the purview of this section But a contrary view, viz. that the expression "operation of law" would not include a charge created by a decree has been taken in the undermentioned cases (10)

The plaintiff's suit for specific performance was not decreed but the suit was decreed for the amount paid by the plaintiff to the defendant vendor with interest, charged on the property which was agreed to be sold In execution of the decree, the defendant s property was auctioned and was purchased by the decree holder Thus the charge was created on the property by the court by its decree In respect of the charge created for the first time by a decree, S 100 has no application. This was not a case where decree was passed in favour of the decree holder in recognition of any right available to him under S 55(6)(b) It was again not a charge created by a decree passed in pursuance of agreement or by act of parties but a charge created by the court by its decree. Therefore S 100 would not apply.(11)

There is a distinction between decree which declares a charge and a decree which creates a charge In the former case charge declared under the decree is created by act of parties or by operation of law and comes within Section 100 and to enforce it a fresh suit is necessary. In the case of a decree which creates a charge decree-holder can execute it by putting the property to sale.(12)

A charge created in a decree passed after contest is a charge by operation of law (13)

(B) Enforceability against transferee for consideration without notice.

Even in the cases which held that a charge created by a decree was a charge within the meaning of this section there was a conflict of opinion as to whether such a charge could be enforced against a transferee for consideration without notice of a charge Some cases held that a charge created by decree could be enforced against transferee for consideration whether he had notice of it

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7 AIR 1956 Mad 67 (70, 72) ILR (1956) Mad 697 ** AIR 1940 Nag 163 (166) ILR (1941) Nag 513 (DB).

8. See the Report of the Special Committee.

9 AIR 1946 Mad 51 (51) (The words "by operation of law" in S 100, Transfer of Property Act include a charge brought into being by a decree of a competent Court) ** **AIR 1943 Oudh 354 (358) : 19 Luck 1 (FB).** (There is nothing in S 100 itself which would suggest an intention to exclude a charge created by a decree The section apparently assumes that charges can be created only by act of parties or by operation of law and para 2 which was added in 1929 refers to charges generally A charge created by decree is therefore governed by S. 100.)

10. **AIR 1959 Andh Pra 622 (625) : ILR (1959) Andh Pra 511 (FB)** ** AIR 1968 Cal 336 (339) ** AIR 1956 Mad 67 (72) ILR (1956) Mad 697 (DB) (AIR 1946 Mad 51, **Dissented from.) ** AIR 1951 All 141 (149) : ILR (1953) 1 All 284 (FB).**

11. 1996 AIHC 1739 (1741) · ILR 1996 (2) Ker 35.

12. ILR (1974) Cut 834 (DB).

13. AIR 1969 Orissa 114 (115, 116) : ILR (1968) Cut 788

or not(14) resting this view on the ground that a charge was a transfer of an interest in property and an owner of the property charged could, like a mortgagor, pass it only subject to it (15) A contrary view, namely that a charge could not be enforced against a transferee for consideration without notice was taken by other cases (16) By the amendment in 1929, the conflict has been set at rest by the addition of the proviso in the section and, therefore, no charge, if it comes within the meaning of the section, whether by decree or otherwise, will be enforceable against a transferee for consideration without notice of it.(17)

According to the view which holds that the charge created by a decree is not a charge within the meaning of this section, its enforceability against a transferee for value without notice will be governed by different considerations and different rules The difference which the intervention of a decree makes, according to this view, is that, not only the immediate parties to a decree are bound by it but also all persons who claim through or under them and date their title from after the decree or the institution of the suit In other words, not only are the parties bound by the decree but also their privies. One effect of this is that the question of notice does not arise (18)

Where the decree is not merely declaratory creating a charge but is inexecutable decree under which the charge can be enforced by getting the property charged sold, it cannot be urged that it

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14. (1906) 28 All 655 (660) ** AIR 1925 All 60 (61) . 47 All 90 (DB) ** AIR 1925 Bom 343 (343) (DB) ** (1900)) 27 Cal 194 (196) (DB) ** (1913) 37 Bom 621 (628) (DB) ** (1936) 164 Ind Cas 921 (925) (DB) (Cal) ** AIR 1936 Cal 112 (113)

[See also (1873) 20 Suth WR 196 (197) (DB) (Case before the Act)]

Also see Note 22.

15. (1906) 28 All 655 (659) ** AIR 1925 Bom 343 (343) (DB).

Also see Note 22

16. AIR 1937 Oudh 217 (219) : 13 Luck 101 (FB) ** AIR (1945 Pat 434 (437)) 24 Pat 345 (DB).

[See also AIR 1934 Mad 353 (354) (DB). (Obiter.)]

17. AIR 1950 Nag 117 (127) ILR (1949) Nat 802 , Attachment of decree by making decretal amount charge on immovable property — Adjustment created by Court — Charge held one under S 100 and did not bind purchaser without notice of it — Even if charge be regarded not one created by decree same results would follow Agreement made charge as one by act of parties and subsequent incorporation in order of Court made no difference) ** AIR 1944 Nag 1 (7) ILR (1943) Nag 713 (DB) (Decree incorporating a compromise between the parties) ** AIR 1943 Oudh 354 (359) : 19 Luck 1 (FB). (Charge created by a decree based upon award made upon agreement out or Court of otherwise is not enforceable against *bona fide* transferee for value without notice) ** AIR 1941 Pat 94 (98) 20 Pat 86 (DB) ** AIR 1941 Cal 436 (438, 439) (Decree incorporating a compromise between the parties.)

18. AIR 1951 All 141 (145, 151) : ILR (1953) 1 All 284 (FB) ** AIR 1966 Mysh Pra 318 (323) ** AIR 1956 Mad 67 (72) ILR (1956) Mad 697 (DB) Hence an auction purchaser cannot take advantage of his purchase of the property sold in enforcement of the charge created by the decree to the detriment of the other charge created by the same decree but which is still subsisting and which is yet to be enforced by the party in whose favour it was created) ** ILR (1949) 1 Cal 392 (397) (DB) ** (1936) 19 Nag LJ 254 (258) ** (1949) 53 Cal WN 129 (132) (DB) This principle however can be applied only when the charge can be enforced by enforcement of the judgment itself, for, otherwise no question of estoppel would at all arise Where the decree which created the charge has been satisfied in full and no longer exists and a person wants to enforce a charge which has accrued in his favour by operation of the law of subrogation the law of estoppel cannot be called into aid, as it is only a charge and not as a judgment that he wants to enforce it AIR 1938 Nag 27 Approved) ** AIR 1940 Nag 163 (166) ILR (1941) Nag 513 (DB) ** AIR 1938 Nag 129 (130, 131) : ILR (1938) Nat 431 (DB).

was binding only against the judgment-debtor but not against his privies including the purchaser for value without notice.(19)

Thus, where a decree creating a charge is executable, that is to say, if the Court orders the defendant to pay the plaintiff a certain sum of money on a specified date and directs that if it is not paid, property which it specifies is to be sold for its recovery, those orders must be carried out and the judgment-debtor cannot evade them by transferring the property so charged to another, however innocent the other party may be. The doctrine of estoppel by record applies in such a case. The doctrine of *lis pendens* may also apply (20) The effect of the former doctrine is to create an estoppel in such a case so as to bind the transferee from the judgment-debtor after the decree to carry out its orders in the same way and to the same extent as the judgment-debtor himself and it is not necessary for the decree-holder to sue the transferee all over against (21) But when the decree creating a charge is merely declaratory and does not direct the doing of a particular thing, that is to say, it is not executable, an important difference arises, and the transferee, though bound by the decision in the sense that it is *res judicata*, is not necessarily bound to the same extent and in the same way as the judgment-debtor. Pleas are available to him which are not available to the judgment-debtor. The effect of the application of the doctrine of estoppel by record to such a decree is only this : The estoppel being restricted to the precise point put in issue and decided, or at the outside, to a point which might and ought to have been raised,the decree is effective to create a charge on property in the hands of the judgment-debtor in that suit and nothing more Then the ordinary rule governing the charges, namely that a *bona fide* purchaser for value without notice takes the property free of charge, obtains in this case, and a transferee for consideration without notice of a charge created by a decree will not be bound by the charge (22) The same result follows by the application of the doctrine of *lis pendens*. When a decree creates a charge and provides expressly or impliedly for its execution, it does not put an end to the suit and hence the transferee from the judgment-debtor is bound by the charge, whether he takes it with or without notice (23)

A judgment-debtor had brought a title suit to set aside the money decree and applied for stay of execution proceedings in which the suit land was sought to be sold to realise the decretal amount, the court granted the stay after the judgment-debtors furnishing a security bond Ultimately the title suit was dismissed and the land was sold in auction The judgment-debtor had, however transferred the land during pendency of the suit It was held that the transferee from the judgment-debtor could not contend that the transfer was not attracted by the mischief of *lis pendens* A charge within the meaning of S 100 is quite competent to attract the provisions of S 52 of the T P Act (24)

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19. AIR 1966 Madh Pra 318 (323) : 1966 Jab LJ 1133.

20. AIR 1966 Madh Pra 318 (323) ** ILR (1949) 1 Cal 392 (397) (DB) ** (1936) 19 Nag LJ 254 (258) ** AIR 1940 Nag 163 (167) ILR (1941) Nag 513 (DB) ** AIR 1938 Nag 129 (130, 131) ILR (1938) Nag 431 (DB) (**Affirming** 169 Ind Cas 169 on L P Appeal)

21. AIR 1940 Nag 163 (167) ILR (1941) Nag 513 (DB) ** AIR 1938 Nag 129 (130) ILR (1938) Nag 431 (DB).

22. AIR 1957 All 575 (562) (DB) ** **AIR 1951 All 141 (151, 154) : ILR (1953) 1 All 284 (FB) ** AIR 1940 Nag 163 (167, 171) : ILR (1941) Nag 513 (DB).**

23. AIR 1966 Madh Pra 318 (323) ** AIR 1953 Mad 71 (72) (DB) ** AIR 1946 Bom 207 (209) ILR (1945) Bom 885 (DB) ** (1936) 19 Nag LJ 254 (258) ** AIR 1940 Nag 163 (172) ILR (1941) Nag 513 (DB) ** (1937) 169 Ind Cas 169 (171) (Nag) ** AIR 1934 Mad 353 (354, 355) (DB)

[**See also** AIR 1930 Mad 824 (830) 54 Mad 132 (DB) (Transfer before passing of the decree in a suit for maintenance claiming charge on specific property — **Held,** transfer hit by the doctrine of *lis pendens* and purchaser is bound by the charge)]

[**But see** (1913) 37 Bom 621 (627, 628) (DB) (Case before amendment of S 52 in 1929)]

24. AIR 1984 (NOC) 85 (Gauhati).

But where the decree is merely declaratory and inexecutable, the suit *qua* suit is at an end and the transfer is not hit by the doctrine of *lis pendens* (25) In short, where a decree creating a charge is executable, the property in the hands of a transferee for consideration without notice will be bound by the charge, while in case of a declaratory and inexecutable decree, he will not be so bound.

A mortgage created in spite of notice of a pending suit in which charge in respect of the same property is claimed will be bound by the decree under Section 52 (26)

This section will not apply to the case of a transfer during the pendency of a litigation in which a charge is created by a decree In such a case the transfer is affected by the doctrine of *lis pendens* and the question of notice is immaterial (27) See also S 52 Notes 6a and 20

(C) Enforcement of the charge.

By virtue of O 34, R. 15, Civil Procedure Code, all provisions in O 34 applicable to a simple mortgage apply, so far as may be, to charges within the meaning of S 100 If a charge created by a decree is regarded as one under S 100, the rules in O 34 will apply to it so far as they are appropriate to the nature of the charge Thus, where a decree creating a charge is final in its terms, no fresh final decree is necessary (28) Rule 14 of O 34, however, does not apply to charges which are created for the first time by a decree Such a charge can therefore, be enforced in execution without any fresh suit being filed in respect of it.(29)

If a charge created by a decree is treated as one not within S 100 it will be enforced by sale of the property in execution of the decree itself when it is executable(30) and by a suit to enforce the charge by sale, where the decree is declaratory.(31)

The question whether the charge had been created by the decree itself or by the compromise stated by the counsel before the Court is a question of fact which has to be decided on the interpretation of the statement which has been made by the counsel (32)

As to whether a personal remedy is available for such a charge, see Note 10a on O 34, R 15 Civil Procedure Code in the Appendix.

29. Payments in the nature of salvage.

Where a person having some interest in a property or some right or duty towards the owner of

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25 AIR 1957 All 575 (582) (DB) ** AIR 1940 Nag 163 (172) ILR (1941) Nag 513 (DB)

26. (1975) 1 Andh WR 264 (DB).

27. AIR 1956 SC 593 (597) : ILR (1956) Mys 152 ** AIR 1968 Pat 238 (244) (DB) ** AIR 1945 Mad 126 (127) ILR (1945) Mad 726 ** AIR 1944 Bom 191 (193) ILR (1944) Bom 274 (DB) (Charge created by maintenance decree — Purchaser during pendency of suit — Case is covered by S 52 even if transfer is for consideration without notice — S 100 does not apply to such case — Charge has preference over rights of private purchaser or auction purchaser.)

28. See Note 2 on O. 34, R. 15 of the Code of Civil Procedure in the Appendix

29. See Note 3 on O 34 R 14 of the Code of Civil Procedure in the Appendix ** AIR 1968 Cal 336 (339) ** AIR 1968 Gu, 156 (157) (DB) ** AIR 1968 Pat 238 (243) (DB) ** AIR 1958 Mad 23 (25) ** AIR 1946 Bom 207 (209) : ILR (1945) Bom 885 (DB)

30. AIR 1963 Tri 46 (47) ** AIR 1957 Cal 201 (208) ** AIR 1957 Punj 935 (938) ILR (1957) Punj 938 ** AIR 1953 Cal 676 (681) (DB) (When a charge is created by the decree and is enforceable in execution under the terms thereof the statutory impediment contained in O 34, Rr. 14 and 15 of the Civil Procedure Code, does not apply and no suit is necessary — imperative in that behalf under the law.)

31. AIR 1968 Cal 336 (339) ** AIR 1958 Mad 23 (25) ** AIR 1957 All 575 (582) (DB) ** (1907) 17 Mad LJ 217 (217).

32. AIR 1953 All 588 (589) (DB).

the property pays money in order to save the property from loss or destruction, he has a first charge on the property for such payments.(1)

Government revenue is the first and paramount charge upon the land and if default is made in payment, the land is sold in a summary way. The purchaser gets a clear title and the land is lost for ever to the defaulting proprietor (2) The question arises as to whether a person who pays the Government revenue on behalf of another who is liable to pay it and thus saves the land from sale is entitled to a charge, for payment, on the land saved. In *Nugender Chunder Ghose v. Shreemutty Kominee Dossee* (3) A mortgaged his property to B. A died and his widow C while in possession of the property allowed the Government revenue to fall into arrears. In order to save the property from being sold, B paid up the arrears. Their Lordships of the Privy Council observed :

> "Considering that the payment of the revenue by the mortgagee will prevent the *talook* from being sold their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the *talook* as entitled him to pay the revenue due to the Government, and did actually pay it was thereby entitled to a charge on the *talook* as against all persons interested therein for the amount of the money so paid"

Following this decision it was held in the undermentioned cases(4) that a co-sharer who paid the quota of the Government revenue due from another co-sharer in order to save the estate from being sold was entitled to a charge on the other co sharer's share for the payment made on his behalf. This view was, however, adversely commented upon in *Kristomohunee Dossee v. Kali Prosono Ghose*.(5) The question came for decision before a Full Bench in *Kinu Ram v. Mozaffar Husain*(6)

Section 100 — Note 29

1. **(1867) 11 Moo Ind App 241 (258) : 8 Suth WR PC 17 (18) (PC) ** (1824) 21 Cal 142 (148, 149) : 20 Ind App 160 (PC)** ** AIR 1978 (NOC) 192 (1978) 1 Mad LJ 276 (Payment of Municipal property tax to the Municipality is a statutory liability under the Madras District Municipalities Act 1920 Under S 85 of that Act it is a first charge on the property S 332 of the Act confers a right of reimbursement on the occupier of the property to reimburse himself from the landlord the amounts he has paid to the Municipality by way of property tax for the building under his occupation S 100 of the T P Act 1882, does cover such charges) ** AIR 1953 Orissa 103 (104) ** AIR 1952 Pat 81 (81) 1LR 27 Pat 421 (DB) (Principle does not apply to a case where the person who claims salvage lien had no interest in the properties before he made the payment.)

   Also see S. 48, Note 11.

2. **(1894) 21 Cal 142 (148) : 20 Ind App 160 (PC)** ** (1881) 6 Cal 389 (391) (DB) ** AIR 1917 Mad 984 (986) 40 Mad 93 (DB) (According to the principle enunciated in S 141 of the Contract Act, as assignee of Government revenue is entitled to the security which the Government had, although he may not be entitled to all the statutory remedies of his assignor and consequently an assignee of jodi as such will have a first charge therefor)

   [See also (1890) 13 Mad 319 (329) (DB) (Land revenue of certain lands assigned to a temple — Government still issuing pattas — Assignees are entitled to bring land to sale for arrears of revenue, the land being security for the revenue) ** (1885) 8 Mad 130 (132, 133) (DB) (By accepting a sanad or patta a landholder pledges each and every field included in it as security for the whole assessment, and he cannot split the security any more than an ordinary mortgagor The Government can therefore sell a field for the arrears due on the entire patta, and a person claiming an interest in that particular field cannot obtain its release upon payment of the proportionate arrears due on that field, or at all events its full assessment.)]

3. **(1867) 11 Moo Ind App 241 (258) : 8 Suth WR PC 17 (PC).**

4. (1874) 22 Suth WR 411 (412) (DB) ** (1883) 9 Cal 377 (379) (DB) ** (1886) 11 Bom 313 (319) (DB) ** (1886) 8 All 384 (386) (DB) ** (1880) 8 Cal LR 210n (211n) (DB)

   [See also (1881) 6 Cal 549 (551) 8 Cal LR 209 (212) (DB) ** 1886 All WN 269 (269, 273) (DB)]

5. **(1882) 8 Cal 402 (419) (DB).**

6. **(1887) 14 Cal 809 (825, 832) (FB).**

and the majority of the Judges held that the observations of their Lordships of the Privy Council in *Nugender's case*(7) were merely *obiter*; that those observations ought to be understood as applicable to the case of a mortgagee alone, that the doctrine of salvage lien acted upon in Irish cases was rejected in England in the undermentioned cases(8) and that there was no general principle of law that a payment of Government revenue or any other payment necessary to save the estate made by one having an interest which would be sacrificed by the loss of the estate, gives a charge on the estate for the money so paid and that, therefore, a co-sharer paying the Government revenue and thus saving the estate did not by reason of such payment acquired any charge on the share of the defaulting co-sharer. The minority, however followed *Nugender's case*(9) and took the contrary view taken by earlier cases. Following the majority view in *Kinu Ram's case*(10) the High Courts of Allahabad(11), Bombay(12), Calcutta(13) and Patna(14) have held that the co-sharer has no charge for the payment. The Madras High Court(15) on the other hand, has followed *Nugender's case*(16) and the view taken by the minority of the Judges in *Kinu Ram's case*(17) and held that the co-sharer has got a charge in such cases. The Nagpur Court adopted the majority view in *Kinu Ram's case*(18) in one case(19) but later cases(20) held that the co-sharer has got a charge.

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7. **(1867) 11 Moo Ind App 241 (258) : 8 Suth WR PC 17 (PC).**

8. (1886) 34 Ch D 234 (246, 248, 249) : 56 LJ Ch 707 : 57 LT 210 : 35 WR [illegible] 143 [illegible] v. Scottish Imperial Insurance Co. ** (1883) 23 Ch D 552 (563) : 32 LJ Ch 762 : 48 LT 564 : 31 WR (Eng) 561. Leshe v. French

9. **(1867) 11 Moo Ind App 241 (258) : 8 Suth WR PC 17 (PC).**

10. **(1887) 14 Cal 807 (825, 832) (FB).**

11. **(1892) 14 All 273 (295, 298) (FB)** ** AIR 1937 All [illegible] 8 (669) : ILR (1937) All 768 (DB) (There is no charge created in favour of Zamindar under S. 2[illegible] Agra Tenancy Act, II of 1926.)

    [**See also** AIR 1932 All 332 (334) : 54 All 140 (DB) (A person who makes a payment on account of another in respect of immovable property does not thereby acquire any charge on the property so saved, but has only a personal remedy.)]

12. (1902) 26 Bom 437 (442) (DB)

13. (1888) 15 Cal 542 (545) (DB) ** (1898) 25 Cal 565 (569) (DB) (The claim for contribution for the payment of Government revenue creates only a personal liability against the co-sharers on account of whose share the payment has been made and does not create a charge on the estate.) ** AIR 1914 Cal 263 (268) (DB)

    [**See also** AIR 1920 Cal 956 (957) (DB).]

14. AIR 1928 Pat 641 (643, 644) : 7 Pat 613 (DB)

15. **(1903) 26 Mad 686 (711, 722, 725) (FB)** ** (1888) 11 Mad 452 (454) (DB) ** (1904) 28 Mad 493 (494) (DB) ** (1913) 36 Mad 493 (494) (DB) ** (1893) 17 Mad 247 (250) (DB) ** AIR 1916 Mad 980 (981) : 39 Mad 795 (DB) ** AIR 1926 Mad 141 (142) ** AIR 1932 Mad 180 (191) : 55 Mad 468 (DB) (But not to first charge.) ** AIR 1936 Mad 752 (760, 763) (DB) (Zamindari sold for arrears of peiscush — Owner of village in zamindari property so recovered.)

    [**See also** AIR 1920 Mad 739 (740) (DB).]

    [**See however** AIR 1950 Mad 39 (40) (Patta including property not belonging to person in whose name the patta is — Such person and the owner of item cannot be said to be co-owners — Former paying land revenue on that item cannot claim any charge — 26 Mad 686 (FB), **Distinguished.**)]

16. **(1867) 11 Moo Ind App 241 (258) : 8 Suth WR PC 17 (PC).**

17. **(1887) 14 Cal 807 (825, 827, 832) (FB).**

18. **(1887) 14 Cal 807 (825, 827, 832) (FB).**

19. (1892) 7 CPLR 42 (43, 44).

20. AIR 1941 Nag 245 (249) : ILR (1941) Nat 474 (DB) ** AIR 1932 Nag 171 (172) : 28 Nag LR 214.

The minority view in *Kinu Ram's case*(21) left the case of a mortgagee paying Government revenue untouched and it was held in the undermentioned cases(22) following *Nugender's case*,(23) that the mortgagee paying the Government revenue in order to save the property from sale has a charge on the property.

The principle referred to above as to payments in the nature of salvage is not confined to payments of Government revenue, but is of general application (24)

A tenant for life may spend to save the property from the forfeiture by a creditor of the estate and has a lien for the money so spent But he spends for improvements at his peril. Such tenant cannot sell portion of the property and contend it is binding on the remainderman The principal of salvage being that if the property has to be saved, he cannot be permitted to sell the property or even a portion of it except with the consent of the remainderman (25)

A purchased an oil well which was subject to a mortgage. *B* had a right of pre-emption. *A* made payment to the mortgagee in part satisfaction of the mortgage decree on the oil well, the payments being necessary to save the oil well from sale It was held that *A* had a charge for the amount paid as against *B* exercising his right of pre-emption.(26)

It will thus be seen that even if it is assumed as held in *Kinu Ram's case*(27) that the doctrine of salvage has been rejected in England, it has been applied,(28) and applied by the highest tribunal, in India Thus, in *Manohar Das v. Hazari Mull*(29) decided in the year 1931 their Lordships of the Privy Council observed .

> "As regards the present question, the only effect of the preliminary decree was to make the mortgaged property security for the judgment debt pending realization, by sale as provided in the decree, and, pending such realization the plaintiff as a secured decree-holder was just as much interested in the preservation of the security as he had been under his mortgage while it subsisted, and their Lordships see no reason why he should not be entitled, in accordance with the opinion of the Board in the case already cited *Nugender's case* to a first charge in respect of the payments of revenue made after the passing of the final decree, which were really in the nature of salvage payments on behalf of all persons interested."

It has been held by the Rangoon High Court that the charge given on the principle of salvage lien is not a charge within the meaning of the section.(30)

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21. (1887) 14 Cal 807 (825, 832) (FB).

22 (1903) 30 Cal 794 (798, 799) (DB) ** AIR 1930 Cal 151 (153) 57 Cal 298 (DB). (His remedy to realize it is the same as under S 72, T P Act) ** AIR 1920 Pat 521 (522) 5 Pat LJ 248 ** AIR 1919 Low Bur 136 (138).

[See however AIR 1936 Rang 47 (48).]

23. (1867) 11 Moo Ind App 241 (248) : 8 Suth WR PC 17 (PC).

24 AIR 1943 Mad 573 (576, 577) ILR (1944) Mad 44 (One of the mortgages of kanomdar paying renewal fee to landlord is entitled to priority in respect of sum paid.) ** AIR 1924 Rang 204 (206) 1 Rang 714 (DB) (Payment of portion of mortgage-debt) ** (1879) 4 Cal 539 (541) (DB) (Payment of zamindari rent) ** AIR 1928 Rang 278 (280) 6 Rang 500.

25. (1972) 1 Mad LJ 417 : (1972) 85 Mad LW 124.

26. AIR 1924 Rang 204 (205, 206) : 1 Rang 714 (DB).

27. (1887) 14 Cal (825, 832) (FB).

28. AIR 1943 Mad 573 (576, 577) ILR (1944) Mad 44 (The principles of salvage lien can be applied in India to cases of payment of rent or other dues the non-payment of which would have wiped out all the subsidiary interests in land.)

29. AIR 1931 PC 226 (228) : 59 Cal 463 : 58 Ind App 341.

30. AIR 1924 Rang 204 (206) : 1 Rang 714 (DB).

As to priority of salvage liens, see S 48, Note 11 and the undermentioned case.(31) As to distinction between subrogation and salvage lien, see S 92, Note 1A

30. Hindu widow's right of maintenance.

A Hindu widow's right of maintenance is not a charge on the family property within the meaning of this section though it may be made a charge by a decree of Court or by agreement (1) In some decisions, no doubt, the word "charge" or "security" has been used in connection with the widow's right of maintenance(2)but it is in a loose sense that the word can be so used (3) Thus it may be said that the widow has a charge on the property only in the sense that the liability of her husband's relations to maintain her is not a personal one but arises from there being family property in their hands.(4)

If a charge is created in maintenance suit on specific immovable property the decree can be executed against the property.(5)

A charge created by the Court in like a judicial lien, which is separate and distinct from the charge created under S 82 There is no question of applying the doctrine of equity Therefore in a decree for maintenance creating a charge on the suit properties decree holder is entitled to proceed against any of the charged properties created by the Court leaving the rest of the charged properties Furthermore, the charge created by the Court cannot be split ups(6)

Maintenance decree is not only a declaratory decree but is also an executory decree The decree-holder is entitled to recover past maintenance by proceeding against the charged property as well as future maintenance and charge continues as long as the decree holder has right to recover further maintenance Sale in execution of such a decree does not extinguish the charge completely Therefore the same property can be brought to auction whenever maintenance becomes due and the

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31. AIR 1943 Mad 573 (577) ILR (1944) Mad 44 (The application of the doctrine of salvage lien does not depend upon the question whether the demand which was met was a charge or a first charge on the property The doctrine of salvage lien is wider than the doctrine of subrogation In the case of subrogation the person making the payment acquires only the rights of the person whose dues are paid off while in the case of salvage lien such person is entitled to a right prevails over all the interests which are saved by the payment)

Section 100 — Note 30

1. (1968) 9 Guj LR 24 (40) (DB) ** AIR 1957 Cal 204 (208) ** AIR 1956 Nag 143 (144) ILR (1956) Nag 181 (DB) ** AIR 1955 Mad 571 (574) ** (1906) 4 Cal LJ 476 (481-483) (DB) ** (1911) 35 Mad 147 (151) (DB) ** (1872) 17 Suth WR 432 (436) (DB) ** **(1887) 10 Mad 283 (288) (FB)** ** AIR 1936 All 527 (529) (DB) ** AIR 1928 Lah 32 (33) 54 Lah 375 (DB) ** AIR 1927 Mad 1092 (1092) ** AIR 1929 Mad 47 (48) (DB) ** AIR 1937 Mad 913 (918) (DB) ** (1900) 22 All 326 (327) (DB) ** AIR 1939 All 579 (580) (DB)

   [See also AIR 1937 All 56 (57) ILR (1937) All 269 (DB) (Claim of wife for maintenance is not charge upon estate of her husband unless fixed and charged upon it) ** (1878) **23 Suth WR 33 (33) (DB).]**

   [But see 1871 Pun Re No. 7, p. 11 (11) (DB).]

   See also cases cited under Note 5 on S 39.

2. (1886) 13 Cal 336 (343, 345) (DB) ** **(1889) 16 Cal 758 (766) : 16 Ind App 115 (PC).** (On appeal from 13 Cal 336 Affirmed) ** **(1875) 1 Cal 133 (138) : 2 Ind App 275 (PC).**

3. **AIR 1916 Pat 252 (254) : 2 Pat LJ 55 (DB).**

4. AIR 1957 Cal 204 (208) ** AIR 1927 Mad 502 (503) (Obiter) ** AIR 1927 Lah 883 (883)

   [See also (1883) 9 Cal 535 (555) (DB).]

5. 1969 All LJ 480 (484) ILR (1969) 1 All 900 (In case of default in payment the plaintiff would be entitled to recover maintenance by executing the decree separate suit not necessary.)

6. **1997 AIHC 732 (734) : 1996 (3) Andh LT 915.**

auction purchaser purchases it subject to the charge An executory charge decree for maintenance becomes executable again and again as future sums become due (7)

Charge attaches to the property charged and a charge for maintenance present and future is a recurring charge and is not extinguished by decree for sale. A recurring charge is not identical with a mortgage and an auction purchaser would not get the property free from charge.(8)

Where a charge is created in a suit for maintenance by wife against the husband as manager of joint family her step-sons who were made eonomine parties are bound by the decree and subsequent partition does not change its position.(9)

Similarly, once a charge is created over the properties, which would stand as a security for the payment of maintenance the charge will continue to be there even if the maintenance amount is increased due to change of circumstances and would also be available for the entire amount including enhanced maintenance.(10)

Debts due by a deceased Hindu are also not a charge upon any specific property unless expressly made so by agreement or by a decree.(11) Debts binding upon a Hindu, however, take precedence over his widow's right of maintenance (12) Therefore, though under S. 39, a right of maintenance can be enforced against a transferee with notice or a gratuitous transferee, the rule does not apply where the debts having precedence over the right of maintenance, a transfer of the family property is in liquidation of such debts (13) But if the maintenance has been made a charge upon the property it will take precedence over the right of a subsequent purchaser of the same property in execution of a money decree even though such decree is in respect of a debt binding on the husband.(14)

The effect of charge created by maintenance decree on properties of judgment-debtor even if

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7. (1978) 1 AndhWR 37 : (1977) 2 APLJ 136.
8. (1973) 1 Andh WR 80
9. (1968) 2 Mad LJ 569
10. 2002 (2) Mad LJ 601 (607).
11. (1883) 9 Cal 535 (555) (DB) ** (1902) 26 Mad 792 (796) (DB) ** **1866 Agra 71 (74) (FB).**

    [See also (1869) 11 Suth WR OC 21 (23) (DB)]

    [See however (1874) 14 Beng LR 21 (44) (DB)]
12. AIR 1955 Mad 571 (574) ** AIR 1920 Mad 722 (722) 43 Mad 800 (DB) (But not over a charge created by a decree for maintenance) ** AIR 1930 Mad 824 (829) : 54 Mad 132 (DB) ** AIR 1927 Mad 1092 (1093) ** (1881) 5 Bom 99 (109) ** (1903) 27 Mad 45 (49, 50) (DB) ** AIR 1927 Lah 883 (883) ** **(1878) 2 Bom 494 (505) (FB)** ** AIR 1933 Lah 901 (904) : 15 Lah 9 (DB).
13. AIR 1955 Mad 571 (575) ** (1878) 2 Bom 494 (498, 499) (DB) ** AIR 1915 Mad 464 (466, 470, 471) (DB)

    [See also AIR 1940 PC 11 (14, 15) : ILR (1940) 1 Cal 255 : ILR (1940) Kar PC 33 : 67 Ind App 11. (Mortgage by A, a Hindu governed by Dayabhaga, in favour of B — A dying leaving widow C, and son D — B then suing on his mortgage and buying property in execution of his decree on mortgage — B gets the rights of A, the original mortgagor and not those of D, his son and so, B's purchase is not subject to the claim for maintenance of C, the widow — The principle being that the purchaser under a mortgage decree gets the rights of the mortgagor at the date of the mortgage and not at date of sale nlike what a purchaser at a sale under a simple money decree will get.)]
14. **AIR 1928 Mad 713 (718) (FB)** ** AIR 1930 Mad 824 (830) 54 Mad 132 (DB) ** AIR 1920 Mad 722 (722) 43 Mad 800 (DB)

they were purchased by third parties in the auction held by the court in execution of the maintenance decree is that the acution-purchaser purchases the properties subject to the charge (15)

After passing of the decree for maintenance, the husband of the decree-holder wife died Consequently she became entitled to succession to the share in the property left by her deceased husband Therefore the security in the form of charge obtained by her because of decree for maintenance became merged in the greater right of succession and thus the charge stood extinguished Her remedy to proceed against the property for realising maintenance amount came to an end (16)

When a person is trying to execute a maintenance decree with a charge he is really trying to enforce a charge, he is not trying to recover a debt within meaning of Section 214 of Indian Succession Act and there is no need for him to obtain a succession certificate (17)

So also where in a suit for maintenance filed in forma pauperis a decree creating a charge on property for arrears of maintenance was passed the charge so created was held to take precedence over the rights of the purchaser at the sale held in enforcement of the statutory charge under O. 33, R. 10, Civil P C for arrears of court-fee in that suit (18)

See also Notes 2 and 5 on Section 39.

31. Debts of a deceased Muhammadan.

The unsecured debts of a deceased Muhammadan are not a charge upon the estate left by him and do not give the creditor any priority over a *bona fide* purchaser for value to whom it has been transferred by his heir-at-law (1) A Muhammadan wife's claim for dower is exactly on the same footing as any other unsecured debt and does not create a charge upon the estate of the husband (2) Thus, in *Hamira Bibi* v. *Zubaida Bibi*(3) their Lordships of the Privy Council observed

"The dower ranks as a debt and the wife is entitled, along with the other creditors to have it satisfied on the death of the husband out of his estate Her right however is no greater than that of any other unsecured creditor except that if she lawfully with the express or implied consent of the husband or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the

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15. (1978) 1 Andh WR 37 : (1977) 2 APLJ 136 (143)

16. 2000 (4) Civ LJ 30 (33) (Mad)

17. AIR 1982 Andh Pra 107 (109) : (1982) 1 Andh WR 359.

18. AIR 1949 Pat 466 (469) : ILR 28 Pat 336 (DB).

Section 100 — Note 31

1. (1881) 7 Cal L R 460 (463) (DB) ** (1878) 4 Cal 402 (408) : 5 Ind App 211 (PC) ** AIR 1929 Mad 609 (610) (DB)

   [See also AIR 1921 Oudh 150 (153) (The word 'charge' is used in this case in a loose sense.)]

2. AIR 1926 Pat 404 (406) (DB) ** AIR 1942 Pat 210 (212) 20 Pat 798 (DB) ** (1869) 11 Suth WR 212 (213) (DB) ** (1873) 20 Suth WR 92 (93) (DB) ** AIR 1934 Oudh 307 (312) 9 Luck 701 (DB) ** 1884 All WN 33 (33) (DB) ** AIR 1923 All 331 (331) 45 All 384 (DB) ** AIR 1925 Oudh 171 (172) ** AIR 1934 Oudh 437 (438) ** AIR 1934 Oudh 63 (65) (DB) ** 1880 Pun Re No 96 page 231 (232) (DB) (Except in the sense that dower is a debt payable out of the estate of the deceased it is not a charge on the estate) ** 1894 Bom PJ 173 (DB) ** (1902) 25 Mad 658 (659) (DB).

   [See also (1903) 26 All 28 (34, 36) (DB) ** (1870) 13 Suth WR 49 (49 50) (DB) ** AIR 1923 Pat 72 (76) 2 Pat 75 (DB) (The rigt of Muhammadan widow to retain possession of her husband's estate in lieu of dower is strictly speaking neither a lien nor a charge She has a right to transfer the debt coupled with the security so as to bind her co-heirs until they discharge the debt She can also during her lifetime transfer the right of possession apart from the debt but that is a matter between herself and her transferee and the transfer will not bind her co-heirs after her death.)]

3. AIR 1916 PC 46 (48) : 38 All 581 : 43 Ind App 294.

rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this is the only creditor's lien of the Mussalman law which has received recognition in the British Indian Courts and at this Board' (4)

32. Nankar and dahyak rights.

Nankar is the assignment of a portion of land or the revenue of an estate to the occupant of a zamindari as an allowance for his subsistence (1) A right to receive a cash *nankar* out of the profits of a zamindari is a charge on such zamindari.(2) A cash *nankar* granted in lieu of the surrender of zamindari rights has been held to be an under proprietary right and a charge on the zamindari rights so surrendered (3) *Dayhak* or *daswant* is closely analogous to *nankar* and is also a charge on the property.(4)

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^[101. NO MERGER IN CASE OF SUBSEQUENT ENCUMBRANCE.— Any mortgagee of, or person having a charge upon, immovable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.]

[A] Substituted for the original section, by the Transfer of Property (Amendment) Act, 1929 (20 of 1929), S. 51.

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4. (1873) 20 Suth WR 92 (93) (DB) ** (1870) 13 Suth WR 49 (50) (DB) ** (1904) 1 All LJ 394 (395) (DB) (A Mahomedan widow cannot by seizing upon her husband's estate create a lien on it for her dower debt.) ** AIR 1923 All 331 (331) 45 All 384 (DB) ** AIR 1925 Oudh 171 (172) ** AIR 1937 Lah 589 (590) ILR (1937) Lah 149 (DB) ** **(1855) 6 Moo Ind App 211 (228, 229) (PC).**

Section 100 — Note 32

1. **The Law Lexicon of British India, by P Ramanatha Aiyer.**

   A Manual of Law Terms and Phrases, by K Jagadisa Aiyer (Nankar is the name given to the commission and the allowances granted to a zemindar when originally these zamindars were only farmers of revenue and had to make payments of the entire collection from ryots to the State.)

2. AIR 1961 Pat 291 (292) ** AIR 1916 Oudh 129 (130) 19 Oudh Cas 49

3. AIR 1938 Oudh 84 (85) 13 Luck 746 (DB) (Taluqdari estate subject to charge of nankar and entered as such in khewats and siji bul-arz, sold in execution — Decree-holder himself auction-purchaser — Auction-purchaser must be presumed to have constructive notice of charge — Charge is binding on him.) ** AIR 1916 Oudh 176 (176, 177) 18 Oudh Cas 380 (Granted by the decree of settlement officer — The payment of nankar or dahyak is not a mere personal right but an interest in immovable proeprty — After the transfer of the property, it cannot be enforced against the original owner but can only be enforced against the transferee.) ** (1898) 1 Oudh Cas 163 ** AIR 1919 Oudh 403 (404) 21 Oudh Cas 327 ** AIR 1916 Oudh 129 (130) 19 Oudh Cas 49. (Granted by a decree of settlement Court.)

4. AIR 1919 Oudh 403 (404) · 21 Oudh Cas 327 (Cash allowance in perpetuity awarded by an order of the settlement Officer amounting to a tenth of the assumed rental.)

Synopsis

1. Scope of the section.
1A. Prior mortgagee purchasing property and taking possession — Whether his possession is as mortgagee.
2. Benefit under the rule of intention must be a benefit at the time the charge is paid off.
3. Renewal of one mortgage by another.
4. Mortgagee taking subsequent sale or mortgage in discharge of the prior mortgage — Later transaction invalid — Effect.
5. Mortgagee purchasing portion of mortgaged property — Effect.
6. Purchase at sale in execution of decree for rent.
7. Extinguishment of mortgage by decree of Court. See Note 26 on S. 60.
8. We can claim benefit of section.
9. "As between himself and any subsequent mortgagee," etc.
10. Charge kept alive — Enforcement.
11. Section, if retrospective.

1. Scope of the section.

It is an important principle of equity jurisprudence, that the mere fact of a charge having been paid off does not decide the question whether it was *extinguished*. It is a matter of *intention* of the parties. If the charge is intended to be kept alive it will not be extinguished. The intention to keep the charge alive is presumed where it is for the *benefit* of the person paying to do so, for a man is presumed to act according to his interest (1). This principle of equity, which may be called the rule of intention is, however, not applicable where the person paying off a charge is *himself personally liable* to pay it. In *Adams v. Angell* (2) the leading English case on the point, Jessel, M. R., observed as follows :

> "In a Court of Equity, it has always been considered that the mere form in which a charge has been paid off does not decide the question whether it was intended to be kept alive or not. ... The person who pays off the charge may keep it alive or extinguish it, and he may keep it alive either by means of an assignment to a trustee or by a declaration of intention. ... The intention, however, is always to prevail if it is sufficiently expressed or evidenced by the surrounding circumstances."

In *Thorne v. Cann*(3) Lord Macnaghten observed :

> "Nothing, I think, is better settled than this ... that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot."

The equitable rule of intention was applied in England, not only to cases where a charge was paid off by a person, but also to cases to which the doctrine of *merger* was applicable. Under the latter doctrine where a smaller estate and a larger estate in property became united in the same person in the same capacity, as where a chargeholder acquired the ownership in the property, or the owner acquired the charge on the property, the lesser estate became merged and extinguished in the greater (4). Equity, however, prevented the merger by applying the rule of intention to such cases

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Section 101 — Note 1

1. (1884) 10 Cal 1035 (1046) : 11 Ind App 126 (PC) ** AIR 1928 All 77 (79) ; 50 All 218 (DB) ** AIR 1920 Pat 258 (254) (DB) ** AIR 1920 Mad 389 (390) (DB) (Purchaser of the equity of redemption discharging an encumbrance on the property is entitled to the benefit of subrogation.) ** (1928) 108 Ind Cas 291 (293) (Mad) ** AIR 119 Mad 542 (544).

   Also see S. 92, Note 2

2. (1877) 46 LJ Ch 352 (352) : 5 Ch D 634 : 36 LT 334
3. (1894) 64 LJ Ch 1 (6) : 1895 App Cas 11 : 71 LT 852.
4. Halsbury, Laws of England, Vol. 13, p. 164, Topham, New Law of Property, 4th Edn., 1932; pp. 194, 195.

also.(5)

In India the rule of intention was applied by Courts to cases arising before the Act was passed, as being in consonance with justice equity and good conscience.(6) In *Mohesh Lal v. Mohunt Bawan Das*.(7) *A* took a loan from *B* in 1872 on a mortgage for Rs. 20,000 of which a sum of Rs 8,000 and odd was for the payment of an earlier mortgage of 1869 carrying a higher rate of interest *B* himself paid off the earlier mortgage out of the consideration amount and got back the discharged mortgage-bond There were no mesne incumbrances between *A's* mortgage and the earlier mortgage It was held by their Lordships of the Privy Council that the question whether a charge paid off was kept alive or extinguished was one of intention of the parties, that in the circumstances of the case the intention of the parties was to extinguish the charge, that it was not for the benefit of the parties on the date of the advance that the prior charge should be kept alive, and that therefore the charge was extinguished In *Gokaldas Gopaldas v Puranmal Premsukh Das*,(8) *A* purchased, in execution of a money decree, certain property which was already subject to two mortgages x and y *A* paid off x and, in a suit by the mortgagee of y in right of his mortgage, claimed to hold x as a shield. Their Lordships of the Privy Council held that he was entitled to do so They refused to extend to India the rule laid down in *Toulmin v Steere*(9) that when a person paid off a prior charge with notice of an incumbrance, he could not keep the charge alive against the incumbrancer Their Lordships observed :

> "The obvious question to ask in the interests of justice, equity and good conscience is what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest."

In the year 1882, the Act introduced two provisions in Ss 74 and 101. The former provided that any subsequent *mortgagee* paying off a prior mortgage was entitled to all the rights and powers of the mortgagee paid off, independent of any rule of intention In other words, the mortgage paid off was kept alive without reference to any intention of the parties. Section 101 enacted the rule of intention in relation to *merger*. It ran as follows :

> "Where the owner of a charge or other incumbrance on immovable property is or becomes absolutely entitled to that property the charge or incumbrance shall be extinguished, unless he declares, by

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5. Halsbury Laws of England, Vol 13 p 146 Topham New Law of Property 4th Edn, 1932 pp 194 195 ** **AIR 1922 PC 94 (95) : 98 Ind App 485.** (Merger of mokarrari interest with patni interest — Question is of intention — AIR 1918 Pat 651, **Affirmed.**) ** (1955) 57 Pun LR 185 (187) (Rule of intention preventing merger applied — **Held,** there was no merger of *zamindari* rights with proprietary right in land) ** AIR 1931 Pat 426 (431, 432) (0 Pat 630 (DB) (Merger does not *ipso jure* take place on acquisition of superior with inferior right — Inferior right may be kept alive when manifestly for benefit of person having superior right) ** AIR 1918 Pat 651 (652) (DB) (Question of merger of mokarrari right in patni tenure is one of intention) ** AIR 1914 Cal 233 (234) (DB) ** AIR 1915 Cal 452 (454) (DB).
6. (1871) 7 Mad HCR 229 (231) (DB) ** 1882 All WN 59 (59) (DB) ** 1885 All WN 155 (155) (DB) ** 1883 All WN 40 (40) (DB) ** 1885 All WN 21 (25) (DB) ** (1881) 3 All 682 (686, 687) (DB) ** (1882) 4 All 196 (198) (DB) (Mortgagee purchasing in execution of money decree) ** (1882) 4 All 518 (525) (DB) ** (1885) 7 All 568 (569) (DB) ** (1885) 7 All 577 (579) (DB) ** **(1882) 6 Bom 404 (407) (FB)** ** (1882) 6 Bom 561 (563) (DB) (6 Bom 404 (FB), **Followed.**) ** (1878) 3 Cal 307 (311) (DB) (Tennison v Sweeny ** (1844) 1 Jones & Lot 710, **Applied.**) ** **(1875) 23 Suth WR 338 (339) (DB)** ** (1872) 17 Suth WR 480 (483) (DB)
7. **(1883) 9 Cal 961 (977) : 10 Ind App 62 (PC).**
8. **(1884) 10 Cal 1035 (1046) : 11 Ind App 126 (PC).** (11 Bom HCR 41 and 14 Suth WR 491, **Held not good law.**)
9. (1817) 36 ER 81 (85, 86) : 3 Mer 210 : 17 RR 67.

express words or necessary implication that it shall continue to subsist, or such continuance would be for his benefit."

The section did not, in terms, apply to cases where the charge-holder did not, become *absolutely entitled* to the property charged and there was therefore no question of merger (**10**) In such cases and in all other cases not regarded as covered by Ss 74 and 101 where a charge or mortgage was paid off the general rule of intention was applied by Courts (**11**)

(a) Where a *charge-holder* acquired the ownership of the property charged and there were no intermediate incumbrances and no other circumstances showing that it would be for his benefits to keep the charge alive the charge was extinguished by merger (**12**) The case fell within Section 101 of the Act as it stood before the amendment of 1929.

(b) Where a *charge-holder* acquired the ownership of the property charged and there were intermediate incumbrances or other circumstances rendering it benefi[illegible] for him to keep the charge

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10. AIR 1931 All 76 (8[illegible]) (DB) (Part owner of equity of redemption paying off prior mortgage.)

11. AIR 1931 All 76 (81) (DB) (Person himself liable to pay a charge can [illegible] the charge-holder, keep alive a prior charge paid off) ** AIR 1926 All 653 (655) (DB) (Subsequent mortgagee by redemption of one of the prior mortgages becomes entitled to the position of the mortgagee redeemed and he can keep alive the prior [illegible] he redeemed if it suits him — He need not have an absolute title to the property) ** AIR 1930 Cal 530 (531) · 57 Cal 473 (DB) (A mortgaged to B and then sold to C — He again sold the same property to D who paid off B — Held, D can keep alive the mortgage against C) ** AIR 1922 All 394 (395) · 44 All 659 (DB) ** AIR 1928 Lah 301 (303) · 9 Lah 58 (DB) (Mortgagee purchasing or acquiring satisfaction [illegible] ** AIR 1936 Mad 171 (175) · 59 Mad 359 (FB).

12 AIR 1916 Oudh 332 (333) (Sale by mortgagor — Prior mortgage [illegible] — There is merger of interests — Mortgagee cannot sue for balance) ** (1913) 40 Cal 89 (103) · 39 Ind App 228 (PC) ** AIR 1943 Mad 429 (431) · 11 R (1943) Mad 531 (FB) (Per Panchapakesa Sastri, J , in the Order of Reference — Subsequent mortgagee purchasing equity of redemption in execution of his decree on mortgage — No subsequent incumbrances or any other interests such as would operate to prevent merger at the date of sale — Mortgagee purchaser cannot afterwards be allowed to put forward his own mortgage so as to defeat charge for contribution claimed by co-mortgagor who paid off the prior mortgage, even if such charge were held to arise on the date of payment and not on the date of mortgage redeemed — 40 Cal 89 (PC) — Relied on) ** AIR [illegible] 19 Luck 17 (DB) (Mortgagee acquiring ownership of property by foreclosure — No subsequent mortgage — Mortgage held not alive — merger [illegible] because there was no [illegible] of pre-emption suit) ** AIR 1926 Cal 165 (166, 167) (DB) — Mortgagee purchasing in execution of decree on mortgage — No rent charge lien in existence — Merger takes place — He cannot set up the mortgage against subsequent purchaser [illegible] 40 Cal 89 (PC) Followed.) ** (1911) 9 Ind Cas 139 (140) (DB) — Mad) ** AIR 1916 Mad 855 [illegible] (DB) ** AIR 1917 Mad 536 (539) (DB) ** AIR [illegible] Mad 879 (883) · 52 Mad 165 (DB) ** AIR 1925 Mad 786 (787) (DB) ** AIR 1930 All 311 (312) (DB) ** AIR [illegible] Bom 25 (26) · 38 Bom 369 (DB) ** AIR 1924 Lah 377 (378) (DB) (Mortgagee acquiring equity of redemption — No intermediate incumbrance — Merger takes place) ** AIR 1935 Lah 714 (716) (DB) (Mortgagee purchasing equity of redemption — Purchase made in benamidar's name — Merger takes place) ** AIR 1915 All 359 (359) (DB) ** (1913) 18 Ind Cas 99 (100) (All) ** AIR 1935 All 770 (771) ** (1885) 1885 All WN 210 (211) (DB) ** (1906) All WN 190 (190) ** AIR 1922 Bom 211 (212) · 46 Bom 1009 (DB) ** (1894) 18 Bom 348 (354) (DB) ** AIR 1930 Lah 620 (623) (DB) (Purchase of equity of redemption by mortgagee — No intermediate mortgage — Presumption of merger) ** (1909) Pun Re No 59 p 241 (203) (DB) ** (1910) 6 Ind Cas 764 (766) (DB) (Mad).

alive the charge was not extinguished **(13)** If even in such a case the *intention* was clear to extinguish the charge, it was extinguished.**(14)** This case also fell within the old S 101.

(c) Where the *owner* of property acquired a charge upon it and there were no incumbrances and no other benefit by keeping the charge alive, the charge was extinguished by merger.**(15)** But where the owner (not being the mortgagor himself) acquired a charge thereon and there were intermediate incumbrances, or it was otherwise for his benefit to keep the charge alive, it was not extinguished.**(16)** These cases also were held to come within the old S 101**(17)**, though a contrary view was expressed in the undermentioned case**(18)** that the matter was governed not by S. 101 but by the general doctrine of merger The same principles applied where the owner of property subject to several mortgages (not being the mortgagor himself or a person personally liable to pay them) *paid off* an earlier mortgagee On such payment, he was held entitled to treat himself as *buying the charge* and was thus reduced to the position of an owner of property acquiring a charge thereon, and the question whether the charge was extinguished by the rule of merger was one of intention under S. 101 of the Act In *Mali Reddi Avvareddi v. Gopala Krishnayya***(19)** their Lordships of the Privy Council observed as follows :

> It is now settled law that where in India there are several mortgages on a property the owner of the property subject to mortgages, may if he pays off an earlier charge treat himself as buying it and stand in the same position as his vendor, or to put it in another way he may keep the incumbrances alive for his benefit and thus come in before a later mortgagee This rule would not apply if the

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13. (1880) 5 Cal LR 29 (32) (DB) ** (1904) 1 All LJ 288 (291) (DB) (Purchase of equity of redemption by pisne mortgagee No extinguishment against prior mortgagee) ** AIR 1930 Cal 335 (337) 57 Cal 82 (DB) (Mortgagee purchasing property can keep alive the mortgage against subsequent lessee) ** AIR 1924 Mad 103 (103) (DB) ** (1904) 7 Oudh Cas 330 (332) ** AIR 1919 Pat 53 (54) (DB) ** AIR 1926 Pat 478 (480) (DB) ** AIR 1916 Mad 859 (861) 38 Mad 18 (DB) ** AIR 1934 Pat 70 (73) ** AIR 1932 Pat 332 (334) (DB). (Heir of assignee of prior mortgagee and mortgagor same — Heirs can claim priority) ** AIR 1934 Pat 134 (138) 13 Pat 200 (DB) ** **AIR 1922 PC 11 (13) : 48 Ind App 465 : 43 All 469.** (Auction-purchaser in execution of mortgage decree) ** AIR 1917 All 237 (238) (DB) ** AIR 1923 All 457 (457) (DB) ** (1910) 32 All 1 (3) (DB) ** AIR 1923 Pat 581 (584) (DB) ** AIR 1932 Lah 237 (238) (DB) ** AIR 1922 All 394 (395) 44 All 659 (DB) ** AIR 1914 Bom 268 (270) 38 Bom 24 Bom 24 (DB) ** AIR 1932 Cal 772 (773) (DB) (Mortgagee purchasing.) ** (1904) 31 Cal 370 (372) (DB) (Purchase by mortgagee of mortgaged property along with others does not extingish mortgage) ** AIR 1933 All 412 (413) (DB) ** AIR 1932 Rang 197 (200) 10 Rang 465 ** AIR 1932 Mad 84 (85) ** AIR 1914 Sind 131 (133) 8 Sind LR 264 (DB) ** AIR 1924 Nag 266 (268) 20 Nag LR 115 ** AIR 1930 Nag 166 (171) ** AIR 1932 Lah 56 (57) (Property mortgaged twice — First mortgagee buying property in execution of a money decree Court ordering it to be sold subject to both mortgages but sale certificate and proclamation mentioned only the subsequent encumbrance — Omission was held not capable of raising presumption that prior mortgagee gave up his charge on the property) ** AIR 1927 Oudh 341 (343) (DB) ** AIR 1917 All 309 (311) : 39 All 74 (DB).
14. AIR 1928 Mad 1109 (1111, 1112) (DB) ** AIR 1923 Oudh 121 (122) : 26 Oudh Cas 289. **[See also AIR 1924 Oudh 1 (9) (DB).]**
15. AIR 1932 Oudh 268 (270) 8 Luck 103 (DB) (No subsequent encumbrance — Prior charge held extinguished.) ** AIR 1915 All 242 (243) : 37 All 309 (DB).
16. AIR 1915 All 242 (243) 37 All 309 (DB) ** AIR 1934 Lah 143 (144) (Representative of a mortgagor purchasing the mortgagee rights.)
17. AIR 1942 Mad 558 (562) (DB) (Question in the case was the applicability of the old S 101 AIR 1915 All 242, **Dissented from.**)
18. AIR 1915 All 242 (242) : 37 All 309 (DB).
19. **AIR 1924 PC 36 (38) : 47 Mad 190 : 51 Ind App 140.**

owner of the property had covenanted to pay the later mortgage-debt ... It is further to be presumed, and indeed the Statute so enacts (Transfer of Property Act S. 101) that (there is no indication to the contrary the owner has intended to have kept alive the previous charge if it would be for his benefit."

Where therefore an owner of property (not being himself under a personal liability to pay the debt) paid off an earlier mortgage, he was held entitled to keep the charge alive, if there were intermediate incumbrances or it was otherwise for his benefit to do so **(20)**

(d) Where a person *advanced* money to a mortgagor for the purpose of paying off a prior mortgage, and took a sale or mortgage of the properties in consideration of such advance, the question whether the mortgage paid off was kept alive for his benefit was regarded as one depending on the intention of the parties.**(21)**

(e) A person who had *covenanted* to pay the debt or was otherwise personally liable to pay the debt could not, by paying off a prior charge, keep it alive as against the former **(22)** Thus the

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20. (1941) Nag LJ 639 (640) (DB) (**Held,** there was intention to keep prior mortgage alive) ** (1911) 11 Ind Cas 649 (652) (DB) (Cal) (Intention is to keep alive prior mortgage) ** AIR 1916 Oudh 169 (175) (DB) (Auction-purchaser paying earlier mortgage) ** AIR 1926 Lah 430 (430) : 7 Lah 212 (DB) (Owner paying off earlier mortgage) ** AIR 1917 Pat 417 (418) (DB) ** AIR 1930 Cal 572 (573, 574) (DB) (Property mortgaged twice — Purchase by A having no knowledge of [illegible] First mortgage is kept alive) ** (1913) 18 Ind Cas 704 (705) (DB) (All) ** AIR 1922 Lah 275 (276) : 3 Lah 99 (DB).

21. AIR (1925 Mad) (29 (C.W.N.) (Such a person is not a volunteer) ** AIR 1925 Pat [illegible] (DB) (Prior mortgage held kept alive on paying it off) ** AIR 1924 Calcutta [illegible] (Subsequent mortgage to pay off prior mortgage — Intention was to keep it alive as intermediate mortgage) ** AIR 1918 Pat 299 (300) (DB) (**Held** that intention to keep prior mortgage alive could be presumed) ** (1912) 39 Cal 527 (555) : 39 Ind App 68 (PC) ** AIR 1925 Mad 1217 (1217) ** AIR 1924 Mad 103 (103) (DB) ** (1906) 33 Cal 1133 (1155) (DB) ** (1902) 29 Cal 154 (165) : 29 Ind App 9 (PC). (On the facts it was held that the intention was to keep the mortgages paid off alive : 3 CWN 153 Affirmed on appeal.) **AIR 1922 Pat 181 (182) : 1 Pat 332 (DB) (Intention held to be to keep it alive) ** AIR 1928 Rang 287 (288) : 6 Rang 488 (DB) (Do.) ** AIR 1920 Mad 904 (904) (DB) (Do.) ** AIR 1914 Mad 693 (694) (DB) (Do.) ** (1906) 29 Mad 37 (39, 41) (DB) (Presumption is of intention to keep it alive) ** AIR 1919 Mad [illegible] (DB) (Do.) ** AIR 1918 Mad 333 (334) (DB) (Do.) ** (1897) 20 Mad 486 (486, 487) (DB) (Do.) ** (1910) 7 Ind Cas 473 (473) (DB) (Cal) (Do.) ** (1912) 34 All 102 (103) (DB) (Do.) ** AIR 1926 Mad 1082 (1083) (DB) (Do.) ** AIR 1928 Pat 195 (196) (DB) (Do.) ** AIR 1929 Pat 325 (327) : 8 Pat 360 (DB) (Do.) ** AIR 1933 Lah 1000 (1001) (Do.) ** (1902) 29 Cal 25 (30) (DB) (Do.) ** (1913) 18 Ind Cas 945 (945) (DB) (All) (Do.) ** AIR 1916 All 81 (82) : 38 All 502 (DB) (Do.) ** AIR 1931 Bom 545 (546) (DB) (Do.) ** AIR 1927 All 211 (212) : 49 All 233 (DB) (Do.) ** (1891) 13 All 581 (584, 585) (SB) (Do.) ** AIR 1934 Lah 806 (806, 807) (29 Cal 154 : 29 Ind App 9 (PC) Referred to) ** AIR 1914 [illegible] 443 (444) (DB) (Prior and secondary mortgage paid off but mortgagor and mortgagee person paying, getting into possession — **Held,** that intention was to extinguish the mortgages) ** (1909) 5 Low Bur Rul 138 (140) (DB) (Presumption is to keep it alive) ** AIR 1936 Cal 313 (314, 315) (Do.) ** AIR 1930 Lah 1063 (1065) (DB).

[**See also** AIR 1921 Cal 78, (78) (DB) (Intention is to keep it alive — Where however opportunity to meet the presumption was not given in first two Courts by the question not being opened the presumption cannot be acted upon in second appeal) ** (1911) 12 Ind Cas 805 (806) (Low Bur) (*X* paying off a mortgage with the knowledge of mortgagor — Valid assignment of mortgage not made — *X* becomes equitable transferee and can look to the mortgage property for his money.)]

See also S. 92, Note 19.

22. AIR 1924 PC 36 (38) : 47 Mad 190 : 51 Ind App 140.

mortgagor who had effected two mortgages on the same property could not, by paying off one of them, keep it alive against the other **(23)** So also a person who had undertaken to pay mortgages *x* and *y* could not pay off *x* and keep it alive against *y*.**(24)**

Where a person *paid off a* prior charge on the property and was entitled under the rule of intention to keep the charge alive for his benefit he stepped into the shoes of the charge-holder who was paid off. In other words he was *subrogated* to the rights of the prior charge-holder. But where the mortgagee or charge-holder or incumbrancer himself acquired the ownership of the property there was no question of any subrogation or substitution of one person to the rights of another but it was merely a question of *keeping alive* the mortgage

By the introduction of the new S 92 and the substitution of the new S 101 for the old section, the Legislature has abolished the rule of intention in cases falling within their scope. A right of *subrogation* to the rights of a mortgagee does not now depend upon any rule of intention but is governed by the terms of S 92.**(25)** Where a mortgagee or a person having a charge upon immovable property purchases or acquires the rights in the property, the question wheher the mortgage or charge is *kept alive* (there being no question of subrogation in such a case) does not also depend upon any rule of intention. The section declares that there shall be no merger as between the mortgagee and any subsequent mortgagee or charge-holder of the same property.**(26)**

But the section does not provide for a case of an *owner* of property acquiring a charge on the property**(27)** as by inheritance Nor does it provide for a case where a mortgagee acquires the

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[**See also** (1884) 7 Mad 127 (127) (DB) (Purchase subject to two mortgages — Purchaser paying off first is not entitled to priority unless he has kept the first mortgage outstanding.)]

23. AIR 1915 All 242 (243) 37 All 309 (DB) (The rule of intention is founded on equity and is not applied where *A* having created as charge himself acquires or pays off an earlier charge) ** (1906) 29 Mad 113 (114) (DB) ** (1885) 7 All 864 (866) (DB) (The ground on which the decision was rested in this case was however, that it would be fraud for the owner or his heirs to set up the charge as against the subsequent encumbrancer)

[**See also** AIR 1925 Oudh 215 (219) (DB) (Mortgagor purchasing not at the auction sale but after it will not prevent extinction of other encumbrances) ** (1907) 5 Cal LJ 95 (99) **(DB). (Mortgagor purchasing at court-auction.)**]

24. AIR 1916 Oudh 169 (176) (DB) (Auction purchaser in execution of money decree against mortgagor covenanting to pay encumbrances *X* and *Y* — Paying only *X* — Cannot set it up against *Y*) ** (1910) ILR 34 Mad 119 (121) (DB) ** 1885 All WN 130 (131) (DB) ** AIR 1926 Nag 321 (322) (DB) ** AIR 1924 Mad 103 (104) (DB) ** (1932) 136 Ind Cas 824 (824) (DB) (All) ** (1930) 123 Ind Cas 687 (688) (All) (33 All 101 (FB) and AIR 1923 All 509. Followed) ** **(1911) 33 All 101 (104) (FB)** ** AIR 1916 Cal 801 (802) 43 Cal 69 (DB) ** (1905) 2 Cal LJ 228 (295, 296) (DB) ** (1909) 2 Ind Cas 207 (208) (All) ** **AIR 1936 Mad 171 (172) : 59 Mad 359 (FB)** ** AIR 1928 All 77 (79) 50 All 218 (DB).

[But see AIR 1932 All 489 (491) : 54 All 897 (FB).]

25. See AIR 1933 Nag 155 (156) : 30 Nag LR 164.

26. AIR 1948 Bom 379 (380) (Prior mortgagee purchasing mortgaged property in execution of money decree obtained by third party and entering into possession — Prior mortgage is kept alive as against subsequent mortgagee.) ** AIR 1940 Pat 64 (65)

[**See however** AIR 1943 All 156 (157) : ILR (1943) All 444 (DB) (It cannot be said that it is not possible for the parties to contract themselves out of this provision of law — But a contract which does operate to deprive the prior mortgagee purchaser of his charge upon the property when he becomes the owner of it under a sale would have to be a very clear one — A mere mention of the amounts due upon the prior mortgages at the time of the sale would not be sufficient to justify the conclusion that it was the intention of the parties that the rights of the prior mortgagee should be merged in the rights of the vendee)]

27. See AIR 1942 Nag 33 (35) : ILR (1942) Nag 309 (DB).

ownership of the property and it is for his benefit to keep it alive though there are no subsequent incumbrances. In such cases it is conceived that the rule of intention will still be applicable **(28)**. In the undermentioned cases**(29)** however the High Court of Bombay has held that a mortgagee acquiring the rights in the property cannot under the present section, keep alive the mortgage if there is no intermediate incumbrance on the property even if it would be otherwise for his benefit to keep it alive. It is submitted that this view is not correct. The section merely says that there shall in the circumstances specified in the section be no merger *as against subsequent incumbrancers*. It does not say that in all other cases where a mortgagee acquires the property there shall be merger. In the case noted below the view has been expressed that the only case in which it is to the benefit of a mortgagee or charge-holder to keep an encumbrance alive is when it is necessary as a defence against a subsequent encumbrance.**(30)**

It will thus be seen that the section is only concerned with saving that the doctrine of merger shall not apply in the cases specified. It does not touch the general question as to when merger will take place under the law or when it will not take place **(31)**. It is conceived that the general English doctrine set forth above will apply in India also subject to statutory exception such as that contained in this section **(32)**. As noted already, it is essential for the application of the principle of merger that the two estates must become entitled united in the same person in the *same capacity*. Otherwise

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[See also AIR 1942 All 175 (184) : ILR (1942) All 259 (DB). (NOTE. — In this case a Hindu widow mortgaged her husband's estate. — The mortgagee then transfered the mortgage to her. — **Such a case is not provided for by this section.**)

28. AIR 1962 Mad 343 (344). (Mortgagor seeking equity of redemption to mortgagee with a stipulation for re-conveyance. — In pursuance of the clause mortgagee reconveyed property to assignee of mortgagor. — There is no merger by purchase. — Clause for reconveyance indicates intention against merger as non-merger would benefit the mortgagee.) ** AIR 1943 Oudh 407 (408, 409). : 19 Luck 260 (DB). (Subsequent permanent lessee. — Prior mortgage purchasing property. — Intention to keep alive mortgage. — Prior mortgage is **enforceable against lessee.**)

29. AIR 1942 Bom 95 (96) (DB).

[See also AIR 1943 Mad 429 (430) : ILR (1943) Mad 531 (FB). (Per Patanjali Sastri J., in the Order of Reference. — Under the present S. 101, it is clear that the mortgagee purchaser would not be entitled to treat the mortgage as subsisting, as the section prevents merger only in cases where a subsequent encumbrance on the property is outstanding. — Subsequent mortgage acquiring equity of redemption in execution of his mortgage decree. — No subsequent encumbrance in existance at the date of purchase. — Mortgagee purchaser cannot treat his mortgage as alive so as to defeat the charge for contribution claimed **by co-mortgagor who has redeemed the prior mortgage.**)]

30. AIR 1947 All 214 (221) : ILR (1946) All 375 (DB).

31. AIR 1945 Bom 116 (118, 119). (In enacting amended S. 101 Legislature had adopted the simple rule that the existence of a subsequent incumbrance prevents a merger. — But it was not the intention of the Legislature to amend or alter the old law as to the union of two estates which occurred when the mortgagee acquired the rights of the mortgagor and vice versa. — Charge created in creditor's favour in respect of his debt. — Charge-holder purchasing charged property in execution of decree against debtor. — Charge as well as debt are extinguished. — Creditor cannot claim to proceed against debtor personally for the debt. **AIR 1941 Bom 90 (FB). Disting.**)

[See also AIR 1923 Mad 340 (341) (DB). (Decree for mesne profits against B by A. — C standing surety for B. — On death of B, B's mother surrendering B's estate to A. — Debt is **extinguished by merger. — C is discharged — S. 101 not applicable.**)]

32. See AIR 1962 Mad 343 (344). (Section 101 is not exhaustive and in cases not covered by it, the question whether there is a merger will be a matter of intention depending upon the facts and circumstances of each case.) ** 1956 Madh BLJ 1243 (1246) (DB). (A mortgag-

there would be no merger.(33) Thus where a Hindu widow mortgages her husband's property and then the mortgagee transfers to her in her individual and independent capacity the mortgagee right, there would be no merger and the widow's personal heirs would inherit the mortgagee right, after her death while the equity of redemption would devolve on her husband's heirs.(34) See also S. 111, Note. 7.

After passing of the decree for maintenance, the husband of the decree-holder wife died. Consequently she became entitled to succession to the share in the property left by her deceased husband. Therefore the security in the form of charge obtained by her because of decree for maintenance became merged in the greater right of succession and thus the charge stood extinguished. Her remedy to proceed against the property for realising maintenance amount came to an end.(35)

Where property is sold for arrears of revenue, the sale is *free of all encumbrances*. If a mortgagee of the property purchases the property at such a sale, there is no *merger as* there is no question of the mortgagee acquiring the *equity of redemption* in such a case.(36)

The doctrine of merger as enunciated in S 101 would not apply to case of a lease followed by a mortgage.(37)

1A. Prior mortgagee purchasing property and taking possession — Whether his possession is as mortgagee.

Where a prior mortgagee purchases the mortgaged property in execution of a money decree obtained by a third party against the mortgagor and enters into possession of the property, it has been held that as between himself and the puisne mortgagee (against whom the mortgage is kept alive under this section) the prior mortgagee is liable to account for rents and profits of the property though he is entitled to interest on the mortgage money (1) (See also Note 10 and S 76 Note 5) But this rule does not apply to the case of a stranger auction-purchaser who has purchased the mortgaged property in execution of a prior mortgagee decree. The puisne mortgagee is not entitled to call for an account of the profits of the property in his hands nor can the auction-purchaser, though he may set up the prior mortgage as a shield, claim interest for the period during which he was in possession.(2)

There would be no merger of the equity of redemption if a mortgagee had purchased the

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ing his property to B — Sub mortgage by B to C — In partition between A and C, the property allotted to C — There is no meager — B can redeem C)

33. See AIR 1952 Trav-Co 292 (293) ILR (1951) Trav Co 834 (DB) (The principle of merger would equally apply whatever be the manner in which the two characters happen to become vested in the same individual whether by act of parties or by operation of law)

[See also AIR 1924 Pat 721 (726) ILR 3 Pat 880 (DB) (Interest of maintenance holder held did not merge by purchase by mortgagee in personal capacity and not as reversioner.)]

34. AIR 1942 All 175 (184) : ILR (1942) All 259 (DB).

35. 2000 (4) Civ LJ 30 (33) (Mad)

36. AIR 1945 Nag 289 (291) ILR (1945) Nag 643 (DB) (Hence the debt is not extinguished by such purchase and the mortgagee's right to proceed against the debtor for the balance of the debt is not affected.)

[See however AIR 1920 Cal 26 (32) (DB). (Revenue sale brought about by fraud — Mortgage debt not extinguished.)]

37. AIR 1978 Kant 71 (72) (1978) 1 Kant LJ 155 (DB). ((1975) 2 Kant LJ 107, held no longer good law in view of AIR 1976 SC 1565.)

Section 101 — Note 1A

1. AIR 1948 Bom 379 (380) (AIR 1918 Mad 103, Foll, AIR 1916 Mad 859 Ref) (The rents and profits enjoyed by him after his entry into possession cannot be set-off as equivalent to interest due for the period of possession.)

2. AIR 1956 All 422 (428) : ILR (1956) 2 All 210 (DB).

property at a Court auction, there having been created a charge by way of registered security bond in between the mortgagee and the auction purchase (3)

Where a mortgagee purchased the property himself ordinarily there is merger and the mortgage merges with the sale But the mortgage may continue if only the mortgagee so desires for his benefit and declares either by express words or by necessary implication that the mortgage shall continue to subsist.(4)

Under Section 101, although the mortgagee who purchases the equity of redemption may keep the mortgage alive for his own defence as against the puisne mortgagee it is not obligatory for him to do so.(5)

2. Benefit under the rule of intention must be a benefit at the time the charge is paid off.

As has been seen in Note 1, an intention to keep alive a charge in favour of a party will, under the rule of intention, be *presumed* if it is for the *benefit* of the party that it should be kept alive But whether it is for the benefit of the party to keep a charge alive must be decided with reference to the circumstances existing *at the time the charge is paid off or the union of interests takes place* for otherwise the nature of the title will remain in suspense for an indefinite period (1) Thus the possibility of a future claim for pre-emption is not a circumstance from which it can be said that it is for the benefit of the person paying off a charge to keep it alive (2)

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3. AIR 1975 Mad 223 (225) : 88 Mad LW 21 (DB)

4. AIR 1973 Mys 58 (60) : 1972 Mys LJ 385

5. AIR 1972 Punj 149 (150)

Section 101 — Note 2

1 AIR 1943 Mad 429 (431) . ILR (1943) Mad 531 (FB) (Per Patanjali Sastri J [illegible] Order of Reference Subsequent mortgagee purchasing equity of redemption [illegible] of his own mortgage — No subsequent encumbrance or any other [illegible] the date of execution-sale showing that it would be for the benefit of the mortgagee purchaser to keep his mortgage alive — Co-mortgagor paying off [illegible] mortgage and claiming contribution from mortgage purchaser — Held, [illegible] bution arose out of default of mortgagee purchaser after he became full owner of [illegible] ties and the circumstances did not exist at the time of mortgagee's acquisition of full ownership — Mortgagee purchaser therefore could not put to [illegible] such claims Citing statement of law in Liquidation Estates Purchaser Co v White [illegible] 65 LJ Ch 486 affirmed in 67 LJ Ch 251 with approval) ** AIR 1943 Oudh [illegible] . 19 Luck 17 (DB) ** AIR 1922 Bom 211 (212) 46 Bom 1009 (DB) ** AIR 1934 Pat 134 (136) 13 Pat 200 (DB) ** AIR 1942 Mad 558 (564) (DB) (AIR 1936 Mad 875 Approved) ** (1892) 15 Mad 268 (280) (DB) (On appeal from 13 Mad 383

[See also 1942 Nag LJ 579 585) The section deals with state of facts existing at the time of purchase When no subsequent encumbrance is on [illegible] does not apply.) ** AIR 1947 All 214 (221) ILR (1946) All 375 (DB) (Third mortgage, in renewal of first mortgage — Intention to keep alive first mortgage [illegible] judged as at the time when the third mortgage is executed — The intention must be to effect some purpose or guard against some contingency which can be foreseen at the time of the third mortgage — Some threat to the mortgage which may arise later is [illegible] — Third mortgage failing on account of want of registration — Intention to keep alive first mortgage cannot be gathered merely from this.)]

2. AIR 1926 Oudh 606 (608) : 1 Luck 560 (DB) ** (1912) 34 All 268 (272) (DB)

[See also AIR 1921 Mad 51 (54) (DB) Mortgagor's right to redeem [illegible] Purchaser from him paying off mortgage in belief that he may in future acquire [illegible] property from third person — Mortgage not keep alive) ** AIR 1943 Oudh 284 (287) 19 Luck 17 (DB) (Mortgagee as subrogee acquiring property by foreclosure — No subsequent encumbrance at the date of foreclosure decree — Contingency [illegible] pre-emption held not sufficient to keep mortgage alive) ** (1906) Pun Re No 58 [illegible] (350).

The existence of an intermediate incumbrance is a circumstance which will render it beneficial to a party paying off a charge to keep it alive. But it is *one* of such circumstances.(3) The fact for instance that a property is at the time of the transaction under *attachment*, is another circumstance which will render it beneficial to a party to keep the charge alive. (See Note 4).

3. Renewal of one mortgage by another.

A renewal of one mortgage by another does not necessarily extinguish the prior security. The rule of intention applies to such cases and the prior mortgage will remain if it is for the benefit of the party renewing, to keep it alive.(1) Thus, if there is an intermediate mortgage, the prior mortgage will be kept alive as against the intermediate mortgagee,(2) and this would be so even if the prior mortgagee obtained the renewal in partial discharge of the prior security or obtained other additional security (3) In *Tennison v. Sweeny*,(4) Lord St Leonards said :

> "Then another point was started that, as the successive mortgagees were for the sum secured the former mortgages and for the sums subsequently advanced, the old securities were merged in the new, and that the judgment-debtors had a right to come before the last mortgage. That is a very novel view of the operation of the deeds. It is clear that the former mortgages continued untouched and operative, notwithstanding the new mortgages, and the new mortgages were for the purpose of letting in the further advances upon the property. Nothing could be more alarming to creditors than that a doubt should be thrown out whether by taking a new security for their old debt and for further advances they do not prejudice their original securities."

A similar view was expressed by Vice-Chancellor Knight Bruce in *Milu v. Walton*.(5) He said :

> "Does a creditor, having a mortgage on the funds of his debtor for part of his debt, necessarily surrender that mortgage or lower its priority by taking a subsequent mortgage on the same funds for the whole of the debt? If there be no more in the transaction, I apprehend that the earlier mortgage remains in force and maintains its rank notwithstanding the other, and may be dealt with by the creditor separately."

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3. AIR 1942 Mad 558 (565) (DB).

Section 101 — Note 3

1. (1913) 18 Ind Cas 199 (201) (DB) (Mad) (A selling property to B — B undertaking to execute mortgage to A in respect of unpaid purchase-money — B executing such mortgage after he has executed a mortgage in favour of C — B's mortgage being merely a renewal of the vendor's charge for purchase-money the charge is kept alive as against C.) ** AIR 1918 Mad 1033 (1036) (DB) ** AIR 1935 Lah 350 (353) 16 Lah 881 (DB) ** AIR 1938 Oudh 90 (91) 13 Luck 753 (DB) ** AIR 1920 Nag 215 (216) ** (1878) 3 Cal 307 (310, 311) (DB) ** (1913) 35 All 211 (225) : 40 Ind App 105 (PC). (Especially if the renewal is by a person having only a limited estate in the property.)
2. AIR 1947 All 74 (77) : ILR (1947) All 11 (FB) ** AIR 1944 Nag 163 (171) : ILR (1944) Nag 383 (FB) ** AIR 1924 Nag 346 (347) ** AIR 1941 All 200 (206) ILR (1941) All 220 ** (1889) 16 Cal 523 (529) (DB) ** (1886) 10 Bom 88 (90) (DB) ** (1911) 33 All 368 (370) (DB) ** (1910) 7 Ind Cas 468 (469) (DB) (All) ** (1912) 35 Mad 642 (647) (DB) ** (1897) 20 Mad 274 (275) (DB) ** AIR 1918 Mad 1327 (1328) (DB) ** AIR 1921 Mad 693 (694) (DB) ** AIR 1929 Rang 298 (299) ** AIR 1934 Rang 7 (7) (AIR 1922 PC 11 and 39 Cal 527 (PC), relied on.) ** AIR 1932 Oudh 314 (317) 7 Luck 26 (DB) ** AIR 1939 Rang 247 (248) : 1939 Rang LR 207 (The doctrine of merger is not applicable to mortgages.)
3. (1913) 19 Ind Cas 18 (19) (DB) (All) ** AIR 1915 Cal 77 (79) ** AIR 1924 Mad 619 (620) (The taking of a new mortgage for a potion of a debt on the earlier mortgage does not extinguish the earlier mortgage.) ** AIR 1918 Mad 1327 (1328) (DB) ** AIR 1940 Pat 65 (70) (DB) ** (1889) 16 Cal 523 (529) (DB) ** AIR 1941 All 200 (206) . ILR (1941) All 220
4. (1844) 1 Jones & Lot 710 7 Ir Eq R 511 (Cited in AIR 1928 Lah 301.)
5. (1843) 60 RR 184 (190, 191) 2 Y & CCC 354 7 Jur 892 63 ER 156

This principle was applied by the Lahore High Court to a case where a prior mortgagee had purchased the rights under a puisne mortgage and it was held that the rights under the prior mortgage remained in force.(6)

Where notwithstanding it would be for the benefit of the mortgagee to keep the prior mortgage alive, the intention is clear that the prior mortgage should be extinguished, it will not be kept alive (7) If the prior mortgagee by taking the subsequent mortgage, *undertakes* to discharge not only his own prior mortgage but also another mortgage on the property, he cannot keep alive his prior mortgage as against the mortgagee whom he had undertaken to pay (8) In order that a prior mortgage may be *kept alive* in a later mortgage, taken in renewal of it, the earlier mortgage must be legally enforceable at the time of the latter mortgage. If it has become barred by limitation at such time, it cannot be *revived* by the fresh mortgage (9) See also Note 10 and Section 92 Note 20

4. Mortgagee taking subsequent sale or mortgage in discharge of the prior mortgage — Later transaction invalid — Effect.

Where a mortgagee takes a subsequent sale or mortgage in discharge of his mortgage and it turns out that the latter transaction is inoperative or invalid the prior mortgage remains and is not extinguished (1)

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6. AIR 1928 Lah 301 (303, 304) : 9 Lah 88 (DB).

7. (1881) 3 All 706 (709) (DB) ** (1889) 13 Bom 348 (351) (DB) ** AIR 1935 Lah 203 (206)

8. AIR 1940 All 540 (543) ** AIR 1931 All 347 (348, 349)

9. AIR 1947 All 74 (77) ILR (1947) All 11 (FB). (The effect of the principle involved in S 101 is to "keep alive" the prior incumbrance and not to "give it a rebirth" Thus, a mortgage which at the date of the subsequent incumbrance is already dead in the sense that owing to the operation of the Limitation Act it cannot be sued upon will not be revived as a protection against an intermediate incumbrancer.)

[See also AIR 1919 All 105 (108) ILR 41 All 456 (FB) (Prior mortgagee extinguished by passing of order absolute in lieu of which a fresh mortgage is taken.)]

Section 101 — Note 4

1 AIR 1949 Mad 255 (256) (DB) (He can, however enforce the original mortgage only within time allowed for suit on that mortgage Declaration of invalidity of sale does not give him fresh cause of action) ** AIR 1949 Nag 5 (8) ILR (1948) Nag 913 (DB) ** (1904) 14 Mad LJ 485 (486) (DB) (A judgment in a suit for setting aside an auction sale to the mortgagee as fraudulent and for recovery of possession will not bar the mortgagee from suing to recover the amount due under his hypothecation) ** AIR 1947 All 214 (221) ILR (1946) All 375 (DB) (First mortgage in 1916 — Second mortgage in 1921 of same properties in favour of another person — Third mortgage in 1922 of same properties in favour of 1916 mortgagees, in renewal of 1916 mortgage — 1922 mortgage found to be invalid owning to defect of registration — On consideration of recitals in 1922 mortgage held there was express contract to keep 1916 mortgage alive Assuming that 1916 mortgage was absorbed in 1922 mortgage held it was case of revival of earlier mortgage — **Held**, on failure of 1922 mortgage, 1922 mortgagees were entitled to fall back upon 1916 mortgage) ** **AIR 1938 All 418 (423) : ILR (1938) All 714 (FB)** ** AIR 1933 Nag 241 (242, 243) 30 Nag LR 142 ** AIR 1933 Rang 92 (92) 11 Rang 112 (Purchase of property by mortgagee Subsequent discovery that vendor had only partial interest — Mortgage revives to the extent not covered by such interest) ** (1905) 1 Cal LJ 337 (343) (DB) ** (1882) Pun Re No 173 p 515 (516) ** **AIR 1917 Lah 443 (443) : 1917 Pun Re No. 68 (FB)** ** (1864) 2 Bom HCR 198 (203) (DB) ** 1880 Bom PJ 215 p 345 (346) (DB) (Sale colourable) ** AIR 1932 Mad 181 (185) (DB) ** (1880) 2 All 455 (459) (DB) (Sale) ** AIR 1925 Nag 26 (28) ** (1896) 19 Mad 160 (161) (DB) ** (1904) 14 Mad LJ 485 (487) (DB) ** AIR 1936 Mad 61 (62) 59 Mad 44 (DB) (Fact that such contingency was not contemplated does not matter) ** AIR 1914 Mad 489 (490) 37 Mad 423 (DB) ** (1913) 21 Ind Cas 978 (979) (DB) (Mad) AIR 1937 Mad 293 (294) (Agreement to sell to mortgagee immovable property mortgaged — Unless title in property mortgaged passes

In *Har Chandi Lal v. Sheoraj Singh* (2) one Jai Chand mortgaged five-sixth share in village to one Chatri Lal in 1876. After the death of Jai Chand, his widow Mt. Nandan and his nephew Phul Singh executed another mortgage in favour of Chatri Lal in 1887 in discharge of the previous mortgage. The property mortgaged was the whole village including one-sixth share therein belonging to Phul Singh in his own right. It was found that the later mortgage was not binding on the widow, Mt. Nandan. The mortgagee then sued to enforce the earlier mortgage. Their Lordships of the Privy Council held that he was entitled to do so. They observed :

> "It is of course true that the mortgagee's intention at the time when the two deeds of 1887 were executed was to accept a new security, extending to the whole mouza, for the indebtedness both of Jai Chand and Phul Singh in lieu (*inter alia*) of the security of the 13th of November, 1876. Pursuant to this intention, he appears to have handed over the mortgage of the 13th of November, 1876, to Phul Singh. But the original intention of the mortgagee was entirely frustrated by the fact that the two deeds were held not to be binding on Mt. Nandan and it does not appear to their Lordships to be consistent with equity or good conscience that the first three defendants having successfully maintained that the transaction embodied in the two deeds of 1887 was not binding on Mt. Nandan, and consequently did not bind them as heirs of Jai Chand, should now claim the benefit of such transaction as a release of the mortgage of the 13th November, 1876. In their Lordships' opinion the 41st section of the Indian Contract Act, upon which the High Court relied, has no application to a case like the present. It applies only where a contract has been in fact performed by some person other than the person bound thereby."

The above view was again reiterated by their Lordships of the Privy Council in the undermentioned case.(3)

Where a mortgage takes a subsequent mortgage or sale in discharge of his mortgage, but at that time the properties are under *attachment* in execution of a money-decree, the subsequent sale or mortgage is inoperative against all claims enforceable under the attachment. On the principles stated above, the prior mortgage will remain enforceable and will not be extinguished by the subse-

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to mortgagee, mortgage is not discharged even if possession is already transferred to him.) * AIR 1927 Nag 83 (84) ** (1912) 16 Ind Cas 779 (779) (DB) (Mad) ** AIR 1919 Oudh 89 (91) : 22 Oudh Cas 349 (DB).

[See also AIR 1922 Cal 114 (115) (DB) (Mortgagee obtaining possession under invalid agreement of sale is still a mortgagee and must account for rents and profits.) ** AIR 1939 Rang 247 (248) : 1939 Rang LR 307 (Where a person executes two mortgages one after the other in favour of the same mortgagee, then unless there is something in the second mortgage to show a contrary intention, the creditor must be presumed to have intended to keep the earlier security alive for his own protection and he can sue on the earlier mortgage.) ** (1908) 31 Mad 439 (341) (DB) (Invalid sale of mortgaged property — Purchaser paying off a mortgage — Purchaser allowed to recover from mortgagor money which he had paid for discharging the mortgage — He stands in the shoes of the mortgagee.) ** (1911) 9 Ind Cas 789 (790) (DB) (Mad) (A purchaser of land who, while in possession of the land purchased, pays off an encumbrance on it, is entitled, when his purchase is found to be invalid, to stand in the shoes of the mortgagee whom he has paid off.)]

Also see Section 58, Note 7

2. AIR 1916 PC 68 (70) : 39 All 178 : 44 Ind App 60. (On appeal from 19 Ind Cas 127.)

3. AIR 1938 PC 123 (127) : 32 Sind LR 448.

[See however AIR 1937 Mad 148 (149) (In this case, the Privy Council decision in Har Chandi Lal's case was distinguished as not applicable to the facts of the case. It was stated that in this case there was no fraud played on the mortgagee. He simply took a mortgage without realising that it was a mortgage and that he ought to have it attested and registered. On this ground the mortgagee suing on the subsequent mortgage was held not entitled to fall back on the original mortgage.)]

quent inoperative transaction (4) A contrary view has, however, been expressed in the undermentioned cases (5) On the ground that an attachment renders a transfer pending it, inoperative, only against claims enforceable under the attachment and not against the transferor himself, and that the transferor being *partly* operative, the transferee cannot fall back upon the earlier transaction in discharge of which the transfer was taken. It is submitted that this view is not correct As pointed out by Varadachariar, J , in *Mahalakshmi v. Somaraju*(6) the question is not whether the transfer is not effective as between the transferor and the transferee, but whether there being the possibility of the transfer being ineffective, as against a third party, it is not to the interest of the mortgagee not to treat his mortgage as extinguished by the transfer

Where a prior mortgagee sues on his mortgage without making the subsequent mortgagee a party to the suit, and purchases the property in execution of his decree, the purchase is inoperative against the subsequent mortgagee On the principles stated above, the prior mortgage remains as against the subsequent mortgage.(7)

As to the effect of purchase by mortgagee in execution of his own decree in contravention of R. 14 of Order 34, Civil P. C , see Note 7 under O 34, R 14 in the AIR Commentary on the Code of Civil Procedure 10th (1985) Edition.

5. Mortgagee purchasing portion of mortgaged property — Effect.

The purchase of the *whole* of the equity of redemption by the mortgagee will of course, extinguish the mortgage where there is no subsequent mortgage or charge, against which protection is required (1) It has been held that where the mortgagee purchasers only a *part* of the mortgaged

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4. AIR 1918 Mad 460 (460) (DB) ** (1882) 8 Cal 530 (533) (DB) (Private purchase by the mortgagee of the mortgaged property having become void as against the purchaser in execution of the same property by reason of the property having been under the attachment at the time of the conveyance held the mortgagee purchaser was entitled to fall back upon the lien created by the mortgage) ** AIR 1928 Mad 703 (705) (DB) (29 Cal 154 (PC), Relied on.) ** AIR 1939 Mad 393 (395, 396) ; ILR (1939) Mad 600 (DB) (8 Cal 530, Followed AIR 1932 All 76 and AIR 1933 Mad 879) 57 Mad 195 Dissented from.) ** AIR 1937 Rang 359 (360), (8 Cal 530; Followed.) ** AIR 1938 Mad 465 (466)

[See also AIR 1925 Rang 89 (92) (Case of a vendee pending attachment paying off a prior mortgage.)]

5. AIR 1922 All 76 (78) (DB) ** 1944 All LJ 376 (377) (DB) (AIR 1922 All 76 Followed) ** AIR 1933 Mad 879 (882, 883) 57 Mad 195 (DB) ** AIR 1936 Mad 61 (63) 59 Mad 44 (DB) ** AIR 1936 Pat 404 (405) 15 Pat 120 (DB) (The clause in the sale deed that the mortgage would be kept in tact was intended to preserve to the mortgagee a shield against subsequent encumbrances — He cannot sue on the mortgage AIR 1922 All 76 Relied on)

[See also AIR 1952 Cal 749 (750) (Mortgagee purchasing entire mortgaged property of which mortgagor was found entitled to only eight annas share — Partial failure of consideration — Remedy of mortgagee is to sue vendor for damages — Eight anna share of mortgage does not subsist) ** (1909) 1 Ind Cas 683 (684) (DB) (Cal) (Passive mortgagee during attachment paying off prior mortgage — **Held,** prior mortgage was extinguished as there was no intention to keep it alive — The effect of the attachment was not discussed or considered.)]

6. AIR 1939 Mad 393 (395) ILR (1939) Mad 600 (DB) (29 Cal 154 (PC), Relied on)

7. AIR 1931 Rang 105 (107) ILR 9 Rang 1 (DB) (Subsequent mortgagee made party to suit on prior mortgage but suit dismissed *ex parte* against him — Purchase by prior mortgagee — Mortgage held kept alive against subsequent mortgagee) ** AIR 1937 Mad 769 (773) (DB).

Section 101 — Note 5

1. AIR 1945 Bom 116 (199) (Charge created in favour of creditor by debtor — Creditor purchasing charged property in execution of decree obtained against debtor by another —

property, the whole mortgage is not extinguished in its entirety, but it is extinguished *pro tanto* in respect of the part purchased(2) and the mortgagor is entitled to a *pro rata* deduction from the amount due under the mortgage in respect of the property sold.(3)

It has been seen in the Notes on S 92 that there arises no right of subrogation unless the mortgage in respect of which subrogation is claimed is redeemed in *full*. In cases falling under the present section, however, it is not necessary, before the benefit of the section can be claimed that the mortgage should have been discharged in full. Thus a mortgagee purchasing the mortgaged property in *partial* discharge of his mortgage can nevertheless keep the mortgage alive as against a subsequent encumbrancer.(4)

6. Purchase at sale in execution of decree for rent.

Where a mortgagee himself purchases the property at a sale in execution of a decree for rent S. 165 of the Bengal Tenancy Act, and *there is no benefit in keeping it alive*, the mortgage is extinguished even though the mortgagee does not take steps to extinguish the mortgage under S. 167 of the Act.(1)

But where there is a subsequent rent-charge on the property, the mortgage will not be extinguished but will be kept alive Where therefore the mortgagee purchases the property in execution of his decree, and the same property is purchased subsequently by the landlord in execution of a decree on the rent-charge, the landlord cannot oust the mortgagee from possession without annulling under S 167, Bengal Tenancy Act, the incumbrance which must be deemed to have been kept alive against the subsequent rent-charge.(2)

Where in execution of a decree for rent, the landlord himself purchases a *raiyati* holding, he can, as against a mortgagee of the holding , hold his charge for rent as a shield against the mortgagee (3) See also the undermentioned cases(4) under S. 9 of the C.P Tenancy Act (1 of 1920), to the similar effect.

Charge is extinguished and along with it, the debt — Creditor cannot proceed against the debtor personally for the debts.)

[See however AIR 1917 All 43 (46) ILR 39 All 700 (DB) (Mortgage reserving annuity for mortgagor — Entire equity of redemption acquired by mortgagee — Right of mortgagor to annuity not extinghished)]

2. See Notes 44 and 45 on S. 60 and Note 18 on Section 82

3. AIR 1958 Mys 43 (48) ILR (1957) Mys 277 (DB) (Suit to enforce mortgage — Correct procedure is to give deduction even before passing the preliminary decree)

4. AIR 1936 Mad 473 (475) (DB)

[See also AIR 1916 Mad 649 (651) (DB) (Fact that the whole of the previous mortgage has not been wiped off is not a ground for depriving the purchaser of the right of subrogation to the extent he has actually paid off the mortgage) ** AIR 1916 Mad 637 (638) ILR 38 Mad 548 (DB) (Subsequent mortgage satisfying part of prior mortgage debt - He is entitled to priority to that extent)]

Section 101 — Note 6

1. (1900) 28 Cal 12 (15, 16) (DB) ** (1904) 8 Cal WN 332 (335) (DB) (28 Cal 12, Foll)

[But see (1909) 4 Cal WN 268 (269) (DB).]

2. (1911) 38 Cal 928 (932) (DB).

[But see AIR 1921 Cal 599 (600) (DB). (Submitted not correct — At the time of the mortgagee's purchase the rent charge had come into existence and therefore there could be no extinguishment of the mortgage — The Privy Council case of 39 Ind App 228 (PC), was a case where the rent charge came into existence after the mortgagee's purchase)]

3. (1902) 6 Cal WN 834 (835) (DB).

4. AIR 1948 Nag 316 (321) ILR (1947) Nag 912 (DB). (Where a landlord purchases at the

7. Extinguishment of mortgage by decree of Court.

See Note 26 on Section 60.

8. Who can claim benefit of section.

The benefit of the section can be claimed not only by the mortgagee acquiring the rights in the property but also by persons deriving title from him (1) The same was the law under the old section and in cases where the rule of intention applied.(2)

9. "As between himself and any subsequent mortgagee", etc.

The section declares that there shall be no merger as between the purchasing mortgagee and *subsequent mortgagees or charge-holders* It does not prevent the applicability of the doctrine of merger where there are no subsequent mortgages or charges on the property In the undermentioned case(1) it appears to have been assumed that after the introduction of the present section merger can be avoided where a mortgagee acquires the rights in the property even though there are no intermediate mortgages or charges In that case the sons of a mortgagee living with him as members of a joint Hindu family, purchased the mortgaged property, in discharge of the mortgage There were no intermediate incumbrances A third person sued for pre-emption and the sons set up the mortgage as a shield It was assumed for the purposes of argument that the purchase was by the mortgagee himself, but it was held that there was no merger under the present section It is submitted that this view is not correct, either under the old section or under the new As has been seen in Note 2, the possibility of a future claim for pre-emption is not a circumstance from which it can be said that it is for the "benefit" of the mortgagee to keep his charge alive, there being no mesne incumbrances and no other benefit, and consequently, the charge would under the old section be extinguished The present section prevents the application of the doctrine of merger *only* as against subsequent mortgagees or incumbrancers (2) and only when the subsequent encumbrance exists *at the time* of acquisition by the prior mortgagee of the rights of the mortgagor (3)

On the other hand, the High Court of Bombay has taken another extreme view namely that where there are no intermediate incumbrances, merger necessarily follows even though it would be for the benefit of the mortgagee to keep the charge alive (4) As has been seen in Note 1 this view also is not correct.

10. Charge kept alive — Enforcement.

Where a charge is kept alive under this section or under the rule of intention, it can always be

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auction in execution of his rent decree under S 9 C P Tenancy Act, in respect of an absolute occupancy holding S 101 comes into play and he is entitled to set up his own charge against any other encumbrancer)

Section 101 — Note 8

1. AIR 1938 Lah 286 (288) (DB).
2. AIR 1922 Mad 249 (253) (DB) (Mortgagee of S who was entitled to keep alive a prior charge, held entitled to hold it up as a shield against subsequent incumbrancer)

Section 101 — Note 9

1. AIR 1935 Oudh 445 (446) : 41 Luck 302 (DB).
2. AIR 1960 Pat 264 (265) ** AIR 1953 Mys 122 (122) ILR (1952) Mys 227 (DB) (The mortgagee cannot be considered to be trustee in any sense by becoming the purchaser of the property) ** AIR 1951 Nag 164 (170) ILR (1950) Nag 698 (DB) (Section does not confer rights against owners of the property.)
3. AIR 1960 Pat 264 (265) (No subsequent encumbrance at the time of purchase - Merger takes place.) ** 1942 Nag LJ 579 (585).
4. AIR 1942 Bom 95 (96) (DB).

used as a *shield* against subsequent incumbrancers (1) This being a weapon of *defence*, the rules of limitation do not apply and the charge may be set up as a shield even though, at the time the plea is raised, the enforcement of the charge may have been barred by limitation (2) But a charge can only be *kept alive*. It cannot be *revived*, if it has become time barred, by a renewal of mortgage. Thus, by taking a renewal of a prior mortgage after it has become time barred, it cannot be revived and used as against an intermediate encumbrancer.(3)

The charge kept alive may also be used by way of an *attack*. In other words, the charge may be actively enforced by way of suit (4) In such a case, however, the enforcement must be within the period of limitation prescribed therefor.(5)

There has been a difference of opinion on two questions arising in this connection :

(1) Where a charge kept alive by *A* is used as a shield against B, a subsequent incumbrancer, can *B* sell the property in enforcement of his mortgage *subject* to *A's* charge or is *B* bound to redeem *A?*

(2) If A's charge does *not* entitle him to *possession* of the property but he has got into possession as a purchaser or in some other way, can he defend his possession against *B* or the auction-purchaser in execution of the decree on *B's* mortgage?

On the first question, in cases arising before 1929, it was held in one set of cases that *B* can sell the property subject to *A's* charge (6) A contrary view was held, namely that *B's* right was only

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Section 101 — Note 10

1. **AIR 1922 PC 11 (13) : 48 Ind App 465 : 43 All 469 ** AIR 1944 Nag 163 (171) : ILR (1944) Nag 383 (FB) **** (1913) 20 Ind Cas 864 (865) (DB) (Cal) ****** (1899) 12 CPLR 70 (72) ****** (1905) 2 Cal LJ 202 (213) (DB).

2. AIR 1953 Nag 200 (204) : ILR (1952) Nag 684 (DB) (Decree by prior mortgagee — Puisne mortgagee not made party — Suit by latter — Prior mortgage can be used as shield even though a fresh suit to enforce it would be barred by time.) ** AIR 1933 Nag 241 (243) : 30 Nag LR 142 ** AIR 1940 Mad 646 (649) ** AIR 1922 Mad 249 (254) (DB) ** AIR 1939 All 660 (662).

   [But see AIR 1927 All 638 (640) (A barred mortgage cannot be used even as a shield.)]

3. **AIR 1947 All 74 (77) : ILR (1947) All 11 (FB).**

4. AIR 1945 All 158 (159) : ILR (1945) All 186 (DB) (AIR 1922 All 394, **Dissented from.**) ** AIR 1943 Oudh 407 (408, 409) (DB) (AIR 1916 Mad 875, **Dissented from.**) ** AIR 1942 Mad 558 (565) (DB) (AIR 1936 Mad 61 and AIR 1936 Mad 814, Referred.)

   [But see AIR 1916 Mad 875 (881) (DB).]

5. **AIR 1947 All 74 (77) : ILR (1947) All 11 (FB).** (Subsequent mortgagee invoking assistance of prior mortgage in his favour against intermediate mortgagee really sues on cause of action constituted by both mortgages — Subsequent mortgagee can only rely on prior mortgage if, apart from S. 101, it was capable of being sued upon at date of subsequent mortgage.) ** **AIR 1944 Nag 163 (172) : ILR (1944) Nag 383 (FB).** (Prior mortgagee getting renewal after mesne mortgage — Suit on subsequent mortgage — Prior mortgage itself must be in time (apart from renewal for plaintiff to obtain priority over mesne incumbrancer on the strength of prior mortgage. 39 Cal 527 (PC) and AIR 1933 Oudh 9, Relied on.) ** AIR 1927 All 638 (640) ** AIR 1927 All 417 (418) : 49 All 430 (DB) ** **1932 Oudh 314 (316) : 7 Luck 26 (DB).**

   [See also AIR 1949 Mad 255 (256) (DB). (Sale in favour of prior mortgagee declared invalid — Mortgagee can enforce his mortgage within the time allowed for suit on it — Declaration of invalidity of sale does not give fresh cause of action.)]

6. (1905) 1 Cal LJ 531 (538) (DB) ** (1881) 4 Mad 213 (215) (DB) ** **(1886) 8 All 105 (108) (FB).**

   [See also AIR 1934 Mad 31 (38) (FB).]

to redeem *A* and not to sell the property subject to *A*'s charge (7) The words in the present section "no subsequent mortgagee or charge holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge *otherwise than subject thereto*," make it clear that *B* can now sue for sale of the property subject to *A*'s charge (8)

On the *second* question it has been held generally that on equitable grounds *A* can retain the possession of the property until he is redeemed (9) A contrary view has been taken in some cases, namely, that *A* cannot get any better right against *B* than what he would have had under the charge kept alive and if it did not give him a right to possession as against *B*, he cannot resist delivery of possession to the purchaser in execution of a decree on *B*'s mortgage (10)

See also Note 1A.

11. Section, if retrospective.

There is a difference of opinion on the question whether the section is retrospective in operation According to the Allahabad(1) and Nagpur(2) High Courts it is retrospective But according to the Madras,(3) Rangoon(4) and Lahore(5) High Courts it is not retrospective

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Notice and Tender[E]

102. SERVICE OR TENDER ON OR TO AGENT.— Where the person on or to whom any notice or tender is to be served or made under this Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such

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7. (1885) 7 All 577 (581 582) (DB) (Per Mahmood J, contra) ** (1885) 7 All 568 (569 576) (DB) (Per Oldfield J Mahmood J Dissenting.) ** (1888) 10 All 629 (632) (DB) ** (1912) 13 Ind Cas 939 (940) (DB) (All) ** (1891) 13 All 432 (438, 439, 459, 463) (FB) ** (1910) 32 All 138 (141) (DB) ** AIR 1932 Mad 84 (85).

8. AIR 1948 Bom 379 (380) ** AIR 1939 All 660 (661) (AIR 1935 Oudh 411 Followed.)

9. (1903) 7 Cal WN 11 (20) (DB) ** AIR 1923 Rang 107 (107) (DB) ** (1870) 14 Suth WR 233 (235) (DB) ** AIR 1933 Nag 241 (244) 30 N L R 242 (2 Ind App 7 (PC) Followed.) ** AIR 1935 Oudh 411 (412) 11 Luck 270 (DB) (Possession of first mortgagee purchaser cannot be disturbed by subsequent mortgagee until redemption.) ** AIR 1937 Oudh 478 (480) (DB) (Subsequent mortgagee cannot recover possession.) ** AIR 1939 All 660 (662) ** AIR 1940 Mad 646 (649).

[See also AIR 1948 Bom 379 (380) (Prior mortgagee entering into possession as purchaser under money decree obtained by third party — He is bound to account for rents and profits of property when accounts are taken between him and puisne mortgagee.) ** AIR 1922 Mad 249 (252, 253) (DB) (Part of mortgaged property sold in execution of mortgage decree and decree partly satisfied — Purchaser can hold property as shield against subsequent incumbrancer (not made party to mortgage decree), to the extent to which the mortgage decree was discharged. 35 Mad 183, Referred to.)]

10. See (1910) 5 Ind Cas 490 (491) (DB) (Mad).

[See also (1885) 7 All 568 (573) (DB).]

Section 101 — Note 11

1. AIR 1932 All 489 (492) : 54 All 897 (FB).

2. (1936) 163 Ind Cas 602 (603) (Nag).

3. AIR 1942 Mad 558 (570) (DB).

4. AIR 1932 Rang 197 (199) 10 Rang 465 ** AIR 1936 Rang 152 (156) 14 Rang 494 (DB) (AIR 1932 Rang 197, Followed.)

5. AIR 1932 Lah 237 (238) (DB).

person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

^[Where no person or agent on whom such notice should be served can be found or is known] to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient :

[B][Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made.]

[C][Where no person or agent to whom such tender should be made can be found or is known] to the person desiring to make the tender, the latter person may deposit [D][in any Court in which a suit might be brought for redemption of the mortgaged property] the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

[A] Substituted for the words "Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown," by the Transfer of Property (Amendment) Act, 1929 (20 of 1929), S. 52

[B] Inserted, ibid.

[C] Substituted for the words "Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown", ibid.

[D] Substituted for the words "in such Court as last aforesaid", ibid.

[E] Provisions of Ss 102 to 104 have been made applicable to notices under the Co-operative Societies Acts *see* Assam Act 1 of 1961, S 33, A P Act 7 of 1964, S 113, Guj Act 10 of 1962 S 144, J and K. Act 28 of 1960 S 91, Maha Act 24 of 1961, S 143, Mys Act 11 of 1959, S 97, Ori Act 2 of 1963, S. 100 and Raj. Act 13 of 1965, S. 115.

Synopsis

1. Legislative changes.
2. Scope.
(A) Notice.
(B) Tender.
3. Tender to a person who disclaims authority.

1. Legislative changes.

The reasons for the amendment of the section have been stated in the Report of the Select Committee as follows :

"Section 102, which relates to the servie of notice on or tender to an agent of a mortgagee allows the mortgagor to apply to the Court for direction if the mortgagee or his agent cannot be found in the District in which the mortgaged property is situate Even if the mortgagor knows the mortgagee or his agent's whereabouts outside the district, the section allows him to apply to the Court The third paragraph also contains a similar provision as regards tender We think that unless the whereabouts of the mortgagee or his agent are entirely unknown to the mortgagor or unless the mortgagee or his agent cannot be found anywhere the mortgagor should not be entitled to apply to the Court for direction We propose to omit the words "in the district" in paragraphs 2 and 3 of the section In paragraph 2, we propose to make it clear that the application for the service of notice shall be made to the Court in which the deposit has been made and not to any other Court In paragraph 3 we propose to make it clear that the deposit is to be made in the Court in which a suit for redemption could be filed"

2. Scope.

Section 60 provides, for a *tender* of the mortgage-money by the mortgagor under certain

circumstances. Section 69 provides for *notice* being given to the mortgagor before a mortgagee exercises his power of sale under that section. Section 83 provides for notice being given to the mortgagee of the deposit of the mortgage amount into Court under that section. This section and the next lay down rules of procedure as to the service of such notice or the making of such tender.

(A) Notice.

Suppose, *A* is the person on whom notice is to be served under chap. IV and *B* the person required to serve such notice. Then—

(1) If *A can be found* and has no agent or has an agent who is not known, the section seems to assume that service must be made on *A* wherever he may be and *B* cannot apply to the Court for directions.

(2) If *A* resides within the district in which the mortgaged property or part thereof is situate service must be made on *A himself, whether he has an agent or not*. Service on the agent would not be valid service.

(3) If *A* resides outside the district and has an agent empowered to receive notice, service on principal or on the agent *wherever he may be* is sufficient.

(4) If *A cannot* be found, and has *no agent or has an agent but he is not known*, then *B* can apply for directions under the second paragraph of the section. Such application, in the case of notice required to be given by S. 83, should be made to the Court in which the *deposit has been made*. (Proviso).

(B) Tender.

Suppose *A* is the person to whom a tender is to be made under Chapter IV of the Act and *B*, the person who is entitled to make the tender. Then—

(1) If *A can be found and has no agent* or has an agent *who is not known*, tender must be made to A wherever he may be and *B* cannot deposit the money into Court under the last paragraph of the section.

(2) If *A* resides within the district in which the mortgaged property or part thereof is situate tender must be made to *A* himself whether he has an agent or not. Tender to the agent is not a valid tender.

(3) If *A* resides outside the district and has an agent empowered to accept the tender, tender to the principal or to the agent *wherever he may be* is sufficient.

(4) If *A cannot* be found and has *no agent* or has an agent but he is not known, *B* can deposit the amount into any Court in which a suit might be brought for the redemption of the mortgaged property.

3. Tender to a person who disclaims authority.

In order that the notice or tender to an agent may be sufficient, he must hold a general power-of-attorney from the principal or must, otherwise, be duly authorized to accept the notice or tender (1). A tender made to a person who disclaims authority to accept it is made at the risk of the persons making it, and, if it is subsequently found that the former had no authority to receive it, the tender fails and has not the effect of stopping interest under S. 84 of the Act (2). Thus, in the under mentioned case(3) a tender was made by the mortgagor to one P whose services had been engaged by the mortgagee and who had been assisting the agent of the mortgagee in his attempts to obtain possession of the mortgaged property as per terms of the mortgage deed. He was, however, not recorded as the attorney of the mortgagee and he disclaimed authority to receive a tender on behalf

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Section 102 — Note 3

1. (1908) 32 Bom 521 (531) (DB).
2. (1908) 32 Bom 521 (531) (DB).
3. (1908) 32 Bom 521 (531) (DB).

of the mortgagee. It was held that the abovementioned circumstances did not constitute *P* the agent of the mortgagee and that the tender was bad.

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103. NOTICE, ETC., TO OR BY PERSON INCOMPETENT TO CONTRACT.— Where, under the provisions of this Chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served [A][on or by], or tender or deposit made, accepted or taken by, the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of [B][Order XXXII in the First Schedule to the Code of Civil Procedure, 1908], shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

[A] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S 53.

[B] *Substituted* for the words "Chapter XXXI of the Code of Civil Procedure" by Act XX of 1929, S 53

Synopsis

1. **Legislative changes.**
2. **Scope of the section.**
3. **"Person incompetent to contract".**
4. **"Legal curator".**
5. **"Requisite or desirable in the interests of such person".**
6. **Provisions of Order 32 of the Civil Procedure Code shall, so far as may be, apply.**
7. **Effect of deposit or tender without guardian ad litem being appointed.**

1. Legislative changes.

The words "on or by" were inserted by S 53 of the Transfer of Property (Amendment) Act, 1929 (20 of 1929) after the words "such notice may be served" in order to correct a mere clerical error.

The words "Order 32 in the First Schedule to the Code of Civil Procedure, 1908" were substituted for the words "Chap. 31 of the Code of Civil Procedure". The words "Chapter 31 of the Code of Civil Procedure" in the old section referred to the Code of 1882. Chapter 31 of the old Code corresponds to O. 32 of the Code of 1908.

2. Scope of the section.

The Code of Civil Procedure, 1908, provides for the appointment of guardians *ad litem* for minors and persons of unsound mind, for the purpose of *proceedings taken against them in Court*. No guardian *ad litem* is appointed in proceedings taken by such a person, though he should be represented in such proceedings by a *next friend*. This section provides for the appointment of guardians *ad litem* for persons incompetent to contract, for the purpose of certain acts being done *by* or *against* them, and this, not only in proceedings taken in *Court*, such as a deposit under S. 83 of the Act, but for doing acts *independent of any proceeding* in Court, such as the making of a tender under S. 60 or the service of a notice under section 69.

A guardian *ad litem* under this section is to be appointed only when there is no legal curator of the property of the person incompetent to contract. Where there *is* such a curator, the notice

referred to in the section may be served on or by such curator, and the tender or deposit, made, accepted or taken by him.

In cases where a guardian *ad litem* is necessary to be appointed, the acts specified in the section cannot be said to have been validly done until such guardian is *actually appointed*.

A *tender* under S. 60 or a *notice* under S. 69 or S. 83 cannot obviously be made to, or served on, a "guardian *ad litem* until such a person is *actually appointed*(1). Nor is a *deposit* in Court in favour of a minor mortgagee valid until a guardian *ad litem* is actually appointed inasmuch as notice under the provisions of the second paragraph of S. 83 to the mortgagee is necessary under S. 84 to stop interest running, and such notice cannot be given until a guardian *ad litem is actually appointed*(2). See also section 83, Note 16 and section 84, Note 10.

3. "Person incompetent to contract".

These words must be read in the light of Ss. 11 and 12 of the Contract Act, 1872, which run as follows :

"11. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

"12. A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interest.

A person who is usually of unsound mind but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind."

See also Note 3 on section 7.

4. "Legal curator".

A legal curator is a person appointed under any provision of law to protect the property of any person(1). The guardian of the property of a ward appointed under the Guardians and Wards Act

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Section 103 — Note 2

1. (1903) 27 Bom 23 (29) (DB) (Tender.)

2. AIR 1959 Pat 457 (459).

The words "and the notice required by S. 83 has been served on the mortgagee" were absent in the old S. 84 and the conclusion that for the purpose of a valid deposit in favour of a minor, a guardian *ad litem* must actually be appointed, was rested on the provision that the mortgagor should have done all that is to be done to enable the mortgagee to take the money out of Court. It was held that this cost, duty on him under S. 83 to see that a guardian was actually appointed. See (1903) 27 Bom 23 (29) (DB) ** AIR 1923 All 183 (184) : 45 All 273 (DB) (Mere making of an application is not sufficient) ** AIR 1922 All 147 (149) : 44 All 102 (DB) (Contra per Stuart, J.) ** AIR 1925 Mad 647 (DB) (Deposit of money in Court — Minor and major mortgagees joined — Mortgagor not appointing guardian *ad litem* for minor — Tender is not valid) ** AIR 1914 Oudh 107 (108) : 16 Oudh Cas 261 ** AIR 1922 All 355 (355) : 44 All 64 (DB) ** AIR 1926 All 665 (666) : 48 All 611 (DB) ** AIR 1938 Mad 405 (408) (DB) (Deposit made before the amendment of 1929.)

[See also AIR 1928 All 311 (312) : 50 All 655 (DB) (Deposit in favour of minor mortgagee with an application for appointing mother as guardian — Court refusing to go into the question of minority raised by mother and making no appointment — Held, that mortgagor had done all that is necessary for the appointment of a guardian — The actual appointment had to be done by Court — Case decided under another point.)]

Section 103 — Note 4

1. Wharton, Law Lexicon, 14th Edn., 1938.

1890, a Court of Wards in charge of the estate of a disqualified proprietor, a curator appointed by the Court to take charge of the estate of a deceased person under Part VII of the Succession Act, 1925, curators appointed by the State Government under S. 210 of the said Act, and the manager of the estate of a lunatic under the provisions of the Lunacy Act, 1912, are all, it is conceived, "legal curators" within the meaning of this section But a natural guardian such as the father or mother of a Hindu minor, cannot be held to be a legal curator and a notice or tender to him without his being appointed a guardian *ad litem* as required by this section is not valid and binding on the minor(2)

5. "Requisite or desirable in the interests of such person".

In *Pandurang v. Mahadaji*(1), Sir Lawrence Jenkins, C J , dealing with the expression "requisite or desirable in the interests of such person" occurring in the section, observed as follows

> "I pause here for a moment to notice the words *requisite or desirable in the interests of such person* as it has been suggested that they obscure the meaning of the section On a fuller consideration I am of opinion that this is not so, and that they are designedly used in reference to distinct events I will make my meaning plainer by an illustration If where the *mortgagee* is a minor it is determined by the mortgagor to proceed under Ss 83 and 84, then it is *requisite* that a notice should be served, if in the case of an infant mortgagor those entrusted with the care of his affairs consider the mortgage-money should be tendered or paid, then it may be *desirable in the interests* of the minor that this should be done."

6. Provisions of Order 32 of the Civil Procedure Code shall, so far as may be, apply.

Where the fact of minority of the person in whose favour a deposit is made under S 83 of the Act, is disputed, the Court can, under the provisions of O 32, R 3 of the Civil Procedure Code, make an enquiry into the matter(1). Where the proposed guardian refuses to act as such, the Court can under O. 32, R. 4 of the Code, appoint an officer of the Court as the guardian *ad litem* for the purposes of this section(2).

7. Effect of deposit or tender without guardian ad litem being appointed.

It has been seen in the Notes on S. 84 that in the case of non-possessory mortgages, interest will not cease to run unless the tender or deposit, as the case may be, is valid In the case of possessory mortgages, the mortgagee will not lose his right to continue in possession and the mortgagor cannot get any mesne profits unless and until a valid tender or deposit has been made(1). A deposit in favour of a minor usufructuary mortgagee without a proper guardian *ad litem* being appointed for him under the provisions of this section is not a valid deposit, and the mortgagor cannot claim any mesne profits from the former from the date of his deposit(2)

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2. AIR 1922 All 355 (355, 356) : 44 All 64 (DB).

Section 103 — Note 5

1. (1903) 27 Bom 23 (28) (DB).

[See also AIR 1959 Pat 457 (459).]

Section 103 — Note 6

1. AIR 1928 All 311 (312) : 50 All 655 (DB).
2. AIR 1923 All 183 (184) : 45 All 273 (DB). (Letters Patent appeal from AIR 1922 All 147. The view taken by Lindsay, J , confirmed.)

Section 103 — Note 7

1. See Note 19 on Section 84
2. AIR 1959 Pat 457 (460) ** AIR 1926 All 665 (666, 667) · 48 All 611 (DB) ** AIR 1930 All 609 (610) (DB).

104. POWER TO MAKE RULES.— The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this Chapter.

Synopsis

1. Scope of the section.
2. "Consistent with this Act", etc.

1. Scope of the section.

This section empowers the High Court to make rules consistent with this Act for carrying out in itself and in subordinate Courts, the provisions contained in Chap. IV of the Act(1). It is an *enabling* provision, it is not obligatory on the High Courts to frame any rules(2).

Before the year 1908 when Ss. 85 to 90 of this Act were repealed and were re-enacted in the Code of Civil Procedure, 1908, there was a difference of opinion as to whether, in the absence of rules framed under this section, the rules enacted in the Civil Procedure Code, 1882, could be applied to mortgage suits and to the execution of mortgage decrees passed under the provisions of this Act. One set of cases held that they could be applied(3). In the undermentioned case(4) the High Court of Calcutta expressed the view that this section would not have been introduced into this Act if the provisions of the Code were applicable to mortgage suits and the execution of mortgage decrees and that, therefore, the existence of this section must be taken to show that, in the absence of any rules framed under this section, the provisions of the Code would not be applicable to such suits and decrees. The High Court of Calcutta, apparently on this assumption, framed rules under this section *extending* certain sections of the Code of 1882 to the execution of mortgage decrees(5). The repeal of the sections of this Act relating to the procedure in cases of mortgage suits and their re-enactment in the new Code of Civil Procedure, 1908, makes it now clear that mortgage suits and the execution of decrees passed therein are governed by the provisions of the Code(6).

Section 104 — Note 1

1. **(1902) 25 Mad 244 (254, 271) (FB).**

2. **(1902) 25 Mad 244 (271) (FB)** (It was not the intention of the Legislature that this Code of rules contemplated by S. 104 should be an exhaustive and self-contained Code.) ** (1900) 4 Cal WN 474 (479) (DB) ** (1908) 12 Cal WN 282 (284) (DB).

3. **(1902) 25 Mad 244 (257, 258) (FB)** (Sections 310A and 311 Civil PC. be applicable to sales in execution of mortgage decrees.) ** (1900) 4 Cal WN 474 (475, 479) (DB) ** (1909) 31 All 346 (348) (DB) (Provisions of Section 310A, Civil P.C., held applicable.) ** (1901) 25 Bom 104 (106, 107) (DB) (Provisions of S. 310A, Civil P.C., 1882, held applicable to sales held in execution of mortgage decrees passed under T.P. Act.) ** (1908) 12 Cal WN 282 (284) (DB) (Obiter) ** (1899) 22 Mad 286 (288) (DB) (Section 310A, Civil P.C. applies where a sale of immovable property has taken place under a mortgage decree.)

   [See also (1910) 37 Cal 897 (904) (DB) (Section 291 of the Code of 1882, which was applied to mortgage sales by rules framed by the High Court is not in conflict with the provisions of S. 89, T.P. Act.) ** (1905) 1 Cal LJ 31 (36) (DB).]

4. **(1898) 25 Cal 703 (709, 710) (FB). (23 Cal 682, Overruled.)**

   (See also (1903) 8 Cal WN 102 (104) (DB) (Section 258, Civil P.C. does not apply to an application made under S. 89, T.P. Act, the section not having been made applicable by any rule issued by the High Court under S. 104, T.P. Act.) ** (1910) 5 Ind Cas 101 (102) (DB) (Cal) (After the issue by the High Court of the Rules under S. 104, T.P. Act, the provisions of S. 248, Civil P.C. of 1882, cannot be held to apply to proceedings in execution of mortgage-decrees, that section not having been extended to such proceedings.)]

5. (1904) 31 Cal 373 (377) (DB) (Section 291, Civil P.C. (1882), made applicable to sales under T.P. Act by the rules made by High Court under S. 104, T.P. Act.) ** **(1907) 34 Cal 150 (159) : 34 Ind App 9 (PC).**

6. AIR 1914 Oudh 289 (290) (In the absence of any rules framed by the High Court under

The question, however, remains as to the nature of the rules contemplated by the section. In *Mallikarjunadu Setti v. Linganurti Panthulu*(7) Mr Justice Bhashyam Ayyangar observed as follows :

> "Section 104 of the Transfer of Property Act does not in my opinion, primarily contemplate the making of rules for the execution of decrees passed under Chap. IV of the Act, such rules being already provided for by Chap XIX of the Civil Procedure Code, supplemented as they are by Ss 87, 89 and 93 of the Transfer of Property Act What the section contemplates is the making of rules for 'carrying out the provisions' in the chapter The sections relating to foreclosure sale and redemption do not provide for successive redemptions and foreclosures and for the adjudication and enforcement of the rights of puisne mortgagees and of other persons having an interest in the property comprised in the mortgage who are joined as parties to the suit No inconsiderable number of mortgages on which suits are brought are really 'anomalous mortgages' and adequate provision is not made in the chapter for dealing with such suits and for working out the rights and liabilities flowing therefrom The rule making power conferred on the High Court by S 104 is, in my opinion principally intended to regulate the procedure to be adopted for carrying out these and similar provisions contained in the chapter."

The view expressed by Mr Justice Bhashyam Ayyangar would seem to be applicable even now, though the procedure as to mortgage suits has been dealt with in detail in O 34 of the Civil Procedure Code, 1908. In cases where the Code does not provide specifically for any particular contingency relating to the carrying out of the provisions of this chapter rules may be framed under this section.

Can rules be framed under this section which are *inconsistent* with the provisions of the Code? In the undermentioned case(8), the question arose whether a rule applicable on the Original Side of the High Court which had been framed by the High Court of Bombay under this section, but which was *inconsistent* with a provision in the Code of Civil Procedure applicable to the case, would prevail over the latter. Marten, C.J., observed :

> "I would further hold that as the original side rules are specially framed under the Transfer of Property Act to deal with cases arising on the original side, then if and in so far as they are inconsistent they should prevail over the very general terms of the Civil Procedure Code, which would apply to the mofussil."

On the other hand it was held by the Madras High Court in the case noted below (9) that so far as the Courts subject to the superintendence of the High Court were concerned, no rule could be framed under this section inconsistent with the provisions of the Civil Procedure Code. Mr Justice Bhashyam Ayyangar observed :

> "Section 104 of the Transfer of Property Act must be read subject to S 15 of the Charter Act which provides that the High Court shall have power to make and issue general rules for regulating the practice and proceedings of all Courts which may be subject to its appellate jurisdiction provided that the rules so made etc not inconsistent with the provisions of any law in force If S 104 of the Transfer of Property Act were construed as enlarging the powers thus conferred upon the High Court so as to make it competent for the High Court to substitute its own rules for those contained in the Civil Procedure Code or to make rules which are inconsistent with the provisions of the Civil Procedure Code S 104 of the Transfer of Property Act will be *ultra vires* of the Indian Legislature for under S. 22 of the Indian Councils Act (24 & 25 Vict., Cap 67) it is beyond the power of the Governor General in Council to make any Law affecting the provisions of any Act passed in the

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S. 104, T.P. Act, fixing the "Court rate" the case is governed by S 34, Civil P.C and it is quit competent to a Court in a suit on a mortgage bond to award interest at the contract rate of 7½ per cent per annum till the date of realisation.) ** AIR 1917 Mad 128 (131) (DB) (Per Bakewell, J.)

7. (1902) 25 Mad 244 (273) (FB).

8. AIR 1928 Bom 123 (128) : 52 Bom 459 (DB)

9. (1902) 25 Mad 244 (271, 272) (FB).

same session of Parliament, and the Indian High Courts Act (24 & 25 Vict., Cap. 104) was passed in the same session as the Indian Councils Act. The power to make rules for regulating the practice and proceedings of the subordinate Courts is not conferred upon the High Court by Letters Patent but by S. 15 of the Charter Act itself and such power therefore can in no way be affected by the Indian Legislature."

2. "Consistent with this Act", etc.

A rule framed by the High Court under this section must be consistent with this Act. Otherwise it would be *ultra vires*(1). The rule-making power is further limited to carrying *out the provisions of Chap. IV*. If the rule framed goes beyond this it would be *ultra vires*(2).

Section 104 — Note 2

1. (1898) 25 Cal 703 (708, 709) (FB).
2. (1902) 25 Mad 244 (254) (FB).

PERSONAL NOTE

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